OUTER HOUSE, COURT OF SESSION

[2019] CSOH 59

A473/13

OPINION OF LORD DOHERTY

In the cause

SAJJAD SOOFI AND RUMELLA SOOFI

Pursuers

against

JEFFREY MARTIN DYKES

Defender

Pursuers: Parties
Defender: Richardson QC; CMS Cameron McKenna Nabarro Olswang LLP

2 August 2019

Introduction

[1] This is an action for professional negligence brought by the pursuers against the defender, a retired solicitor who formerly carried on practice in Glasgow under the business name Dykes Glass & Co. It concerns the purchase by Bonafied Enterprises International Limited ("BEI") of Airdrie Autopoint - a petrol station, car wash, and shop ("the subjects") - from Mrs Isabel Young. The defender acted for BEI in that transaction. I heard a proof before answer on 14, 15, 16, 21, 22 and 23 May 2019.

[2] The pursuers led evidence from the first pursuer; from Professor Leo Martin, a solicitor who prepared an expert report (6/11 of process); and from Jeffrey Meek, a chartered accountant with Jeffrey A C Meek LLP, who prepared two expert reports (6/3 and 6/7 of process). The witnesses on behalf of the defender were the defender; Mrs Isabel Young; Ian Lee, formerly a partner in Scott Moncrieff, Chartered Accountants, who was the person responsible for preparing Airdrie Autopoint's accounts at the material times; Peter Nicholas, a chartered surveyor with Rapleys who specialises in the valuation of food retail and automotive subjects and who prepared an expert report (7/3 of process); Greig Rowand, a chartered accountant practising as a partner of MHA Henderson Loggie who prepared an expert report 7/2 of process; and Donald Reid, a solicitor with Mitchells Roberton who was instructed to consider the papers and to provide expert opinion evidence.

Uncontroversial evidence

[3] A good deal of the evidence was relatively uncontentious, and it can be set out fairly briefly.

[4] In January 2007 BEI instructed the defender to act on its behalf in relation to the purchase of the subjects. BEI had informally agreed a purchase price of £850,000 with the seller, subject to survey, before the defender was instructed.

[5] BEI obtained a valuation survey report from Ryden dated 9 March 2007. Russell Rutherford BSc FRICS, a partner in Ryden, was the author of the report. He inspected the subjects. He measured the shop as having an area of 25.44m^2 and the office/stores/toilets as having an area of 32.47 m^2. He noted his understanding that the fuel throughput was 2.2 million litres per annum. He described six comparables which he indicated he had taken into consideration in arriving at his views on value. He indicated that he had also taken into

consideration "the distinct elements being the forecourt, the shop, the valeting facilities, together with other income generated by the existence of the ATM within the shop." He opined that entering into a supply/branding agreement with a fuel company would greatly assist in increasing fuel throughput and other sales. He noted that the shop could be enlarged which would increase turnover and profitability. He had been provided with the financial documents contained in Appendix D of his report, which (from the copy of the report lodged as a production) appear to have been (i) page 1 (the list of contents) and page 4 (the notes to the accounts) of the accounts for the financial year ending 31 January 2005 (Note 4 disclosed that the profit for the year had been £131,882); (ii) management accounts for the year ended 31 January 2006 which recorded sales of £2,563,654 and profit of £174,280; and (iii) management accounts for the 6 months to 31 July 2006 which showed sales of £1,281,538 and profit of £100,754. The report noted that the accounts showed profitability over the period, but that as the owner worked in the subjects it was appropriate to reduce the profit by a sum reflecting the wages which would have to be paid if someone had to be employed to do that work. In the whole circumstances he valued the subjects at £900,000. The report did not further explain the valuation method which Mr Rutherford had used, nor did it provide a breakdown of the valuation. The defender was not provided with a copy of the report.

[6] The pursuers are spouses. At the material times the first pursuer was a director of BEI and its principal shareholder, and he was actively involved in running the business at the subjects after their purchase. While not a director or shareholder, the first pursuer's father, Mohammed Soofi, took an active role assisting the first pursuer in some of the negotiations leading up to the purchase.

