OUTER HOUSE, COURT OF SESSION

[2018] CSOH 31

A643/15

OPINION OF LORD TYRE

In the cause

PETER STEWART

Pursuer

against

UK ACORN FINANCE LIMITED

Defender

Pursuer: Smith QC, Macleod; Lefevre Litigation
Defender: Bowie QC, T Young; TC Young LLP

4 April 2018

Introduction

[1] The pursuer is a crofter who owns subjects at Stone Croft, Thrumster, Wick, which comprise a cottage and an area of land extending to about ten acres. The defender is a company which at the material time provided loan finance to *inter alia* the farming industry. In this action, the pursuer seeks:

(i) declarator that he is not indebted to the defender unless and until the defender offers him a loan at a reasonable commercial rate of interest with a term of 15 years;

(ii) declarator that the defender is in breach of contract with him by failing to offer him such a loan;

(iii) reduction of a decree granted by the sheriff at Wick on 3 July 2015, in terms of which he was found to have failed to pay sums due under a short term loan by the defender secured over Stone Croft, with the consequence that the defender was found entitled to exercise its remedies under the Conveyancing and Feudal Reform (Scotland) Act 1970, including entry into possession, sale, and ejection of the pursuer from the subjects; and

(iv) reduction of a warrant of removing.

[2] The basis upon which reduction of the decree and the warrant of removing is sought is that the pursuer was, in the circumstances narrated below, deprived of the opportunity to present two arguments, either of which would have constituted a defence to the defender's sheriff court action. The first was that the property at Stone Croft was residential, and the defender had failed to follow the procedure prescribed by the 1970 Act for recovery of possession of property which is to any extent residential. The second was that the defender was at the material time in breach of its contract with the pursuer, in respect that it had failed to implement a promise to provide the pursuer with medium-term loan finance on expiry of the loan in question, and was accordingly not entitled to enforce any remedies for non-repayment of the initial loan.

[3] The matter came before me for proof before answer. In addition to the pursuer himself, evidence was given on his behalf by his mother, Mrs Heather Stewart, and by Mr Kevin Holt, a farmer in Aberdeenshire who had also been evicted from his farm after receiving loan finance from the defender. I allowed Mr Holt's evidence to be led under reservation as to its admissibility. Evidence was led on behalf of the defender from Mr Mark Sanders, a director of the defender, and from Mr Philip Sheridan, an independent mortgage adviser who was employed by the defender at the material time. I comment below on the witnesses' credibility and reliability.

The nature of the defender's business

[4] Mr Sanders gave evidence, which I accept, concerning the nature of the defender's business. It may fairly be summarised as short-term secured lending to borrowers who, for whatever reason, were unable to obtain finance from a cheaper source. As Mr Sanders explained, the lending was asset-backed and the defender's primary concern was to obtain adequate security to ensure recovery of the sum lent in the case of default by the borrower. Typically, the defender would require a first security over heritable property, for a loan of up to 65% of the property value.

[5] The defender's principal funder was a company called Connaught Asset Management, whose series 3 fund was established to lend money in the agricultural sector through the defender. A limited additional amount of funds were obtained from private investors. The consequence was that the appellant's business policy and practices were largely dictated by Connaught which, among other things, specified the maximum loan to value ratio of the defender's lending. Connaught also specified a process that had to be followed by the defender before a loan could be made. In addition to an independent property valuation, the potential borrower required to complete an application form provided to him by employees of the defender whose job title was "underwriter". On the basis of this information a document setting out the borrower's borrowing and repayment proposals was prepared on the borrower's behalf by a company called Acorn Farm Management Services Ltd. That document was then considered by the defender's credit committee before a decision was made on whether to lend.

[6] In fact, much of the above appears to have been little more than a cosmetic exercise. Mr Sheridan, who was employed as an "underwriter", described his job as a glorified processor/administrator. Mr Sanders was a director of Acorn Farm Management Services Ltd

as well as being a member of the defender's credit committee. In the latter capacity he often found himself reviewing borrowing and repayment proposals which he himself had prepared in the former capacity. My impression is that the defender went through the motions of an administrative exercise insisted upon by Connaught, and that in reality the overriding concern of both Connaught and the defender was to ensure that the sum lent was fully secured by a first security on heritable property which could be called up if necessary.

[7] What is important for present purposes, however, is that Mr Sanders was insistent that the defender's business at the material time consisted solely of making short term loans for periods of up to 12 months, at a rate of interest higher than would be chargeable by a lender under a long term loan. The defender did not and never could offer to supply replacement finance at the end of the short term loan period, because the funding provided by Connaught was strictly limited to short term lending. All that the defender could do was to assist borrowers in attempting to obtain long term funding elsewhere. It did this, according to the defender's witnesses, by charging a monthly management fee in addition to interest, thereby enabling the borrower to demonstrate to a potential long term lender that he was capable of servicing such a loan. (My impression was that this was largely a means by which the defender obtained an additional return on the sum lent.) Mr Sanders noted that at one time it had been hoped that the defender could offer farmers a form of sale and contract farming agreement that would be a suitable replacement for short term loans, but this never came to fruition. In 2012 Connaught went into administration and funding for new loans ceased to be available. The defender's loan book was wound up and the capital fell to be repaid.

