OUTER HOUSE, COURT OF SESSION

[2018] CSOH 5

CA89/17

OPINION OF LORD BANNATYNE

In the cause

ILENE ANDERSON AND SHAUNA INNES

Pursuers

against

GEORGE DAVIDSON WILSON

Defender

Pursuer: Beynon; Lefevre Litigation
Defender: Cowan; Clyde & Co (Scotland) LLP

30 January 2018

Introduction

[1] This matter came before me on the commercial roll for debate at the instance of the defender.

[2] The defender sought dismissal of the action on the following bases:

(a) The pursuers had no title to sue.

(b) The pursuers' claim had prescribed.

(c) The averments supporting the various cases advanced by the pursuers were irrelevant and

(d) The seeking of damages in terms of parts of the pursuers' claim was incompetent.

Background

[3] The pursuers are sisters and are two of the five surviving female children of Thomas Paterson ("the deceased"). The deceased was a dairy farmer on the Cobairdy Estate near Huntly in Aberdeenshire ("the estate"). The deceased died on 21 April 2016. The defender is the husband of one of the pursuers' siblings.

[4] By disposition dated 9 October 2011 the deceased disponed to the defender approximately 255.528 acres of the estate.

[5] By wills executed in October 2012 the deceased left his entire estate to his now deceased wife and that their beneficiaries on the demise of the surviving spouse were to be their five daughters on an equal basis.

[6] That in or around early December 2011 the deceased gifted each of his five daughters the sum of £30,000 under explanation from his wife that "a bit" of the estate had been sold to the defender.

[7] On the death of the deceased his estate passed to his wife, who died on 22 November 2016.

[8] As two of the five daughters the pursuers are beneficiaries in terms of her will.

[9] The present action was raised on 28 July 2017.

The Claim

[10] The pursuers seek damages from the defender on three bases:

[11] First: "The defender deliberately, and without legal justification, arranged for the deceased to execute the said disposition at a price approximately one half of the subject's actual or likely market value." ("the fraud case") (see: Article 9.1)

[12] Secondly: that "At the time of the execution of the disposition, the deceased was in a facile … condition …. His will was overcome by the defender when signing the disposition." ("the facility and circumvention case") (see: Article 9.2)

[13] Thirdly on the basis of undue influence exercised by the defender the deceased had entered into the disposition (see: Article 9.3).

The Submissions on Behalf of the Defender

[14] The first chapter of Mr Cowan's submissions related to the issue of title to sue.

[15] It was his position that in order to have title to sue, the pursuers must be parties to some legal relation which gives them rights which the defender has infringed or denied. He directed my attention to *D & J Nicol* v *Dundee Harbour Trustees* [1915] SC (HL) 7, per the well-known passage of Lord Dunedin at page 12.

[16] Thereafter his argument was a short one: the pursuers never held title to the estate. They were not parties to the disposition. No duties were owed to the pursuers. This first chapter of his submissions he further developed when looking at each part of the pursuers' claim.

[17] The second chapter of his submissions was that the action had prescribed in terms of section 6 of the Prescription and Limitation (Scotland) Act 1973 ("the Act").

[18] In development of that argument he submitted that the action was raised on 28 July 2017 and that was more than five years after the concurrence of *injuria* and *damnum*. Any wrongful conduct on the part of the defender occurred, at the latest, on the date upon

which the disposition was executed, namely: 9 October 2011. In addition as at that date the deceased suffered loss and damage on the basis of the land being sold, at what the pursuers allege, was a gross undervaluation. Equally the pursuers' loss occurred at that date, as at that date the value of their prospective rights was reduced. The pursuers did not, as was contended on their behalf, only suffer loss on the death of their mother.

[19] Mr Cowan then turned to look at the pursuers' averred fall-back position with respect to the prescription argument. This was to seek to rely on section 11(3) of the Act. Section 11(3) of the Act provides as follows:

> "In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware."

[20] In reply to their reliance on this section, he submitted, the onus is on the pursuers to aver and prove, that they were not aware, and could not with reasonable diligence have become aware that the loss and damage had occurred. The pursuers did not plead a relevant case in terms of this section.

[21] There were two branches to his argument. In terms of the first branch Mr Cowan directed my attention to *David T Morrison & Co Limited t/a Gael Homes Interiors* v *ICL Plastics Limited & Others* [2014] SLT 791. In this case the Supreme Court considered what is the correct interpretation of section 11(3). The court set out two possible interpretations. The first of these was at paragraph 16:

> "(16) Section 11(3) is capable of being read in two different ways. One possibility is to read the word 'aware' as referring to the loss, injury or damage, and to treat the phrase 'caused as aforesaid' as adjectival. The subsection is then read as if it said

> '… the creditor was not aware … that loss, injury or damage, which had been caused as aforesaid, had occurred …'
>
> The creditor has then to be aware only of the occurrence of loss, while the words 'caused as aforesaid' connect the loss to the cause of action."