[7] On 13 March 2007 the defender submitted an offer on behalf of BEI to purchase the subjects. There was no response from the seller. On 10 April 2007 the defender wrote on behalf of BEI amending the offer, principally to stipulate for a later entry date. Once again there was no response. The offer lapsed. Since it appeared that the seller no longer wished to sell, BEI turned its attention to other potential purchase targets. Between July and early November 2007 it investigated the possible purchase of a filling station at Hawthorn Street, Glasgow. It sought bank funding of the purchase price from RBS, but RBS required to see audited accounts of the business as a condition of making any advance. Although on 29 October 2007 BEI informed the defender that audited accounts would no longer be required, by 7 November 2007 RBS had made clear that that was not correct. As the seller was not in a position to provide audited accounts the transaction could not proceed, and BEI turned its attention once again to the purchase of the subjects. It instructed the defender to submit a further offer. An offer (in substantially the same terms as the offer of 13 March 2007) was duly submitted on 9 November 2007. On 16 November 2007 the seller's solicitors responded indicating interest, and between then and the end of January 2008 there was informal correspondence between the parties' solicitors as to the proposed terms of the bargain. On 28 January 2008 the seller's solicitors sent the defender a draft qualified acceptance with a view to discussion and agreement of its terms. Following feedback by the defender on behalf of BEI the seller's solicitors issued a qualified acceptance on 25 March 2008. On 16 April 2008 the defender issued a qualified acceptance of the seller's qualified acceptance. On 13 August 2008 the seller sent the defender a further draft qualified acceptance for discussion and agreement. The defender discussed its terms at a meeting with the first pursuer and his father on 22 August 2008. The seller issued the revised and

agreed qualified acceptance on 29 August 2008. That was accepted by the defender by missive letter of the same date and the bargain was concluded.

[8] In terms of the missives the date of entry was 1 September 2008. The purchase price was allocated £465,000 to heritage, £365,000 to goodwill, and £15,000 to fixtures and fittings. The missives also provided (paragraph 3 of the seller's missive letter of 25 March 2008):

> "3. The price shall be exclusive of any VAT which will be payable on the same. Our respective clients undertake to use all reasonable endeavours to procure that the transaction is treated by the VAT authority as a transfer of a going concern both before and after the actual completion date...
>
> ...
>
> 3.5 Notwithstanding the terms of this condition in the event that the transaction effected and the missives to follow hereon does not fall to be treated as a transfer of a going concern and VAT is in consequence properly chargeable in respect of the said transaction your client shall not later than ten business days after written demand to our client from the VAT authority to such effect being intimated to your clients and in exchange for a validly and appropriately receipted VAT invoice make payment of such VAT."

Clause 9 of the offer of 9 November 2007 had provided:

> "9. All sums due to or by the business as at the date of entry will be received or settled by the seller. The seller will make available all business records as reasonably necessary to determine the goodwill of the business."

However, both the seller's draft missive letter of 13 August 2008 and the missive letter of 29 August 2008 proposed that the second sentence of clause 9 be deleted. Paragraph 17 of each of those letters also stipulated that the following entire agreement clause be included in the missives:

> "17. The contract concluded hereon will constitute the whole agreement between the purchasers and seller with respect to all matters to which it refer (sic) and supersedes and invalidates all other undertakings warranties and representations relation (sic) to the premises which may have been made by either party and both parties warrant that they have not relied on such undertakings warranties and representations in entering into the missives."

In its missive letter of 29 August 2008 BEI accepted both of those qualifications.

[9] The missives incorporated a schedule of conditions. Condition 23 provided:

> "23. This offer and the missives following hereon will form a continuing and enforceable contract notwithstanding delivery of the Disposition except insofar as fully implemented thereby, but the missives shall cease to be enforceable after a period of two years from the date of entry except insofar as they are founded upon in any Court proceedings which have commenced within the said period..."

[10] The entire purchase price was funded by two bank loans from Alliance and Leicester Commercial Bank ("the bank"). The monthly loan repayments required were substantial. The annual total of those repayments was about £120,000.

[11] When BEI took entry it closed the subjects for several weeks prior to it commencing trading. In August 2010 it closed the shop for about six weeks to extend it.

[12] During the period that BEI operated the business it was not profitable. In the year ending 31 August 2009 it made a loss of £76,468. It continued to operate at a loss thereafter. It did not comply with its obligation to the seller to use all reasonable endeavours to procure that the transaction was treated by HMRC for VAT purposes as a transfer of a going concern ("TOGC") both before and after the actual completion date (paragraph 3 of the seller's qualified acceptance of 25 March 2008). As a result, the seller was assessed to VAT on the sale in the sum of £126,595 plus interest of £1,298.79. In the spring of 2010 the seller raised proceedings to recover those sums from BEI. BEI did not make any VAT returns or pay any VAT during the period which it traded. The first pursuer's explanation for those failures was that BEI could not afford to account to HMRC for VAT because it needed to use the VAT which it collected as cash flow for the business. BEI defaulted on its loan repayments to the bank. On 29 October 2010 administrators were appointed.

The assignations

[13] Before the action was raised, the first pursuer was assigned BEI's rights, title and interest to pursue any claims against third parties arising out of or relating to the acquisition. Subsequently, on 30 January 2019, the first pursuer assigned those rights to the second pursuer. Intimation of that assignation was not made to the defender until 13 May 2019, on the evening before the proof was to commence. On the morning of the first day of the proof the second pursuer was sisted as an additional pursuer on the defender's unopposed motion.