The loan agreement between the defender and the pursuer

[8] The pursuer had been a customer of a predecessor of the defender for a time in

about 2006-07, when he had been in receipt of short-term loan finance which had been repaid with money borrowed from Commercial First. In 2010 the pursuer wished to raise loan finance for various purposes, and his contact with the defender was renewed. There is dispute about how this came about: the pursuer stated that he was cold-called by the defender, but the defender produced a "New Enquiry Contact Sheet" dated 12 July 2010 which appeared to indicate that the pursuer had telephoned the defender stating that he "would like to re-mortgage for £230K already has mortgage with CF and Northern Rock". It seems to me that the parties' positions are reconcilable. An internal document produced by the defender indicates that it was unclear whether the pursuer's query was followed up. Chronologically, the next document produced was a letter dated 12 October 2010 from the defender to the pursuer intimating that their Mr Des Phillips would visit the pursuer on 21 October. It is reasonable to infer that at about that time the defender took belated steps to follow up on the pursuer's call some months previously, creating the impression of a cold call.

[9] By this time, the pursuer had changed his mind about his preferred course of action. He had approached more than one High Street bank for a loan but had been unsuccessful because no-one was willing to lend on the security of croft land. He wished to borrow a sum of money sufficient not only to purchase Stone Croft, which could be achieved at a very modest sum because of the crofting discount, but also to increase his livestock numbers to make the unit viable, and to repay some debts. Although the pursuer denied that financial difficulty had played any part in his re-financing proposal, Mrs Stewart agreed in cross-examination that it did, and I accept her evidence on this.

[10] No meeting ever took place between the pursuer or Mrs Stewart and any of the defender's employees. A number of telephone discussions were however held, initially between the pursuer and/or Mrs Stewart and Mr Sheridan. No records exist of those

conversations; nor have any letters or emails been produced. The only documents available from this period are (i) a report on the pursuer's borrowing and repayment proposals signed on 1 February 2011 by the pursuer and by Mr Sanders on behalf of Acorn Farm Management Services Ltd; (ii) a form entitled "Credit Committee Lending Approval" signed on 30 March 2011 by Mr Sanders and another director of the defender; (iii) a document entitled "Advice and Witness Certificate" signed on 31 March 2011 by a solicitor in a practice in Wick; and (iv) the defender's offer of loan to the pursuer dated 6 April 2011.

[11] In relation to the telephone conversations that took place, the pursuer's evidence was that he was repeatedly assured that the defender would provide him with medium term finance on expiry of the short term loan. The pursuer had explained that most lenders would not lend on croft land, but Mr Sheridan had promised him that medium term finance could and would be arranged by the defender. This was guaranteed from day 1. Without such a promise, the pursuer would not have taken on a nine-month short term loan. He envisaged that he would receive a medium term loan over a period of around 8-12 years at a lower interest rate than that chargeable on the short term loan. He was never in any doubt that he would be given a medium term loan after nine months. He was told from the outset that the defender had a medium term product available. Mrs Stewart was equally adamant that the defender was offering a bridging loan for up to 12 months, at the end of which they would make available a new medium term finance product that they had been advertising on their website. She too sought and received confirmation that this would be available for croft land over which other lenders would not lend. Her telephone conversations were all with Mr Sheridan. In the early part of 2011 there was a delay because it transpired that the landlord had an entitlement to a payment on any sale of the croft. Mrs Stewart gave a personal guarantee to the landlord in

relation to the amount of that payment. She would not have done so if she had not been assured that medium term finance would be available at the end of the short term loan period.

[12] Mr Sheridan agreed that he had had many conversations with the pursuer, and one or two with Mrs Stewart, throughout the process of arranging the short term loan. His role was administrative: to obtain client information, help the client to complete an application form, carry out a Google search, instruct a surveyor to value the property, and instruct a solicitor to prepare the security documents. He would have made the pursuer and his solicitor aware of the terms and conditions of the loan and would have informed him that the loan had to be repaid after 12 months. He was sure that he would not have said that there would be medium term finance available because he was aware that it was not. He had no conversation with either the pursuer or Mrs Stewart about what would happen at the end of the short term loan period. He had heard talk in the office of sale and lease back agreements but he was not involved in selling products and did not mention them to the pursuer. He was unable to comment on the absence of records of his communications with them.

The borrowing and repayment proposals

[13] The borrowing and repayment proposals ("B&RP") signed by the pursuer and by Mr Sanders narrated that they were instructed on behalf of the defender to prepare the report as directed by the pursuer to summarise his proposals and to enable the defender to establish whether they met its underwriting and credit policy requirements. After narrating certain background and financial information about the pursuer, the B&RP continued:

> "The applicant wishes to secure the maximum loan to value (LTV) of 65% against the value of Stonecroft Croft to realise a £58,500 gross loan… After all loan deductions detailed in the draft loan and repayment proposal this leaves the client with a cash balance of £40,604. This will be used as follows:
>
> 1. Purchase Stonecroft - £3,000.