[22] The majority of the Justices adopted the above interpretation.

[23] The alternative interpretation was set out at paragraph 17:

> "17. The other possibility is to read the word 'aware' as referring not only to the loss, injury or damage but also to the fact that it has been 'caused as aforesaid'. The subsection is then read as if it said:
>
> > '… the creditor was not aware … that loss, injury or damage had occurred, and that it had been caused as aforesaid'."

[24] Mr Cowan then turned to look at the pursuers' averments with respect to this matter. These averments are at Article 11:

> "Shortly after the sale of the land to the Defender by the deceased the Pursuers were aware that a sale had taken place to the Defender of what their now late mother told them was a small piece of land. They had no reason to suspect that the sale was at a gross undervalue. They had no reason to suspect that the Defender would have behaved in a wrongful fashion relative to the sale."

[25] Mr Cowan submitted that in light of the decision in *Morrison* these averments were irrelevant. These averments were directed to awareness of a breach of legal duty and were given the rejection of the alternative interpretation by the Supreme Court accordingly not relevant.

[26] Moreover, by early December 2011, the pursuers were aware that a sale had taken place. They also aver that comments made by their now late mother in October 2016 were sufficient to prompt investigations which resulted in this action (see: Article 9.2). However, the pursuers offer no explanation as to why, at some time prior to 28 July 2012 they could not, with reasonable diligence, have enquired of the deceased and/or their now late mother with regard to the extent of the land sold, and the price thereby achieved. Further they do

not suggest that had they made such enquiries, they would not have been provided with information similar to that provided in October 2016.

[27] In conclusion it was his position that, in the event of there ever having been an obligation to make reparation to the pursuers, that obligation had prescribed in terms of section 6 of the Act.

[28] The next chapter of Mr Cowan's submissions related to the relevance of the pursuers' averments in support of the various substantive cases advanced by them. The first of these cases was an allegation of fraud on the part of the defender.

[29] Mr Cowan commenced his submissions under this head by directing my attention to *Dunn* v *Roxburgh* [2013] CSOH 42. This case contains a helpful summary of the various cases in relation to what is required by way of averment in order to plead a relevant case of fraud.

[30] At paragraph 5 the Lord Ordinary says this:

> "So far as fraud is concerned, it is clear that detailed and specific factual averments are required. This is established in a long series of cases."

[31] In development of this observation the Lord Ordinary referred in particular later in paragraph 5 to the Opinion of Lord Macfadyen in *Royal Bank of Scotland* v *Holmes* [1999] SLT 563, when the Lord Ordinary stated at 569:

> "It is in my view essential for the party alleging fraud clearly and specifically to identify the act or representation founded upon, the occasion on which the act was committed or the representation made, and the circumstances relied on as yielding the inference that that act or representation was fraudulent. It is also, in my view, essential that the person who committed the fraudulent act or made the fraudulent misrepresentation be identified."

[32] Mr Cowan's position was that on applying the above guidance to the pursuers' averments, it was clear that the averments fell far short of what was necessary.

[33] The pursuers' averments relative to fraud were these:

> "In 2011, the defender arranged for the instruction of George Geddes Dominic Fraser, Solicitor of Fraser Mulligan, Solicitors in Aberdeen to act in a transaction as specified next." (See: Article 6 at page 10A to B)

The only further averment was made at Article 9.1 at page 13E which was as follows:

> "The defender deliberately, and without legal justification, arranged for the deceased to execute the said disposition at a price approximately one half of the subject's actual or likely market value."

[34] There were no averments of specific acts on the part of the defender which were to be relied on by the pursuers as yielding the inference of fraud.

[35] The pursuers did no more than to aver that the defender arranged for a firm of solicitors to be instructed and that is the sole conduct relied on. At its highest what this amounts to is a failure for the deceased to have independent legal/tax advice. At its highest that did not amount to fraud.

[36] Beyond that it was his position that, even if there were sufficient pleadings by way of fraud, that only takes the pursuers so far. They still require to satisfy the court that a duty was in fact owed to them. If a fraud was committed on the deceased the pursuers must show that that gives them the right to claim damages from the defender. The basis of the pursuers' claim is that they claim as beneficiaries under their mother's will. They inherited from their mother who inherited from the deceased. No authority is advanced on behalf of the pursuers to vouch the proposition that in these circumstances a third party such as the pursuers could claim for a fraud committed on the deceased. It was his position that any remedy for damages, in such circumstances, would lie with the deceased and on his death his estate.

[37] It was his position, in particular, that the tripartite test in *Caparo Industries Plc* v *Dickman* [1990] 2 AC 605 ("*Caparo*") of foreseeability; proximity; and fairness, justice and reasonableness was not satisfied.