The pursuers' case

[14] The pursuers maintain that the financial information which the seller provided to BEI was inaccurate, and that it overstated the turnover and profitability of the business; that the true value of the subjects at the date of purchase was £465,000; that the defender ought to have advised BEI to seek a warranty from the seller that the information provided by her was accurate; and that in failing to do that he was in breach of his contractual and delictual duties to exercise the ordinary care of an ordinarily competent solicitor. They aver that had the defender given that advice BEI would have accepted it; and that had the defender sought such a warranty either (i) the seller would have agreed to provide it, in which event BEI would have had redress against her for the inaccurate information and would have recovered £385,000 from her (which they maintain was the difference between the price paid and the true value of the subjects at the date of sale); or (ii) the seller would have refused to provide a warranty, in which case BEI would not have proceeded with the purchase and it would have avoided suffering a loss of £385,000.

The contentious issues relating to liability

The defender's discussion of the missives with BEI

[15] The first pursuer's position in evidence was that the defender ought to have attempted to include an information warranty in the missives, or at least advised BEI of the possibility of that course being followed. He indicated that had he been so advised he would have sought the inclusion of a warranty.

[16] The defender's evidence was that it was never suggested to him by the client that such a warranty was needed; and that the circumstances did not suggest that the inclusion of a warranty was necessary or appropriate. The price had been agreed at the outset before the defender's involvement. He had not seen the Ryden report or any other financial information. It had not been suggested to him that BEI was relying upon the accuracy of any financial or other information which had been provided by the seller. The second sentence of clause 9 had been in the missives from the date of the initial offer in March 2007 until it was removed very shortly before the missives were concluded. BEI had had nearly 18 months to obtain whatever financial records of the seller they considered they required to see. The client had been content that the second sentence of clause 9 should be deleted and that clause 17 should be included.

[17] There is a sharp factual dispute as to what happened at the meeting on 22 August 2008 in the defender's office when the terms of the seller's draft missive letter of 13 August 2008 were discussed. The meeting was attended by the first pursuer, his father, and the defender.

[18] The first pursuer's evidence was that the meeting was short - not much more than 20 minutes (including a telephone discussion between the defender and the seller's solicitor) - and indeed that no meetings with the defender had ever been lengthy. The first pursuer

and his father had not had a copy of the seller's letter of 13 August 2008. While the first pursuer accepted that the defender "would have" explained the deletion of the second sentence of clause 9 to him (he was not sure because "it was 12 (*sic*) years ago"), he was adamant that the defender had made no mention of clause 17. The first pursuer had never seen the clause or the relevant page (p 3) of the letter of 13 August 2008. He was "101% sure" of that. He and his father had been entirely unaware that the seller proposed that clause 17 be included. He would never have agreed to its inclusion had it been brought to his notice.

[19] The defender's evidence was that there were several lengthy meetings and many telephone calls with the first pursuer and his father during the course of the negotiation of the missives, and that throughout that period he had explained matters to them in some detail. The meeting on 22 August 2008 was lengthy - about 1 hour and 40 minutes in total. The first pursuer and his father had been sitting at a table with him, and he thought that they had a copy of the letter of 13 August 2008 to read. In any case, he had been sitting with them and he had gone over each of the paragraphs in the letter and explained them. He had made manuscript notes at the time on the letter. On the same day a typed file note of the meeting had been prepared.

The expert evidence from Professor Martin and Mr Reid

Professor Leo Martin

[20] Professor Martin qualified as a solicitor in 1985. He has substantial experience of conveyancing in private practice from about 1987 onwards. He has also taught conveyancing and legal practice at the Universities of Glasgow and Strathclyde. He was a

visiting professor at the University of Strathclyde from 2000 to 2018, and since 2018 he has been an emeritus professor. He is currently a consultant with Levy & McRae LLP.

[21] In April 2013 Professor Martin was instructed on behalf of the first pursuer to examine the defender's files relating *inter alia* to the purchase of the subjects. He prepared a report dated 23 May 2013 (6/11 of process). He adopted that report as part of his evidence at the proof. On pp 1-2 of his report he noted:

> "The test of professional negligence in Scots Law is laid down in the case of *Hunter v Hanley* 1955 SC 200. The Lord President stated as follows:
>
> > '...it must be proved that there is a usual and normal practice; secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course...adopted was one which no professional man of ordinary skill would have taken if he had been acting with ordinary care."

On p 2 Professor Martin narrated some of the terms of the missives, including clause 9 of the offer:

> "In Clause 9 the seller of the business is required 'to make available all business records as reasonably necessary to determine the goodwill of the business.'"

On pp 2-3 he noted that the defender had specified:

> "elements of protection of the value of that business by providing for the grant of a Lottery licence to BEI and for training by the seller of Mr Sajad (sic) Soofi in the seller of the Business' systems."