2. Provide working capital - £19,604.
3. Clear mortgage arrears - £14,000.
4. Clear market creditor - £4,000."

[14] Beside a marginal heading "Repayment Proposals", the B&RP stated:

> "The applicant intends to repay the Acorn loan on the due date (or sooner) by obtaining re-finance from another lender. The applicant understands that it will be necessary to demonstrate to any new lender that the financial projections contained in these proposals have been met and that the business complies with a new lender's requirements and that there is no guarantee that a new lender will be prepared to re-finance his business… In the event that it is not possible for the applicant to obtain replacement lending, the Acorn loan will be repaid by the sale of the security property."

The pursuer warranted *inter alia* that the defender could

> "…provide a copy of these proposals to third parties for the purposes of assisting the applicant in the implementation of the applicant's proposals".

Credit committee lending approval

[15] The credit committee lending approval signed by Mr Sanders and another director narrated the pursuer's stated objective as follows:

> "Requires UK's help to purchase a croft that he currently farms and also increase his livestock numbers other banks have turned him down
>
> Business summary (details of exit route to be given in borrowing & repayment proposal section below):
>
> Mr Stewart is a livestock farmer near Wick. He has the opportunity to purchase a croft which he currently farms at a substantially reduced value (£3,000). With the remaining money he wishes to purchase additional livestock and keep to his current borrowing & repayment proposal as he is happy with the way his current business model is working but requires the increased live stock to increase bottom line profit.
>
> UK is to be repaid via a refinancing of the UK loan to a high street bank. This will be done either at the end of the 12 month loan with UK or sooner."

Advice and witness certificate

[16] On 31 March 2011, the pursuer had a meeting with his then solicitor, Mr Patrick

Copinger of Highland Law Practice, Wick. Mr Copinger signed a form addressed to the defender, which stated *inter alia* that he had seen the pursuer and explained to him the extent of his liability, and that he had no concerns as to the pursuer's understanding of the offer of loan or the "all monies" nature of the heritable security. The pursuer also signed, confirming that he had received the advice referred to above and that he understood the effect of the agreement and the security that he was granting. In his evidence to the court the pursuer stated that Mr Copinger had advised him that there would be no High Street exit for this loan, but the pursuer assured him that he had had a promise from the defender.

Offer of loan

[17] By letter dated 6 April 2011, the defender offered the pursuer a loan facility of £53,350, with a term of nine months from the date of drawdown and secured on Stone Croft. One of the stated conditions of the loan was

> "a satisfactory borrowing and repayment proposal (the "Borrowing and Repayment Proposal") approved by the Borrower addressed to the Lender, prepared at the Borrower's cost by Acorn Farm Management Services Limited, to illustrate the Borrower's proposals and demonstrate how the Borrower will repay the loan".

There is no reference in the offer of loan to the means by which the loan would be repaid. The offer was accepted by the pursuer on 18 April 2011 and the cash balance mentioned above was drawn down. The pursuer granted a standard security over Stone Croft.

The property at Stone Croft

[18] The croft house at Stone Croft had been occupied at some time in the past by the pursuer's father's uncle. The pursuer described it as "more like a bothy". It had a fire, a couch, a kettle, a microwave, and a radio. It also had a cabinet containing animal medicines. It had

never had, and did not have, a water supply. Water to fill the kettle was available in a nearby shed. The pursuer used the house during the day to have tea. During the lambing season when he had to work late at the croft, he would sometimes stay overnight there. This might happen three or four nights in a week. Later in the year he might stay there on the night before a cattle sale.

Pursuer's default

[19] Although the offer of loan specified a term of nine months, the defender appears, probably by oversight, to have treated it as a loan for 12 months. In the course of 2011, the defender's employees sent a number of reminders to the pursuer that he was due to send them information that he had undertaken to provide for monitoring purposes. For their part, the pursuer and Mrs Stewart began to inquire as to the method by which their medium term financing would proceed. In contrast to the period prior to the issuing of the offer of loan, there is a record of at least some of the pursuer's conversations with the defender's employees. Most of those conversations appear to have been with a Mr Dan Rood. In his note of a telephone call on 12 September 2011, Mr Rood recorded that he "ran through questions with Mr Stewart that would allow me to start work on a plan to see if SCF was a viable option". On 14 September 2011, the defender's Ms Karen Phillips wrote to the pursuer in the following terms:

> "Following your many phone calls to office, I now write with regard to sale and contract farming.
>
> Our Sale and Contract farming product is in the final development stage and we hope to be in a position to offer it to the general public in the not too distant future. I wanted to assure you that as soon as we are ready to launch this very exciting product we will contact you. In the meantime, however, please be patient and resist calling the office on a daily basis only to be told that we cannot help you at the present time…"

However, in a note of a call dated 8 February 2012, Mr Rood recorded that he advised the pursuer that it was unlikely that any medium term products would be available by the time his loan was due to redeem.