[38] The case of intentional delict advanced by the pursuers appears to be that the defender owed the pursuers a duty not to act fraudulently in his dealings with the deceased. As discussed in *Thomson* v *Scottish Ministers* [2013] SC 628 at paragraphs 46 to 49, the *Caparo* test is an "incremental test". The law ought to be developed only by analogy with existing precedent. Accordingly, unless a case falls into a category in respect of which a duty of care is already recognised, such a duty should only be imposed if an analogy can be drawn with existing precedent. In the *Thomson* case, the court declined to move the "boundaries" in order to impose a duty of care.

[39] It was his position that in the present case there was no existing category into which the case of fraud as pleaded could be fitted. Equally there was no analogous category. If the court accepted the approach in the *Thomson* case then there was no need to give further consideration to the principles set out in *Caparo*. However, if the court was not with him in relation to the above, he turned to consider in turn the various specific elements of the test identified in *Caparo*.

[40] He first turned to consider the issue of proximity and said this: there was no relationship of proximity between the pursuers and the defender. Whilst the pursuers aver that the deceased had a settled testamentary intention at the time of entry into the disposition, they made no averments of any discussions regarding such matters, whether around the time that the disposition was executed or otherwise, between the defender and the deceased, or between the defender and the pursuers. Moreover, there is no suggestion that the pursuers ever made the defender aware of their views, if any, regarding the sale of the estate. There is also no suggestion that the deceased ever intended to bequeath the estate itself to either, or both, of the pursuers. As at the date that the part of the estate was sold, the deceased and his wife had not executed the wills referred to within the pursuers'

pleadings. They were not executed until October 2012. In terms thereof, the pursuers did not become beneficiaries until after the death of both of their parents. At the time of the disposition, it was not known when that would be. In fact, it was over five years after the date of disposition.

[41] Moving to the fairness, justice and reasonable part of the test he submitted that it would not be fair, just and reasonable to impose duties on the defender for the benefit of the pursuers. Firstly, remedies would have been available to the deceased during his lifetime. Such remedies remain available to his executors. The damages which the deceased, or his executors, would have been entitled to seek could have incorporated the pursuers' losses. Accordingly there is no need to recognise duties to the pursuers in order to fill any lacuna in the law. Further, if duties were owed to the deceased and the pursuers, there would be the potential for their interests to conflict. He submitted that it was perfectly conceivable that the deceased may have been content to sell the land at less than its market value, whilst the pursuers may have wished to insist upon the full market price being achieved.

[42] Finally he turned to consider the issue of the effect beyond the confines of the instant case that holding there was a duty owed by the defender to the pursuers in the averred circumstances and said this: the result would be that in any case in which one party to a contract was privy to the other's testamentary intentions, duties would be owed to that other party's beneficiaries. That would result in a very significant expansion in the potential liability of contracting parties.

[43] Thereafter Mr Cowan moved on to make submissions regarding the relevancy and specification of the case founded upon facility and circumvention. He submitted that the pursuers' averments were not sufficient to set up a case of facility and circumvention. They did not have sufficient averments of either facility or circumvention. With regard to facility,

there were no averments of weakness of mind. Such averments are essential, see: *Mackay* v *Campbell* [1967] SC (HL) 53, per Lord Guest at page 61. He emphasised that in respect to the issue of facility, the pursuers were not entitled to place any reliance on the averments to the effect that the deceased was illiterate. He submitted it did not follow that because the deceased was illiterate he was facile.

[44] As regards circumvention, he did however accept, that the authorities were to the effect that there did not require to be very much pleading in relation to this issue if there were sufficient averments of facility. However, something required to be pled and what the pursuer offered to prove here amounted to nothing.

[45] As regards circumvention, once more, the only conduct of the defender which was founded upon was that he arranged for the already mentioned firm of solicitors to act for both him and the deceased in the purchase of the land. That on its own was insufficient to amount to circumvention.

[46] Lastly, he argued that in any event, damages were not a remedy which was available in a case of facility and circumvention. The appropriate remedy in such circumstances was reduction of the deed. Accordingly the action based on facility and circumvention was incompetent.

[47] As regards undue influence he again submitted that the pursuers' averments were not sufficient to amount to a case of undue influence. Of the four elements identified in *Gray* v *Binny* [1879] 7R 332 per Lord Shand at pages 347 to 348, to set up a case of undue influence the pursuers did not relevantly aver either that the relationship between the defender and the deceased created a "dominant or ascendant influence", or that confidence and trust arose from that relationship. The only averments made by the pursuers regarding

the deceased relying upon the defender's assistance related to certain practical matters and were thus insufficient.

[48] In any event, he submitted that payment of damages was not a competent remedy where undue influence was the basis of the action. He referred to McBryde, *The Law of Contract in Scotland* at paragraph 16-36. The sole remedy was reduction. Accordingly the action was incompetent.