He continued:

> "It is clear that DGC [the defender] are aware of their professional responsibilities in drafting the missives in this contract. They have, however, failed to include any clause requiring some form of guarantee or warranty in the contract in respect of information and documentation provided to the purchaser that allowed the purchaser and its advisers to form a view of the realistic valuation of the business. Goodwill is often described as an ethereal concept. It may be most easily understood as the likelihood that persons who contract with a business will continue to do so as they have before. It is accordingly necessary to have accurate information in accounts or other financial documentation upon which to rely. Solicitors who acquire businesses on behalf of clients will seek to include protection by inserting words in a form similar to this in the contractual documentation that they draft:

> 'The Seller warrants that all information and documents concerning the business which have been supplied to the Purchaser by or on behalf of the Seller are true and accurate and complete in all material respects and that all such particulars and facts relating to the business which might have been expected to affect the Purchaser's decision to purchase the business and the assets or the amount of the consideration payable have been disclosed to the Purchaser.'

> DGC although requiring disclosure in terms of Clause 9 of the offer failed to incorporate any warranty of items disclosed...I would...expect a solicitor to incorporate a warranty of disclosed information in the contract. It is not unusual that a seller seeks in a qualified acceptance that such a warranty is limited or an attempt made by the seller to delete it in its entirety. Such an attempt would promote advice from a solicitor to a purchasing client to be on his guard and, most probably, to have other advisers carry out further due diligence before proceeding. If no such clause is included at any point in the negotiation of a contract then such an opportunity will not present itself...Given the failure of DGC to include such a clause in their negotiation of the contract on behalf of BEI it is my view that they have failed the three part test to be applied following *Hunter v Hanley*."

[22] In oral evidence Professor Martin indicated that he did not know whether the requirement for training had been included in the final version of the missives. He agreed that he had not picked up that the final sentence of clause 9 which he quoted in his report had in fact been removed from the final version. He did not know if that deletion had been discussed with the client. He accepted that whether an information warranty ought to be included in an offer depended on the particular circumstances of the case. He also agreed that it would have been "absolutely normal" if an information warranty of the sort he suggested was qualified or deleted by a seller. He stated that he would expect a solicitor to explain to the client the terms of an entire agreement clause like clause 17. He stressed that in his view the important thing was that the solicitor raised with the client whether any prior communings such as accounts of the business should be warranted by the seller. Proposing such a warranty could be a trigger for a discussion of such matters with the client. In cross-examination he was asked whether if on 22 August 2008 the defender had discussed

with the client the deletion of the second sentence of clause 9 and the inclusion of clause 17 "that could satisfy your requirement for the trigger?" He replied: "I agree with that, because it would be a matter of instructions then."

Donald Reid

[23] Mr Reid is a partner in Mitchells Roberton. He qualified as a solicitor in 1975. His practice since then has mostly involved property transactions. He has lectured and tutored in conveyancing in the Diploma in Legal Practice courses at Glasgow University. He has given expert opinions in more than 700 cases.

[24] Mr Reid was first instructed on behalf of the defender in 2013. He had been provided with copies of the defender's files concerning BEI, Professor Martin's report, and certain other papers. He had been asked to opine whether the defender ought to have tendered the client advice about the inclusion of warranties in the missives. Although he had provided his views in writing to the defender's solicitors, no report by him had been lodged.

[25] Mr Reid said it was common for information warranties like the warranty described by Professor Martin to be included in offers to purchase business subjects. However, it was very common for the seller's solicitor to amend or delete the warranty during negotiation of the missives. A seller's solicitor would wish to reduce the seller's exposure. Whether the purchaser would propose such a clause, and whether the seller would accept it, depended very much upon the facts and circumstances of the particular case. He indicated that his own general approach when instructed to offer to purchase a business was that he included an information warranty in the offer. Under reference to the first stage of the three stage test in *Hunter* v *Hanley,* he said that there was a difference in his view between something being

a standard practice and something being common. He was not prepared to describe it as being standard practice for a solicitor to include an information warranty in an offer to purchase a business; but he thought it was more common to do that than not to do that. He said that he thought his answer to the first question was a slightly tentative yes - that including such a warranty in an offer was the normal and ordinary course. As for the second stage, Mr Reid had some misgivings about categorising the non-inclusion of an information warranty in an offer as a deviation from normal practice. Looking at transactions his firm had been involved in there were a significant number where a warranty had not been sought. The particular circumstances might have justified that course, in which case he doubted whether it would be right to describe the course taken as a departure from normal practice. However, Mr Reid had no dubiety as to the third stage. In his opinion it could not be said that the course followed by the defender was a course which no solicitor of ordinary skill would have taken if he had been acting with ordinary care. It was important to look to the whole circumstances up to the conclusion of missives. Here the circumstances as Mr Reid understood them were that a lengthy period elapsed between BEI's initial offer and the conclusion of missives - ample time for BEI to have investigated, or sought further information relating to, accounts or goodwill if that was thought to be necessary. The clients were not commercially naïve - they had previous business experience. They had arranged the funding for the transaction themselves. They had also been involved in missives for the purchase of the Hawthorn Street subjects and they were well aware of the significance of audited accounts. They knew on 22 August 2008 that the second sentence of clause 9 had been deleted by the seller and that the entire agreement clause had been introduced. At the meeting that day the defender appeared to have been meticulous in explaining all of the changes introduced by the seller's proposed missive letter. In the whole