[20] As the repayment date for the loan approached, the pursuer and Mrs Stewart became increasingly anxious. The pursuer sought medium term finance from other sources but without success. The defender sent demands for repayment of the 12-month loan. The pursuer and Mrs Stewart persisted in their requests to the defender to provide a replacement form of finance, but on 21 May 2012 Ms Phillips reiterated that the defender did not have any funding for medium term finance. Mrs Stewart complained that her calls and emails were not being answered. On 22 November 2012, Mrs Stewart emailed Mr Sheridan, saying "I know that you are waiting for a release of funds but it would be very helpful to have an idea of timescale as creditors are becoming very impatient". A further email in similar terms was sent on 11 January 2013. It is noteworthy that at no time during this correspondence did either the pursuer or Mrs Stewart assert that a binding promise had been made by the defender to provide replacement funding. Mrs Stewart explained that she had been in a state of shock and was trying to come to terms with what was happening. On 28 March 2013 and again on 4 April 2013, the defender served calling up notices requiring payment of a principal sum of £69,671.01.

The sheriff court proceedings

[21] In January 2014, the defender commenced proceedings in Wick Sheriff Court, seeking *inter alia* (i) declarator that the pursuer was in default of the standard security conditions and that the defender was entitled to exercise its remedies under the 1970 Act, (ii) warrant to sell, enter into possession of or let the security subjects; and (iii) an order for the pursuer to remove from the subjects, which failing for a warrant for his ejection. (I shall continue to refer to the

parties in their respective roles in the present case, although obviously in the sheriff court proceedings they were the other way round.) The action appears to have proceeded on the basis of a further calling-up notice said to have been served on 7 October 2013. At this time the pursuer had legal representation but his solicitors subsequently withdrew from acting. On 17 March 2014, the sheriff continued the cause until 28 April "to allow discussions to take place". On 28 April the cause was continued until 26 May "for the [pursuer] to seek legal advice and representation". By 26 May, the pursuer had obtained legal representation. A proof was fixed for 28 July with a pre-proof hearing on 30 June; defences were ordered to be lodged within 28 days.

[22] On 30 June 2014, the sheriff allowed defences to be lodged late at the bar. In summary, the pursuer in his defences craved the court to reduce *ope exceptione* the parties' contract and the standard security. He averred:

> "…the Defender entered into the contract due to specific representations made by an employee of the Pursuers in negotiating the terms of the agreement The employee being engaged by the Pursuers to make such negotiations, representations by said employee were authorised or ostensibly authorised communications of the Pursuer.
> The specific representations made by the Pursuer via their employee was that if the Defender entered into the contract of loan on the terms specified in offer dated 6th April 2011 for a period of 9 months (referred to as 'the short term loan') at or before the expiry of said loan the Pursuers would offer the Defender a further loan (referred to as 'the medium term loan') to repay the short term loan and commence payment of the new loan over an extended period of time, The Defender accepted the offer dated 6th April 2011 in specific reliance of this representation. The Pursuers have refused to offer such medium term loan, and accordingly the Defender was induced to enter into the contract by fraudulent misrepresentation by the Pursuers. Therefore the Defender to [sic] entitled to reduction of the contract."

The pursuer also averred that the defender had failed to comply with the pre-action requirements of section 24A of the 1970 Act where a calling-up notice is served in respect of a property used to any extent for residential purposes. The cause was continued to the proof diet previously assigned.

[23] On 28 July 2014, the proof was discharged on joint motion. A new diet of proof was fixed for 14 October. On that date, however, the proof was again discharged and the cause was sent to the procedure roll "for settlement". In his evidence to this court the pursuer agreed that efforts were being made at that time to reach a settlement. After several continuations on the procedure roll, a fresh diet of proof was fixed for 11 May 2015. A pre-proof hearing was continued several times and then on 7 May the sheriff *ex proprio motu* discharged the proof assigned for 11 May and substituted a debate. By now the pursuer was no longer represented. On 11 May the diet of debate was continued until 3 July.

[24] On 3 July 2015, the pursuer appeared in person. The sheriff called the case in chambers. The pursuer explained to the sheriff that he had been in touch with an employee of Quantum Claims who had advised him to seek a further continuation to allow time to consult senior counsel. He produced an emailed letter from Quantum Claims to this effect, in support of his application for a further extension of time. He stated that he had made numerous attempts to settle the case but that the defender's terms were unreasonable, and that he was waiting for a decision on a refinancing that would enable him to settle the claim. He further stated that if he had not been promised medium term finance by the defender, he would not have granted the security over family property. The sheriff refused the pursuer's application for a postponement and instead pronounced an interlocutor repelling the defences, granting decree as craved, and finding the (present) pursuer liable for the expenses of the action. In a Note, the sheriff stated as follows:

> "This matter called today for debate where the case has had a long history where the defender was both suggesting that he was seeking time to obtain funding to pay the pursuers but also that there was an issue in relation to the paperwork which might offer some defence or another to the proceedings. Additionally the defender had had and not had representation at various stages and now had none.