The Reply on Behalf of the Pursuers

[49] Turning to the first issue of title and interest Mr Beynon accepted the proposition of Lord Dunedin in D & J Nicol, however, he submitted that the pursuers' averments satisfied that test. His position was that the pursuers' title and interest could be found in the averments in Condescendence 10. Put shortly, the pursuers assert that they are wronged beneficiaries due to the conduct of the defender founded upon. There is no requirement in law for the pursuers to have had heritable title to the land or to have been parties to the transaction involving the deceased and the defender. Title and interest to sue requires the pursuers, in the widest sense, to be able to offer to prove that a right has been denied or infringed. He made reference to *Macphail on Sheriff Court Practice* (3rd edition) at paragraph 4.29 onwards in support of his submission. This test is satisfied. The defender's argument adopts a too narrow position which is incorrect.

[50] In respect to the prescription argument the pursuers' reply was a short one. First the prescriptive period did not commence at the date of the disposition as argued on behalf of the defender. The defender's position was shown to be misconceived in that as at the date of the disposition there was not even a will in place in favour of the pursuers. The appropriate

date was the date of the death of the pursuers' mother at which point *damnum* and *injuria* coincided. Thus the obligation had not prescribed in terms of section 6 of the Act.

[51] In any event, it was clear from the pursuers' averments, that until the conversation with their mother in early December 2016 they had no reason to know that something had occurred which had caused a loss. There was nothing at any earlier stage which could reasonably have come to their attention and therefore have properly put them on notice. Thus in terms of section 11(3) of the Act the obligation had not prescribed.

[52] As regards the relevancy of the pursuers' case based on alleged fraud Mr Beynon first said this: the pursuers' case is made sufficiently clear to provide fair notice to the defender. The case is to the effect that the transaction founded on had no honest, normal or economic basis and was, put simply, carried out as a result of the fraudulent conduct of the defender. The pursuers assert, in substance, that the defender took advantage of a very vulnerable elderly person so that the defender would gain materially by his dishonest conduct.

[53] He submitted that when the various averments made on behalf of the pursuers were taken cumulatively there was a relevant case of fraud pled. He in particular relied on the following averments made on behalf of the pursuers:

(1) The defender's arrangement whereby a solicitor was used resulting in the deceased not seeing his own solicitor when the disposition of the estate was being entered into.

(2) That there was no obvious commercial purpose to the disposition.

(3) That the disposition proceeded at a gross undervalue.

(4) The defender's awareness of all of the frailties of the deceased.

[54] Mr Beynon accepted that the pursuers were not in a position to say what representations, if any, were made to the deceased by the defender. However, he submitted that that was not a basis upon which it could be argued that the case was irrelevant.

[55] Mr Beynon's position in summary was this: effectively what the pursuers' case amounted to was that a scheme had been pursued by the defender and that if the individual elements to which he had referred were proved then fraud could be inferred.

[56] As regards the argument advanced by Mr Cowan that in terms of *Caparo* no duty was owed by the defender to the pursuers, Mr Beynon first sought to argue that there was a difference between an intentional delict, such as fraud, and a delict based on negligence which was what was being considered in *Caparo*. In respect to the differences between these two he generally referred me to Walker on *Delict* at pages 165 to 167. As I understood his position it was that in the present case the approach to considering whether a duty was owed by one party to another as set out in *Caparo* was not relevant when considering an intentional delict.

[57] His fall-back position, if I were not with him in respect of his primary submission regarding *Caparo* was to argue that the pursuers satisfied the test in *Caparo*: first in respect to proximity he submitted that the relationship between the defender and the pursuers was sufficiently proximate because of the family relationship. Turning to foreseeability he submitted that the averments made at pages 14A to B of the Record regarding the defender's knowledge of the intention of the deceased to leave the estate to his five daughters was a sufficient averment in respect of this aspect. Finally turning to the fair, just and reasonable part of the test he submitted that in the whole circumstances it would be fair, just and reasonable to hold that there was a duty owed by the defender to the pursuers.

[58] Turning to the relevancy of the case based on facility and circumvention it was his position that a clear case on facility was averred. The weakness of the deceased was not just mental but was also physical. He again submitted that the averments had to be looked at together. If looked at in that way there were sufficient averments made to amount to a relevant case of facility and circumvention. Finally turning to undue influence he said this: The pursuers offered to prove that the defender exercised undue influence over the deceased, ie that the defender had a dominant or influential ascendancy over the deceased contrary to law. The averments in Condescendence 4 fell to be read in conjunction with those in Condescendence 9.2 and 9.3 and if looked at together they amounted to a relevant case of undue influence.

[59] His position regarding the competency of seeking damages under the heads of facility and circumvention and undue influence was to argue that no authority had been cited to the effect that such a remedy was not competent. It was his position that in these circumstances there was no reason why the court should not allow the matter to proceed.