circumstances Mr Reid did not think that it could be said that no solicitor of ordinary skill exercising ordinary care would have failed to propose the inclusion of an information warranty. In his view some such solicitors might have sought to introduce one, but others would not have done so.

[26] Mr Reid clarified that, while it was sometimes done, in his opinion it was not the normal practice of solicitors at the material time to advise the client of the possibility of proposing an information warranty in an offer. Normally, the solicitor simply made a judgement call as to whether it was appropriate in the circumstances to include such a clause in a missive letter.

[27] Looking at the history of the transaction, Mr Reid thought that if the defender had proposed an information warranty the seller's solicitor would have sought to delete it or to qualify it to make it toothless. It was evident that throughout the negotiations he had been astute to protect the seller's interests and to reduce her exposure to risk.

Decision and reasons

Credibility and reliability

[28] I propose to comment first on Mrs Young, Mr Lee, Mr Nicholas and Mr Rowand. In my opinion no issues of credibility arise in relation to any of those witnesses. Each of them appeared to me to be doing his or her best to assist the court. Each struck me as being a candid and fair witness and I have accepted their evidence as being reliable on all material matters.

[29] So far as Mr Meek, Professor Martin and Mr Reid are concerned, no question as to credibility arises, and all three witnesses did their best to assist the court. They all conceded matters which they considered ought properly to be conceded. However, for the reasons

which I outline below I have not accepted some of Mr Meek's evidence and some of Professor Martin's evidence.

[30] That brings me to the evidence of the first pursuer and of the defender. I found the defender to be a credible and reliable witness who was able to draw considerable support for his account from the contemporaneous documentation. As I explain below, I have been unable to accept critical parts of the first pursuer's evidence.

Liability

[31] I am satisfied that the defender's recollection of the meeting of 22 August 2008 is more reliable than the first pursuer's recollection. The defender's evidence on this matter impressed me as being clear and coherent, and the contemporaneous entries in his files provide substantial support for his account. On the other hand, the first pursuer's account contains elements which seemed to me to be inherently unlikely, and it is very difficult to square it with the contemporaneous evidence. He had a tendency to understate the extent of the advice he was given and the time involved in meetings with the defender.

[32] The first pursuer's suggestion that no meetings with the defender were ever lengthy is plainly wrong. It is clear from the defender's file that there were a number of lengthy meetings. I will deal later with the meeting of 22 August 2008. Other examples of lengthy meetings were the meetings on 21 December 2007 (50 minutes), 15 February 2008 (1 hour), and 21 February 2008 (45 minutes).

[33] More generally, my impression from the file is that throughout the course of the transaction it was the defender's practice to discuss material matters with the client, to take instructions when appropriate, and to keep the client well informed of developments. That accords with the defender's evidence.

[34] I reject the first pursuer's evidence that the meeting on 22 August 2008 was short and that it only lasted about 20 minutes. The manuscript notes in the file and the typed file note tend to support the defender's evidence that the meeting was much lengthier than that. A manuscript note appears to record the time involved as having been from 10am until 11.40am.

[35] Moreover, in my view the defender's manuscript notes on the letter of 13 August 2008 and the typed file note provide support for his account of having gone through the letter with the client paragraph by paragraph. I think the first pursuer is mistaken when he says that he never saw p 3 of the letter. In my opinion all the indications from the manuscript annotations and the file note suggest that the contents of that page were discussed. Indeed one of the items - a provision relating to contamination - was controversial. I also consider that the terms of the typed file note tend to support the defender's recollection that he drew clause 17 to the client's attention and that he explained its effect.

[36] I think it possible that with the passage of time and the focussing of issues in the course of this litigation the first pursuer has genuinely convinced himself that his account of events is what actually occurred. However, for the reasons already given I am not persuaded that he is correct. Where the first pursuer's evidence and the evidence of the defender differ I find the defender's evidence to be more reliable.

[37] I turn to the evidence of Professor Martin and Mr Reid. Mr Reid was clear that if the defender's account of events is correct, then a body of solicitors of ordinary competence exercising ordinary care would have done what the defender did. For his part, I understood Professor Martin to accept that if indeed the defender had explained the effects of the deletion of the second sentence of clause 9 and of the inclusion of clause 17, the client would

have been appropriately apprised of the situation and would have given instructions on a properly informed basis to agree to those changes.