> I had sight today of an email from the defender from yesterday together with a letter to the defender of 2nd July from Quantum Claims.
>
> With a view to getting to the heart of the issue I spoke carefully to the defender and Miss Mullen for the pursuers.
>
> As to any technical issue in the preparation for the proceedings Miss Mullen referred me to the Conveyancing and Feudal Reform (Scotland) Act, section 24 where she pointed out that part lA thereof only applied to land etc 'used to any extent for residential purposes' which did not apply herein.
>
> I took from the defender that in the property was a couch which could be used by someone attending cattle etc. in an emergency. Upon further enquiry it became clear that the property had not, in fact, been occupied since the death of the defender's uncle in 1981. This clearly is not a property 'used to any extent for residential purposes'. Indeed the defender stated that it was used to store medication for animals.
>
> Further, the defender confirmed that he accepted that the money sought by the pursuers had been loaned by them to him and that he was trying to settle the debt. He sought more time to do this.
>
> Over all it was clear that virtually no progress has been made herein for many months and that decree had to be granted. The defender's position on all fronts has no merit. This was regardless of any sympathy anyone would have for the defender.
>
> The defender confirmed that Quantum Claims are not solicitors and it was clear that only tentative contact had been made by them in any event with the QC referred to.
>
> I urged the defender now to make contact with the pursuers to try still to resolve matters without enforcement being required."

[25] It will be apparent from the above that the matter proceeded in a somewhat irregular way. Having previously substituted, *ex proprio motu*, a debate for a proof, it seems that the sheriff conducted a hearing more akin to a proof, making his own enquiries into, and forming a view on, factual matters such as whether the provisions of section 24A were applicable to the security subjects. The pursuer understood the sheriff's reference to "an issue in relation to the paperwork" to relate to whether the correct calling-up procedure had been followed for a property used for residential purposes.

[26] No appeal was lodged against the sheriff's interlocutor. The pursuer's recollection was that he spoke to Quantum Claims to advise them of the outcome of the hearing and took directions from them thereafter. By the time senior counsel's opinion had been obtained, the time for appealing had expired. The decree was extracted on 20 July 2015. A charge for removal was served on the pursuer on 5 August 2015. When the defender instructed sheriff officers to effect the pursuer's ejection from the subjects, the present action was raised and on 3 September 2015 interim interdict against implementation of the decree was granted.

Reduction of a decree *in foro*: the test

[27] The test for reduction of a decree *in foro* is a high one. As Viscount Dunedin observed in *Adair* v *Colville & Son* 1926 SC (HL) 51 at 56, it is generally not competent when other means of review are prescribed, and either these means have been utilised or the parties have failed to take advantage of them. In both *Philp* v *Reid* 1927 SC 224 and *Ingle* v *Ingle's Tr* 1999 SLT 650, the principal reason why an attempt to reduce a sheriff court decree failed was because the applicant had not pursued the statutory appeal procedure. The decision of the Lord Ordinary (Weir) in *Kirkwood* v *Glasgow District Council* 1988 SC 169 was to similar effect. In *Campbell* v *Glasgow Housing Association* 2011 Hous LR 7, the Lord Ordinary (Woolman) summarised the position as follows (para 48):

(a) reduction is a question of judicial discretion;

(b) each case turns on its own individual facts and circumstances;

(c) the remedy is only applied in exceptional circumstances;

(d) the test is higher for decrees *in foro*;

(e) reduction should only be granted where it is necessary to ensure that substantial justice is done; and

(f) the existence of, or failure to use, an alternative remedy is not an absolute bar to reduction.

I respectfully agree, but for my part I would emphasise that the general rule is clear: reduction is not available where an alternative remedy was available but not taken; it will only be granted in exceptional circumstances.

Argument for the pursuer

[28] On behalf of the pursuer it was submitted that the overarching issue was the interests of justice. The authorities indicated that even a decree *in foro* that could have been but was not appealed could be reduced if there was a miscarriage of justice or a procedural incompetence. In the present case the following matters were of importance:

- The pursuer was unrepresented during the latter and critical stage of the sheriff court case, because he could not afford a solicitor.
- He had been unable to obtain legal advice in time to appeal.
- The manner in which the sheriff reached his decision resulted in a miscarriage of justice. The sheriff had not been entitled, following a debate, to pronounce decree on the basis of conclusions reached on the facts. Two defences had been presented:
    - The question whether the property was to any extent residential had been incorrectly decided. The sheriff was not entitled on the material before him to hold that the property was not residential and should not therefore have granted decree, because the statutory procedure had not been followed;
    - The defence of fraudulent misrepresentation was not addressed at all. The sheriff failed even to consider allowing a proof on this issue.