Discussion

Title to Sue

[60] I will consider the issue of title to sue later in this Opinion when considering each of the bases upon which the pursuers advance their claim.

Prescription

[61] It was not a matter of contention that for the purposes of the Act time starts to run at the point at which there is concurrence of *damnum* and *injuria*.

[62] There was no dispute the alleged wrongful conduct on the part of the defender occurred at the latest on the date of execution of the disposition.

[63] In respect to the stage at which damage occurred I believe the defender's argument is misconceived and this can be illustrated in the following way: at the date of the disposition the deceased had made no will in favour of either pursuer; after the execution of the deceased's will in favour of, among others, the pursuers he could have altered his will so as to exclude the pursuers as beneficiaries thereunder; and finally prior to the death of the pursuers' mother she could equally have altered her will excluding the pursuers as beneficiaries. Thus it appears to me that Mr Beynon is correct in arguing that it is only at the point when the pursuers' mother dies and there is a will in place whereby the pursuers inherit that loss and damage crystallises and there is thus conjunction of *damnum* and *injuria*.

[64] Even if I am wrong in my above conclusion I consider that the pursuers' argument in terms of section 11(3) of the Act is to be preferred.

[65] The pursuers aver that they were aware of the sale at or about the time of the disposition. However, I am satisfied that there is nothing in such knowledge which, in the exercise of reasonable diligence, should have led the pursuers to carry out some investigation of the sale. Put another way there is at that stage no trigger to cause them in the exercise of reasonable diligence to carry out any such investigations. What they know at that time is an entirely neutral factor, namely: there has been a sale. Nothing, in the exercise of reasonable diligence, arising from such a factor could act as a trigger for further investigation and thus led them to discovery of the occurrence of loss.

[66] I accordingly reject both branches of the defender's prescription argument.

Relevancy

Fraud

[67] I am persuaded that the case pled in terms of fraud is irrelevant.

[68] First there are no averments as to any representations made by the defender which would yield the inference of fraud.

[69] The principal averment relied upon by the pursuers in respect of the fraud case is this:

> "The defender deliberately, and without legal justification, arranged for the deceased to enter the said disposition at a price approximately one half of the subject's actual or likely market value" (see: Article 9.1).

[70] That averment it appears to me is so lacking in specification as to be irrelevant. It entirely fails to set out by what means, namely: by what acts and representation of the defender he brought this about. The sole averment of any act by the defender is in the first sentence of Article 6 and is in the following terms:

> "In 2011, the defender arranged for the instruction of George Geddes Dominic Fraser, Solicitor Fraser and Mulligan, Solicitors in Aberdeen to act in a transaction as specified next."

[71] The transaction referred to therein is the relevant disposition. This averment has to be read alongside the averments in Article 5 that the deceased had at that time an established client relationship with another firm of solicitors and also had at that time an established tax accountant and was deprived of their advice when entering into the disposition. It must also be read in conjunction with the averments that the price was approximately half what the estate was worth and that no independent valuation of the estate was obtained prior to sale.

[72] However, there are no averments of any misrepresentations made by the defender. Looking at all of these averments when taken together, what remains missing, what is not

averred is first that the defender was aware that the deceased had such a relationship with a firm of solicitors and accountants; that it was due to any act or representation on the part of the defender that no independent valuation was obtained; that it was due to any act or misrepresentation on the part of the defender that the price was set at a "gross undervalue"; there is I am satisfied no averred act or representation on the part of the defender from which fraud could properly be inferred. The averments of the deceased's mental and physical weakness at the material time form the background to the disposition but do not assist in the absence of acts or misrepresentations on the part of the defender in setting out a relevant case of fraud. Nor does the averred low price assist in the absence of averments of acts or misrepresentations on the part of the defender which led to that low price being set.

[73] Having regard to the whole averments made on behalf of the defenders, and for the above reasons, I conclude that the pursuers' case based on fraud is bound to fail.

[74] I now turn to consider the argument as to whether any duty was owed to the pursuers by the defender in light of the test in *Caparo*.

[75] It is correct that the analysis and observations by the court in *Caparo* are made in the context of liability for unintentional harm caused by negligent behaviour. The delict founded upon in the instant case is a delict of intentional harm, by means of fraud. However, although the two are different I do not accept that these differences render the analysis in *Caparo* inapplicable to an intentional delict. The tripartite test as set out in *Caparo* appears to me to be equally applicable to intentional and negligent delicts.

[76] Nothing in the analysis of liability for intentional harm in Walker on *Delict* to which I was referred by Mr Beynon causes me to believe that the analysis in *Caparo* cannot be applied to the delict of causing harm through fraud.

[77] Walker on *Delic*t at page 166 defines the duty, breach of which amounts to intentional wrong in this way:

> "The duty, breach of which amounts to intentional wrong-doing and infers liability in reparation, is therefore to refrain from conduct intended to injure another and also from intentional conduct which any reasonable man would appreciate, and which the doer should have appreciated, is likely to cause harm to some other person's legally protected interest."