[38] I accept Mr Reid's evidence. I am not persuaded that there is any good reason to reject it. It impressed me as being measured and fair. It was clear that Mr Reid had a very full knowledge of the defender's files and of all of the details of the transaction. Professor Martin appeared to be less familiar with the detail of the files and the full history of the transaction. It seems that he saw the papers when he prepared his report in 2013 but that he was not instructed to appear as a witness at the proof until after the proof had begun, and that he did not see the papers again until that time. In the end, I do not think that Professor Martin maintained that a case of professional negligence would be made out if the facts were as I have found them to be. In any case, taken as a whole his evidence does not provide a convincing basis for holding that on the facts which I have accepted no solicitor of ordinary competence exercising ordinary care would have acted as the defender did.

[39] It follows that the pursuers have failed to establish that the defender was in breach of contract or negligent.

Causation and damages

Introduction

[40] Given my conclusion on liability I can deal fairly briefly with causation and damages. I will consider first whether the information which the seller provided was inaccurate. Then I will examine what was likely to have happened had the defender proposed that an information warranty be included in the missives.

Was the information which the seller provided inaccurate?

[41] The pursuers ask the court to infer that the financial information which the seller provided to BEI was inaccurate. At one stage during his evidence I understood the first pursuer to suggest that, in addition to the material in Appendix D of the Ryden report, the seller may have provided BEI with the full annual accounts prepared by Scott Moncrieff for the years ending 31 January 2005, 31 January 2006, and possibly 31 January 2007. However, he was vague as to when and where this was said to have occurred, and his evidence on the point did not inspire confidence. The pursuers' averment in article 3 of condescendence is that "BEI had no financial information about the business being sold beyond that contained in the appendices to the Ryden report." In the whole circumstances I am not persuaded that anything more than the financial information in Appendix D was provided to BEI prior to the conclusion of the missives.

[42] The gist of the pursuers' position was that when one compares the turnover in the accounts against the total annual output figures from the seller's VAT returns for corresponding years the turnover figures are about £300,000 higher than the annual outputs. Mr Meek and Mr Rowand both confirmed that to be the case. However, both agreed that the only way of telling which figures were correct would be to examine the underlying financial records of the seller for the relevant periods. Otherwise, it was not possible to say whether the inaccuracy was in the accounts or in the VAT returns. That was also Mr Lee's position.

[43] Mr Lee was the partner with Scott Moncrieff who had been responsible for the preparation of the seller's accounts. His evidence was that Mrs Young had been a trainee accountant with his previous firm, Downie & Wilson, but that she had left to assist her father in his business and she had not qualified as an accountant. Nevertheless, she was

well versed in bookkeeping and the preparation of accounts. The accounts which Mr Lee prepared for Mrs Young were not audited accounts. He did not examine the underlying books and records of the business. Rather, each year he was provided with certain working papers which Mrs Young had prepared, including a 14 column trial balance, journal entries, lead schedules, bank reconciliations, VAT reconciliations and a stock schedule. The material which Mrs Young provided was the sort of material which an in-house finance director commonly prepared. When Mr Lee had any questions about any of the information he had raised them with Mrs Young. It was certainly not the case that Scott Moncrieff merely reformatted accounts which Mrs Young had prepared. The accountants' report within the accounts for the years ending 31 January 2006 and 31 January 2007 stated:

> "...We have carried out this engagement in accordance with best practice guidance issued by the Institute of Chartered Accountants of Scotland...
> ...
> We have not been instructed to carry out an audit of the accounts. For this reason, we have not verified the accuracy or completeness of the accounting records or information and explanations which you have given to us and we do not, therefore, express any opinion on the accounts."

The working papers relating to the preparation of the accounts would have been destroyed after six years in accordance with Scott Moncrieff's policy.

[44] Mrs Young's recollection as to the material she provided to Mr Lee was broadly similar to Mr Lee's recollection. She was unable to explain the difference between the turnover figures in the accounts and the output figures in the VAT returns. She confirmed that the turnover figures in the accounts had not included VAT. If one of the two was wrong she thought it more likely to be the VAT return figures. She had prepared the VAT returns herself. It would have made no sense to overstate turnover and profit in the accounts. The accounts were prepared with a view to showing profits for income tax

purposes. She would not have wanted to pay more income tax than was due. The same point was made by Mr Rowand and Mr Lee.

[45] Mr Meek suggested that if Mr Lee had simply reformatted draft accounts prepared by Mrs Young that would have been inconsistent with the declaration in the accountants' reports in the 2006 and 2007 accounts that the engagement had been carried out in accordance with ICAS best practice guidance. The difference between the turnover and outputs, and the fact that best practice guidance had not been followed, suggested to him that the accounts may be inaccurate.