- A promise of medium term finance had been made to the pursuer by Mr Sheridan on behalf of the defender. The defender had not therefore been entitled to insist upon repayment of the short-term loan unless and until replacement finance had been secured. The case was analogous to *Royal Bank of Scotland plc* v *Carlyle* 2015 SC (UKSC) 93. The express terms in the offer of loan were not inconsistent with the subsistence of a binding promise.

Argument for the defender

[29] On behalf of the defender it was submitted that there were no exceptional circumstances nor any miscarriage of justice such as to meet the test for reduction of a decree *in foro*. The pursuer was simply attempting to run the sheriff court proceedings again. Three strands of complaint by the pursuer could be discerned. The first was the issue of breach of promissory or contractual obligation. The pursuer had failed to prove the existence of any promise or additional contractual term guaranteeing finance for a period of 15 years at a reasonable rate on expiry of the initial loan. The pursuer had mistakenly elevated discussions of hope and ambition into a binding guarantee. His case was inherently improbable. It was further weakened by the absence of any contemporaneous documentation referring to any such promise or guarantee. The evidence of the pursuer and Mrs Stewart as to what they understood to have been promised was at odds with the pleaded case. The alleged promise was inconsistent with the terms of the loan agreement and the B&RP. The absence of any suggestion of such a promise by either the pursuer or Mrs Stewart in later correspondence with the defender's employees had not been satisfactorily explained.

[30] The second strand of the pursuer's complaint was that the sheriff had erred in finding that the property was not used to any extent for residential purposes. That was a view he had

been entitled to take. Even if the sheriff had erred in this regard, it did not render the proceedings fundamentally null or constitute a miscarriage of justice. In any event, the sheriff was plainly correct. The evidence led in the present case confirmed that the property was not residential and that the provisions applicable to such property did not apply.

[31] The third strand of criticism concerned the manner in which the sheriff took his decision at a hearing which had been fixed as a debate. This criticism too was misconceived: the sheriff was entitled to take account of oral statements and concessions made by the pursuer. The case presented by him in the sheriff court made no reference to binding promise or contractual obligation. It was appropriate for the sheriff to deal as he had with the residential issue, and the fraudulent misrepresentation argument appeared to have been abandoned by the pursuer. The pursuer had, moreover, given no satisfactory explanation as to why no appeal was lodged against the granting of decree against him.

Decision

[32] As I observed in *McLeod v Prestige Finance Ltd* [2016] CSOH 69 (affd [2016] CSIH 87), at paragraph 13, an application for reduction of a sheriff court decree granted *in foro* should not be approached as if it were an evidential hearing in the original action or an appeal to the sheriff principal. There must be exceptional circumstances rendering reduction necessary in order to ensure that substantial justice is done. The authorities make quite clear, in particular, that it is not an opportunity for an unsuccessful party to present arguments that he failed to present first time round or, *a fortiori*, arguments that were presented and rejected.

[33] The starting point is to focus on the circumstances pertaining at the time when the sheriff granted the decree whose reduction is now sought. The action had been in court for a year and a half without significant progress. It was not in dispute that the pursuer owed

money to the defenders, that it had not been repaid, that the defender held a standard security over the subjects, that a calling up notice had been served, and that no payment had been made in response. At the hearing on 3 July 2015, which followed a number of discharged and postponed hearings, the pursuer's stated position was that he wanted a further discharge. This appears to have been presented partly in order to enable him to obtain legal advice and representation, and partly to attempt to allow him further time to secure loan finance to facilitate a settlement. Given that (i) the pursuer was not able at that stage to confirm that he would be able to obtain representation or that, if so, the advice that he received would support his continuing to defend the action; and (ii) there had been at least one previous continuation whose purpose had been to allow settlement to be reached, without any progress having been made in that regard, the sheriff was in my opinion entitled, in the exercise of his discretion, to refuse to allow a further postponement.

[34] I turn then to consider whether the sheriff's decision to proceed to grant decree against the pursuer without any further procedure constituted a sufficiently serious miscarriage of justice to amount to exceptional circumstances justifying reduction. It will be recalled that the case had, at the sheriff's own instance, been set down for debate instead of proof, and so the question before the court was not whether the pursuer's averments were correct but rather whether they amounted to a relevant defence. The sheriff's decision to speak carefully to the parties "with a view to getting to the heart of the issue" blurred the distinction between legal and factual dispute. Of the two substantive defences pled, the sheriff's note focused on one, ie whether the property was used to any extent for residential purposes. On the basis of information obtained directly from the pursuer, the sheriff concluded that it was not. The matter was therefore, in effect, treated as one of relevancy: the sheriff heard no contradictory evidence and appears to have accepted as fact what he was told by the pursuer. Even taking

what was said by the pursuer *pro veritate*, he decided that the property did not meet the statutory test.