[78] If the duty is looked at in this way it is I consider obvious that the tripartite test as developed in *Caparo* is applicable to it.

[79] Moving on, the next issue is: do the averments made on behalf of the pursuers satisfy the tripartite test in *Caparo*?

[80] In *Thomson* v *Scottish Ministers* the court adopted at paragraph 47 the incremental test developed in *Caparo*. Thus, if a case did not fall into a recognised category, the law should only be developed by analogy.

[81] Applying that to the present case I observe that: I was referred to no authority saying that a duty as averred was owed. I was not referred to any authority, which in my view, by analogy suggested that such a duty existed. The closest that argument seemed to come on this issue was a passing reference to the line of authority based on the principle developed in *White* v *Jones* [1995] AC 207, relating to the scope of liability of solicitors to disappointed beneficiaries. However, I do not believe the principle developed in that line of authorities is of assistance to the pursuers as an analogy. The proximity of the relationship between a solicitor preparing a will and a beneficiary, is very different from the relationship of the defender to the pursuers.

[82] I consider, for the above reasons, that no duty was owed by the defender to the pursuers of the type averred, and the case of fraud is accordingly irrelevant.

[83] Given my above decision it is perhaps not necessary to turn to look at the *Caparo* test in further detail, however, detailed submissions were made with respect to this and I now turn to deal with them.

[84] First it appears to me that the pursuers are not sufficiently proximate for the defender to owe them the averred duty. I observe that the pursuers are not merely at one remove from the defender. The party at one remove is the deceased's wife. Rather they are at two removes from the deceased.

[85] Secondly as argued by Mr Cowan there are no averments of any discussion between the pursuers and defender or the deceased and the defender as to the deceased's "settled testamentary intention" either at or shortly before the disposition or at any time before the disposition was executed. The only averments relative to any knowledge of the defender regarding this "settled intention" are in Article 9.1 at page 14C. They are wholly inspecific. Beyond that as argued by Mr Cowan there is no suggestion that the defender was made aware by the pursuers of their views as regards the estate or that the deceased intended to leave the estate itself to the pursuers. It would have placed the pursuers in a better position had there been an intent to bequeath the estate itself to them.

[86] Finally it is noteworthy that although it is averred that the deceased had "a settled testamentary intent" at the material time it seems to me that a consideration with respect to the issue of proximity is that the wills in terms of which they ultimately inherited had not been entered into at the date of the disposition.

[87] Against that whole background I conclude there was no relationship of sufficient proximity to fulfil that leg of the tripartite test in *Caparo*.

[88] Turning to the fair, just and reasonable part of the test it was in short Mr Cowan's position that there were a number of factors which rendered it not fair, just or reasonable

that such a duty was owed by the defender to the pursuers. The first part of Mr Cowan's argument was based on a potential conflict of interest, if duties were owed both to the deceased and the pursuers. It is I think possible to envisage a situation even in the context of alleged fraud where a potential beneficiary argued that a gross undervalue sale was being entered into and the seller (the testator) argued that the price was fair, or that for some reason he wished to sell at undervalue and he was not being defrauded. Accordingly this is a factor which favours no duty being owed by the defender to the pursuers of the type averred.

[89] The next issue to be considered is this: is there a lacuna in the law which requires a duty to be created in favour of the pursuers?

[90] In the present situation, in the absence of the pursuers having a remedy that does not mean that no party had a remedy open to it for the alleged fraud. There was clearly a remedy open to the deceased and to his estate. Thus there is no need for the court to create a duty in favour of the pursuers to ensure as a matter of fairness that there is a remedy available to some party. I consider this to be the strongest argument against creating a duty.

[91] Beyond the above for the reasons I have already stated I do not consider the extension of the duty sought to be an incremental extension by analogy and this factor again is of materiality in consideration of whether an extension is fair, just and reasonable.

[92] Finally I agree with Mr Cowan that a creation of a duty owed to the pursuers in the present case would lead to a very significant expansion in the potential liability of contracting parties. Mr Beynon sought to argue that the duty created would only relate to the circumstance of fraud, an intentional delict and would not create a duty of reasonable care. However, I believe if the duty was to exist in the circumstances of alleged fraud then

there would fairly quickly be created by analogy a duty of reasonable care with the effect as contended for by Mr Cowan. This is a further factor against creating a duty.

[93] Overall looking to the justice, fairness, reasonableness part of the tripartite test I do not believe it is fulfilled.

[94] Accordingly I conclude that a further basis for holding that the pursuers' pleadings based on fraud are irrelevant is that they do not meet the tripartite test in *Caparo*.

[95] Accordingly for the foregoing reasons I hold that the pursuers' case based on fraud is irrelevant. In addition for the above reasons they have no title to sue: they do not stand in a legal relation to the defender which gives them some right which the defender infringed.