[46] Even if Mr Meek's premise had been correct, and the preparation of the accounts had not followed best practice guidance, I do not think that that fact together with the existence of the difference (between the turnover in the accounts and VAT outputs) would have justified the inference that it was the accounts which were inaccurate. In any case, I am satisfied that Mr Meek's premise is not correct. I accept that Mr Lee was provided with the working papers already described. I also accept the evidence of Mr Lee and Mr Rowand that what Mr Lee did was consistent with ICAS best practice guidance.

[47] The first pursuer's evidence was that BEI had managed to increase fuel sales, at least initially; but that subsequently there had been times when it had not been provided with sufficient fuel because of difficulties in paying its supplier. The shop had never generated anything like the level of sales which had been hoped for.

[48] As I understand the pursuers' case they maintain that during BEI's trading at the subjects there were drops in turnover and profits compared to the figures achieved in the information provided by the seller; that those drops were indicative of the seller's figures being incorrect; and that the court could exclude other possible explanations for the failure

of the business operated by BEI, such as changes in trading conditions, or the seller having been a better operator of the business.

[49] I observe that the two pages of the abbreviated accounts for BEI's first year of trading record that a loss was suffered in that year, but they do not disclose the turnover. Nor is there any vouching of the turnover and profit/loss for any later period of trading by BEI.

[50] Even if in those circumstances it is appropriate to proceed on the basis that BEI's turnover and profit/loss were always materially lower than the seller's turnover and profit as shown in the financial information which was provided to Ryden, I am not convinced that the court ought to infer from BEI's lack of success that the seller's accounts were inaccurate. Nor am I satisfied on the evidence before me that I ought to exclude other possible explanations for the differing success achieved by the seller and by BEI.

[51] I am satisfied from the evidence of Mrs Young and Mr Lee that Mrs Young was an experienced and hard-working operator who was astute to build and retain customer loyalty and to maximise turnover and profit. On the other hand, there is very little evidence relating to BEI's operation of the business. Only the partial abbreviated accounts for the first year of BEI's trading have been produced. The first pursuer was new to the trade (albeit that he maintained that his family had had relevant experience in the past). After the acquisition the subjects were closed for a period - a matter which had caused Mrs Young concern. Contract customers whom she had nurtured had to go elsewhere. It seems likely that the business run by BEI had greater overheads than the business run by Mrs Young. Mrs Young spent a good deal of her time working in the business, and she and her husband (who is an engineer) personally carried out as much of the repairs and maintenance as they could to keep costs down. BEI had loan repayments of about £120,000 per year to service from income generated by the business (the interest element of which would have been set off in

computing profits), whereas Mrs Young's loan repayments had been fairly negligible. Some of the evidence raises serious questions about the way the business was operated by BEI. BEI's failure to use all reasonable endeavours to procure that the transaction was treated by HMRC as a TOGC for VAT purposes was a serious failing. The failure to make any VAT returns - none of the VAT which BEI collected was accounted for to HMRC - is indicative, at best, of the management of operations having been seriously disordered.

[52] It is also evident that market conditions were becoming more challenging at the time of the purchase, and that there was greater competition than there had been in previous years. An economic recession began in 2008 and it deepened in 2009. I accept the evidence of Mr Rowand and Mr Nicholas that this is likely to have had some negative effect on trading at the subjects. Even more importantly, as Mr Nicholas made clear, the market for petrol filling stations was continuing to change (as it had done for several years before) with the strong trend being for supermarkets and other major food retailers to operate petrol stations at hypermarkets and elsewhere. Profit margins on fuel sales were reducing. Convenience stores at petrol stations were bigger than before, and the profit driver was sales from the stores rather than fuel sales. The shop at the subjects was very small, and in Mr Nicholas' view there was very little scope for expansion. An expansion in 2010 had been too little too late.

[53] Mr Nicholas emphasised that in 2008 the subjects faced very considerable competition. There were six competitors within a two mile radius. Some of these were very close to the subjects, and two of them had been developed or re-developed since the time of the Ryden report in early 2007. Competition had increased significantly since that time.

[54] I understand the pursuers' frustration that the difference between turnover figures in the accounts and the output figures in the VAT returns is unexplained. However, in my

opinion the pursuers have failed to establish that the financial information given to Ryden was inaccurate. Nor in my view have they shown inaccuracy in any of the other accounts upon which they sought to rely.

What would have happened had the inclusion of a warranty been proposed?