[35] Although the procedure adopted in relation to the residential issue by the sheriff was irregular and could perhaps have provided the basis of an appeal to the sheriff principal, I am not persuaded that it resulted in a miscarriage of justice. The pursuer was afforded an opportunity to amplify the very unspecific averments in his defences regarding the residential status of the property. The relevant information was all within his own knowledge. In my opinion the sheriff's decision, having heard what the pursuer had to say, to reject this branch of the defence without further procedure did not amount to exceptional circumstances justifying reduction of the decree.

[36] I reach that decision without taking account of the evidence led before me on the same issue, but when regard is had to it, I consider that the sheriff's decision was not only not unfair but clearly correct. In my judgment the pursuer's description of the subjects as "more like a bothy" was entirely apt. It was in effect a shell of a building with no water supply or drainage, and was obviously not habitable as a dwelling. I reject the contention that occasionally spending the night there because the pursuer was working late at the croft amounted to use for residential purposes. Even during the nights when he was temporarily absent because he was sleeping at Stone Croft, he continued to "reside" at his own home: the purpose of his occupation of Stone Croft was not residential. There was accordingly no obligation incumbent upon the defender to follow the procedure in section 24A of the 1970 Act.

[37] The pursuer's other line of substantive defence was that he had been induced to enter into the loan agreement with the defenders by fraudulent misrepresentation. The sheriff does not deal expressly with this contention other than to say that the pursuer's position "on all fronts has no merits". Once again, in my opinion, this was a conclusion that the sheriff was

entitled to reach on the basis of the material before him. The pleadings (set out above) included averments of a representation made by an unnamed employee of the defender to the pursuer that a further loan would be made available. There was, however, absolutely nothing to support the bare allegation of fraud, and without proper specification of the alleged fraud the pursuer's pleaded case based upon fraudulent misrepresentation was patently irrelevant. There is nothing to indicate that when he addressed the sheriff the pursuer gave any indication of insisting in the line of defence pled. It is accordingly unsurprising that the sheriff decided that this branch of the case had no merit.

[38] No appeal was lodged against the granting of decree. I heard no satisfactory explanation for this. I note that in their letter dated 2 July 2015 to the pursuer, Quantum Claims stated that they expected to obtain senior counsel's opinion within the next two weeks. I see no reason why matters could not have been kept alive by the marking of a timeous appeal. In my view the present proceedings fall into the category of an attempt to present an argument that could have been, but was not, presented either before the sheriff or in an appeal against decree, without any satisfactory explanation of why this was not done. There is ample authority for the proposition that this does not meet the test of exceptional circumstances that would entitle the pursuer to reduction of a decree *in foro*.

[39] I turn finally, however, to consider whether the evidence led before me in relation to the alleged making of a promise or guarantee by the defender demonstrates that I should, in the exercise of my discretion, and despite all of the above, set aside the decree on the ground that this is necessary to secure substantial justice.

[40] I did not find the pursuer to be a wholly credible or reliable witness. I have already mentioned the fact that he denied that the loan had been sought partly because of financial difficulties, when the converse was clearly the case. His assertions regarding a promise or

guarantee were dogmatic and formulaic, and notably lacking in any detail of exactly when the promise or guarantee was given, and what it was said to consist of. At best, the pursuer described an understanding that he would be offered a medium term loan "over 8-12 years – something like that" at High Street lending rates. His certainty that a promise or guarantee had been given contrasted with his vagueness on other matters, for which his explanation was that it happened a long time ago. I have approached his evidence with caution where it is unsupported by other material.

[41] I have fewer concerns about Mrs Stewart's evidence. I found her to be a credible witness. She spoke to having had direct telephone contact with Mr Sheridan, and was in no doubt that she had been told that at the end of 12 months the pursuer would be offered a new medium term finance product which had been advertised on the defender's website. I accept her evidence that she asked Mr Sheridan how the defender was able to obtain satisfactory security over croft land when others were unwilling to lend. I also accept that she had a personal interest in ensuring that medium term finance would be available because of the personal guarantee she had given to the landlord. I was less satisfied with her explanation of why, when the defender declined to provide replacement finance, she did not challenge this refusal as the breach of a promissory or contractual obligation. Although she described having been in a "state of shock", the correspondence lasted for many months.

[42] Mr Sheridan was equally adamant that he did not at any time have a conversation with either the pursuer or Mrs Stewart about what would happen at the end of the loan term, far less make any promise or guarantee that the defender would secure replacement funding. He gave his evidence in a straightforward manner; nevertheless I find it difficult to accept this blanket denial of discussion of the issue. There is no evidence that anybody employed by the defender other than Mr Sheridan had direct contact with either the pursuer or Mrs Stewart prior to the

commencement of the loan agreement. It is, however, clear from such contemporaneous material as exists that the pursuer and Mrs Stewart understood that the defender was hoping at that time to offer a medium term facility, variously described as sale and lease back or sale and contract farming. Reference was made to such a facility in the telephone conversation on 12 September 2011 between the pursuer and Dan Rood, and in the letter dated 27 September 2011, where the product is described as being "in the final development stage". Mrs Stewart stated in her evidence to the court that a new product had been advertised on the defender's website. I find it impossible to accept that an employee such as Mr Sheridan who constituted the defender's point of contact with its customer was as unaware of such developments as he claimed to have been. I am not satisfied that Mr Sheridan's evidence of his telephone conversations with the pursuer and Mrs Stewart was entirely truthful.