[96] Equally I consider it follows from my foregoing analysis that if no legal relation is created to give the pursuers a title to sue based on fraud, there can, given the nature of facility and circumvention and undue influence, which form part of the same broad category as fraud, be no legal relationship created to give the pursuers a title to sue. Facility and circumvention in particular "derives from and has a relationship to fraud", see: McBryde in *The Law of Contract in Scotland* at 16 - 21. For these reasons I uphold the defender's plea in law of no title to sue. I cannot envisage any circumstance in which there was no title to sue based on fraud but nevertheless there was title to sue based on facility and circumvention or undue influence.

[97] Although I have held there is no title to sue in terms of the facility and circumvention on undue influence grounds of action I turn to consider the detailed further attack on the relevance of these cases.

Facility and Circumvention

[98] In order to be successful in a plea of facility and circumvention the pursuer must make sufficient averments regarding the following: facility; circumvention; and lesion.

[99] I turn first to look at the concept of facility. A person is facile if his mind is so weak or pliable that he is unlikely to be able to resist pressure applied by another.

[100] In regard to this aspect the pursuer made the following averments at Article 4 of Condescendence:

> "By 2011, the deceased was exhausted, vulnerable, weak and facile. The responsibility of running the estate and the said farming business was far in excess of the deceased's capacity as at that time even with the assistance of his late wife and the said contractors. By 2011 the deceased suffered from obvious anxiety and fatigue. He would frequently become tearful and emotional at family gatherings thereby demonstrating his obvious material vulnerability as there was no objective reason for such behaviour. In 2005/06 the deceased contracted very serious, ie painful shingles which left him with continuing material intermittent pain. He never recovered from this illness. By 2011, the deceased had poor eyesight, deficient hearing and he suffered from curvature of the spine. He was also illiterate."

[101] I am satisfied that these averments could if proved amount to a situation where the deceased's mind was such that it could be circumvented. These averments, could if proved, amount to a weakening of the deceased's mind. It is a combination of both mental and physical weakness that is relied upon and I am persuaded that the pursuers are entitled to rely on both of these factors.

[102] I accept that illiteracy of itself would not be enough to amount to facility. However, it is another factor when looked at in the context of all the other factors which may contribute to his facility. Looking to the whole averments relative to facility I think there are sufficient averments made to show facility.

[103] I now turn to consider the issue of circumvention. When considering the relevancy of the circumvention averments there are two factors which require to be borne in mind.

The first factor is this: so far as circumvention is concerned the authorities are clear that, if facility is present, not much need be pled regarding circumvention. (see: *Horne* v *Whyte* 2004 SCLR 197 at 202 F-G)

[104] Secondly it is not necessary to aver specific instances of deceit (see: Gloag on *Contract* at page 484). Thus unlike with respect to fraud no averments of specific instances of deception, such as misrepresentations, need be averred. A helpful definition of circumvention is given by Lord Glennie in *Smyth* v *Romane's Executors* [2014] CSOH 150 at paragraph 49:

> "Circumvention is the name given to improper pressure applied to such a person by another in such circumstances. That pressure may, at one extreme, be direct, forceful and overpowering or, at the other, be more subtle or insidious, working by solicitation or importuning. Fraud is one example of the way in which a facile mind may be subverted but it is not an essential part of the principle. Bullying or browbeating may equally amount to circumvention. A robust individual will usually be able to resist pressure, or at least decide whether or not he wants to resist it. A facile person may not. But facility is a spectrum; it comes in degrees. A deed will only be at risk of being reduced (or set aside) if the pressure applied is unacceptable having regard to the extent to which the person on whom it is exerted is facile. If a person with a weak and pliable mind – whether that condition is permanent or temporary and whether caused by age, infirmity, pain, grief or something else altogether – is pushed or led by fraud, force or solicitation to do what he would, or might, otherwise have resisted doing had his mind been stronger, then his act can be reduced by the court.

[105] I consider the following averments are of significance in considering the relevancy of the case on circumvention:

[106] First the averment that the defender arranged that the transaction with respect to the estate be carried out by the firm Fraser and Mulligan (see: Article 6 at page 10A).

[107] The averment that said firm of solicitors acted for both parties (see: Condescendence 8 page 12D).

[108] It is further averred as follows at Article 8 page 12D:

> "There were no missives. No advice was prepared by Fraser & Mulligan (or advice given to obtain advice) relative to capital gains and inheritance tax consequences or likely consequences should the disposition proceed. The disposition proceeded in the absence of any independent valuation from a suitable experienced chartered surveyor familiar with agricultural land in Aberdeenshire at the time."