[55] Mrs Young thought that the information in the accounts was correct. She indicated that she would have had no reason to be concerned about warranting it had that been necessary, but that she would have followed the advice of her solicitor on that score. Her solicitor appears to have been astute to protect her interests throughout the course of the negotiations. That accords with Mr Reid's impression of the files. It also accords with the defender's view. Based on his experience of the transaction, the defender was also of the view that the seller's solicitor would not have agreed to a warranty had one been proposed. That seems to me to be a realistic assessment. It represents the pursuers' primary position in their pleadings (articles 8 and 9 of condescendence). In the whole circumstances I think it more likely than not that the seller's solicitor would have advised against the inclusion of a warranty and would have refused to accept one.

[56] The pursuers maintain that in that event BEI would not have gone ahead with the acquisition. I am not persuaded that is correct. The first pursuer and his father appear to have been very keen that the sale should proceed. They seem to have been content with the price of £850,000 before they saw the Ryden report and the information in Appendix D. I am not convinced that they would have pulled out of the transaction had the seller declined to provide an information warranty. If, as I think, BEI would have proceeded with the acquisition, there would have been no loss caused by the defender even if he ought to have

proposed an information warranty. The bargain would have been concluded without a warranty.

[57] If, contrary to my view, BEI would not have gone ahead, the pursuers argue that by acquiring the subjects BEI suffered a loss of £385,000 because the subjects were worth only £465,000 rather than £850,000. If (again, contrary to my view) the seller would have agreed to the inclusion of the suggested information warranty, the pursuers argue that the seller would have been in breach of the warranty and that BEI would have recovered £385,000 from her for that breach. Therefore, that sum represents the loss caused by the defender's breach of contract *et separatim* negligence.

[58] In my opinion neither of these cases is soundly based. Both are premised upon the pursuers establishing that the financial information the seller provided to BEI was inaccurate. As I have already explained, I am not satisfied that there was such an inaccuracy. Moreover, both cases depend upon the pursuers proving that the true value of the subjects at the date of sale was £465,000. However, the pursuers did not lead any valuation evidence that the true value of the subjects at the date of sale was £465,000 (or indeed any other figure less than the sale price). They have failed to prove that the subjects were worth less than the sale price.

[59] Finally, the case founded on a breach by the seller of the proposed warranty would have faced the additional difficulty of proof that BEI would have raised an action against the seller within two years of the date of entry. Neither BEI nor the pursuers raised any question of information inaccuracy with the seller (or with anyone else) within that period. As the first pursuer candidly observed during cross-examination, he had no reason to question the financial information at that time. Even allowing for the counter-factual scenario of the inclusion of an information warranty in the missives and BEI's awareness of

that warranty, I doubt whether BEI would have been in a position to take the necessary steps to make a timeous claim against the seller.

Disposal

[60] The pursuers have failed to establish breach of contract or negligence on the part of the defender. Accordingly, I shall repel the pursuers' pleas-in-law, sustain the defender's second and third pleas-in-law, and pronounce decree of absolvitor. I reserve meantime all questions of expenses.

Postscript

[61] This is an ordinary action rather than a commercial action. Even in an ordinary action, where an expert witness is to give evidence the court expects there to be lodged as a production a report which outlines the terms of the expert's instructions, his or her qualifications and experience, the material examined, and any skilled opinion or other relevant evidence which he or she proposes to give. However, in this case, unusually, no report from Mr Reid was lodged. In those circumstances I asked Mr Richardson to explain why that was so.

[62] Mr Richardson indicated that at the time productions had to be lodged the only report lodged on behalf of the pursuer (until the first day of the proof there was only one pursuer) had been Professor Martin's report dated 23 May 2013 (6/11 of process). That report was narrowly focussed. It did not bear to support a broader case which had been pled by the pursuer. As Professor Martin was listed on the pursuer's witness list, the defender's agents had contacted him with a view to obtaining a precognition. Professor Martin informed them that he had had no contact with the pursuer's agents since he

prepared his report in 2013, and that he had not been cited by them to attend the proof. In the circumstances, since it appeared that the pursuer was not in a position to lead an expert solicitor, Mr Richardson had decided that the defender should not lodge a report prepared by Mr Reid. In any case, the reports which Mr Reid had prepared had only been drafts - not least because it was unclear what expert evidence the pursuer was able to lead. In fact the pursuers had planned not to lead Professor Martin until they had a change of heart on the afternoon of the first day of the proof. (When it became clear to me that the pursuers did not propose to lead Professor Martin I explained to them the likely consequences of that decision.) The following day the pursuers confirmed that Professor Martin could give evidence at the beginning of the second week of the proof. However, it was not until Professor Martin had completed his examination-in-chief that it was clear to Mr Richardson that Professor Martin proposed simply to adhere to his report, and that he was not being led in support of any other aspect of the case which the pursuers had pled.

[63] I accept that in the particular circumstances it would be wrong to criticise the defender for not having lodged a report setting out Mr Reid's views. However, I think it important to stress, lest there be any doubt, that the facts here are highly unusual; and that normally where it is proposed that an expert may give evidence a report prepared by the expert should be lodged.