[43] Having given the conflicting evidence of these witnesses careful consideration, I accept the evidence of the pursuer and Mrs Stewart to the extent of finding that there was discussion of replacement finance after the end of loan period, and that the pursuer was encouraged by Mr Sheridan to believe that such finance would be available. I am, however, unable to find that that encouragement achieved the status of a binding promise which would supplement the terms of the offer of loan. I accept Mr Sheridan's evidence that he was aware at the material time that no such binding commitment could be given by the defender because of the terms on which it obtained funding from Connaught. I find, however, that when the pursuer and Mrs Stewart separately raised the subject of refinance with him, he gave responses that were designed to encourage them to believe that medium term funding would be available from the defender or elsewhere. It may be that his lack of familiarity with crofting law caused him to fail to appreciate the particular difficulties involved in obtaining a loan secured on croft land. Be that as it may, I find that Mr Sheridan created an impression that finance was likely to be

available, but I am not satisfied that this went as far as an unequivocal promise or guarantee. In so far as the pursuer and Mrs Stewart treated it as such, I am satisfied that they did not have a solid basis for so doing. That finding is consistent with the absence of any reference to a guarantee in either contemporaneous correspondence or in such documentation as exists, and also with Mrs Stewart's muted reaction when it became clear that no medium term finance was in fact on offer. It is also consistent with the lack of clarity in their evidence as to when the promise or guarantee was made, and the conditions (such as duration) upon which the medium term loan was to be offered. I conclude that although the recollection of both the pursuer and Mrs Stewart has hardened into certainty with the passage of time, it does not accurately reflect the conversations that took place prior to the entering into of the loan agreement.

[44] Nor, in my view, has the pursuer demonstrated a means by which any assurances given by Mr Sheridan could have become enforceable as a contractual term requiring to be satisfied before repayment of the short-term loan could be sought. As I have noted, one of the conditions of the offer of loan was that the pursuer provide a borrowing and repayment proposal which *inter alia* demonstrated how he would repay the loan. The B&RP stated expressly that the pursuer intended to repay the loan on the due date (or sooner) "by obtaining re-finance from another lender". Both documents were signed by the pursuer, having obtained independent legal advice. A contractual term that nothing was repayable by the pursuer unless and until the defender had provided or procured medium-term finance would accordingly be wholly inconsistent with the conditions upon which the pursuer borrowed from the defender.

[45] For all of these reasons, I am not persuaded by the evidence led at the proof that reduction of the decree is necessary in order to enable substantial justice to be done, nor that the pursuer is entitled to either of the declarators sought.

[46] Finally, I should mention the evidence of Mr Holt which I allowed to be led under reservation as to its admissibility. Mr Holt was a farmer in Aberdeenshire who decided to build a small hydro-electricity scheme on his land. According to his evidence, he obtained a six-month loan from the defender after having received assurances from Mr Phillips and another employee that replacement funding at a more attractive interest rate would be provided at the end of the six months. In the event, no replacement finance was forthcoming, the loan was called up, and Mr Holt's wife ended up in litigation with the defender in Aberdeen Sheriff Court. It was submitted by senior counsel for the pursuer in the present case that Mr Holt's evidence was admissible as evidencing a pattern of behaviour on the part of the defender and its employees, as opposed to a "mere human link": cf *Strathmore Group Ltd* v *Crédit Lyonnais* 1994 SLT 1023, Lord Ordinary (Osborne) at 1032, in which the alleged pattern of behaviour consisted of criminal conduct. Having given the matter further consideration, I accept that Lord Osborne's reference to a pattern of behaviour need not be confined to criminal activities, and that Mr Holt's evidence was admissible as demonstrating a pattern of behaviour. I did not, however, find it of any real help in assessing the evidence in the present case. It is to be noted that the sheriff in the action against Mr Holt's wife found in fact that Mr and Mrs Holt had misunderstood what was being discussed regarding long term finance, and assumed that finance would be provided at the end of the six-month period. On the basis of the very brief evidence given in this case by Mr Holt, I have no reason to find otherwise. At best for the pursuer in the present case, Mr Holt's evidence might assist in establishing a propensity on the part of the defender's employees to encourage a belief by prospective borrowers that replacement finance would be likely to be available to repay the short-term loan, but does not go so far as to support the pursuer's case that a promise or guarantee was given.

Disposal

[47] The pursuer's action accordingly fails. I shall repel the pursuer's pleas in law, sustain the defender's second to fifth pleas in law, and grant decree of absolvitor. Expenses are reserved.