[109] It is further averred that the deceased was at the relevant time:

> "an established client of Burnett & Reid Solicitors in Aberdeen for approximately 50 years, *inter alia*, have recognised expertise in agricultural, property and tax law. The deceased at that time also had an established tax accountant in Aberdeen, namely Ritson Smith. Neither were involved or instructed in the disposition …" (see Article 5 of Condescendence)

[110] The averments regarding the circumstances of the granting of the disposition which were brought about by the defender arranging for a particular firm of solicitors to act can I think properly be described as irregular and unusual, where the deceased had according to the averments a well-established client relationship with another firm of solicitors and a tax accountant. When these averments are taken together, they could I believe amount to circumvention. The pursuers offer to prove that the defender arranged for this firm of solicitors to carry out the transaction, thus depriving the deceased of independent legal and tax advice with respect to the transaction and further depriving him of an independent valuation of the estate. Looking to these averments I believe there are sufficient averments made to amount to a relevant allegation of circumvention.

[111] As regards lesion there are the averments regarding the inadequacy of the price obtained.

[112] Looking to the whole averments regarding facility and circumvention I am not satisfied that as a matter of relevancy the pursuers' case is bound to fail.

[113] The final issue with respect to this aspect of the case is the competency of the remedy sought, namely: damages.

[114] I first observe that I was referred to no authority that in the absence of fraud damages could not be obtained. Equally I was referred to no authority where in such circumstances damages had been held to be a competent remedy. I do not believe that in the circumstances of this case damages can be recovered based on a case of facility and circumvention. Had they been recoverable I believe I could have been referred to an authority which said that or to one of the many text books covering facility and circumvention which said that. I was referred to nothing which supported this contention. The remedy always referred to, when this issue is discussed in the authorities or text books, is reduction. It appears to me that McBryde at paragraph 16 - 11 is correct that in the absence of fraud, plead as part of the circumvention case, damages may not be recovered. That statement I believe fits with the general principles of Scots Law and how the law in this area has developed. I have already held that there is no relevant case of fraud on record and have only held the circumvention case relevant in that it is not necessary for fraud to be plead in order for a relevant case of facility and circumvention to be made out. Accordingly I hold that damages cannot competently be claimed under this head of claim.

[115] Thus although I believe relevant averments are made relative to facility and circumvention I hold that the remedy of damages is not a competent one and for that further reason would not have allowed this head of claim to proceed to proof.

Undue Influence

[116] Lord Shand in *Gray* v *Binny* (1879) 7 R 332 at 347/8 gave the following definition of undue influence:

> "'The circumstances which establish a case of undue influence are, in the first place, the existence of a relation between the granted and grantee of the deed which creates a dominant or ascendant influence, the fact that confidence and trust arose from that

> relation, the fact that material and a gratuitous benefit was given to the prejudice of the granter, and the circumstance that the granter entered into the transaction without the benefit of independent advice or assistance. In such circumstances the Court is warranted in holding that undue influence has been exercised; but cases will often occur…in which over and above all this, and beyond what I hold to be necessary, it is proved that pressure was actually used, and that the granter of the deed was in ignorance of facts, the knowledge of which was material with reference to the act he performed.'"

[117] Having regard to that definition I am not satisfied that the pursuers' case under this head would necessarily fail on the basis of the relevancy attack.

[118] I have made reference to the averments regarding the deceased's facility. It is averred at Article 9.3 that the deceased could not have continued his business until 2011 but for the supportive acts of the defender. These averments when taken together, if proved, could establish a relationship of confidence where the defender had a dominant influence.

[119] In addition there are averments to which I have referred that the deceased entered into this transaction without the independent advice of his own solicitors and accountants and where no independent advice was obtained as to the value of the estate. It is averred that the land was sold for approximately half its true value and where there was no particular need to sell the land.

[120] Given the above averments I believe the various requirements of a relevant case of undue influence as set out by Lord Shand are averred.

[121] It was also argued that the case under this head was incompetent in that damages could not be competently sought.

[122] For the same reasons that I have held that it is not competent to claim damages for facility and circumvention I believe that it is not competent to claim damages in respect to the undue influence case. Mr Cowan relied on a passage in McBryde, *The Law of Contract in Scotland* at paragraph 16-36 to support his position. Again the statement of the author I

think conforms to the general principles of Scots law. For broadly the same reasons I earlier set out when considering the issue in terms of the facility and circumvention case I also find the remedy of damages sought under this head not to be competent.

Conclusion

[123] Accordingly in summary for the foregoing reasons I uphold the defender's argument on title to sue with respect to each head of claim; I reject the defender's argument on prescription; I uphold the defender's argument on relevancy with respect to the claim based on fraud. I reject the defender's argument on relevancy in respect to the cases based on facility and circumvention and undue influence and lastly I uphold the defender's argument with respect to the competency of claiming damages in respect to the last two mentioned heads of claim.

Decision

[124] It follows from the above that I dismiss the action. I reserve the position regarding expenses.