SHERIFFDOM OFGLASGOW AND STRATHKEVIN AT GLASGOW

[2025] SC GLA 10

GLW-CA74-24

JUDGMENT OF SHERIFF D N TAYLOR

in the cause

4U2 LIMITED

Pursuer

against

GLASGOW CITY COUNCIL

Defender

Act: Tosh, Advocate; instructed by Mellicks
Alt: Middleton, Advocate; instructed by Glasgow City Council

Glasgow 14 February 2025

The Sheriff, having resumed consideration of the cause, Sustains the third plea in law for the defender and Dismisses the action; Assigns a hearing on expenses to take place on 27 February 2025 at 9.30 am within Glasgow Sheriff Court, 1 Carlton Place, G5 9DA to call in open court.

NOTE

Background

[1] I heard counsel in debate in this ordinary cause action on 26 November 2024.

[2] The pursuer seeks payment of the sum of £39,062.50 with interest. The action arises out of an application for grant assistance made by the pursuer to the defender in June 2020.

The application was made in terms of the Small Business Grant Fund. Although this fund was financed by the Scottish Government it was administered by local authorities, in this case the defender.

[3] The pursuer avers that its application for grant assistance from the fund was refused by the defender. It is averred that the defender negligently misrepresented the reason for the refusal of the application and that the pursuer suffered loss as a result.

[4] The debate proceeded in respect of the defender's third plea in law which is a general plea to the relevancy and specification of the pursuer's averments.

[5] For the purposes of the debate the parties' written pleadings are contained within a record, No 12 of process dated 13 March 2024. In advance of the debate parties lodged written submissions; Nos 13 and 14 of process for the pursuer and defender respectively. A joint bundle of authorities was lodged in electronic form. Counsel supplemented their written submissions by oral submissions at the debate. In the course of the debate, it was accepted by both parties that I was entitled to look at the contents of the first inventory of productions for the pursuer containing Nos 5/1 to 5/4 of process in considering the relevancy and specification of the pursuer's pleadings. At the conclusion of the debate, I made avizandum.

[6] I now issue my judgment.

The defender's submissions

[7] The defender adopted its written submissions, No 14 of process.

[8] Having regard to the test in *Jamieson* v *Jamieson* 1952 SC (HL) 44 the pursuer's case was bound to fail even if it proved everything it offered to prove.

[9] In order to succeed the pursuer must establish:

(a) that the defender owed the pursuer a duty of care;

(b) that the defender breached that duty; and

(c) that, as a result of that breach, the pursuer has suffered loss and damage.

[10] In relation to the existence of a duty the defender pointed out that the case concerns an administrative decision made by a local authority. The primary issue for determination by the court is whether, in communicating the reasons for its decision on the pursuer's application, the defender owed a common law duty of care to the pursuer.

[11] The defender referred to *Robinson* v *West Yorkshire Chief Constable* [2018] AC 736. In *Robinson* the Supreme Court explained the ratio of the decision in *Caparo Industries PLC* v *Dickman and Others* [1990] 2 AC 605. In *Caparo* the House of Lords applied a tripartite test. For a duty of care to exist there had to be foreseeability, proximity and it had to be fair, just and reasonable to impose a duty. Many courts, including the Court of Appeal in *Robinson,* had been misapplying that tripartite test.

[12] With reference to paragraphs 21, 26, 27 and 29 of Lord Reed's speech in *Robinson* the correct approach was to consider firstly whether the duty claimed fell within established precedents. It was only in novel cases that the court required to look beyond established precedents to consider whether a duty of care existed.

[13] The defender submitted that this case is a novel one. None of the cases cited by the pursuer at paragraph 8 of its written submissions involved a duty of care to avoid economic loss being imposed on a public body issuing reasons for an administrative decision. To impose a duty of care upon the defender in these circumstances would be a development of the law.

[14] Adopting the approach in *Robinson* two issues arose. Firstly, any development in the law would need to be incremental. Secondly, the proposed duty would need to pass the tripartite test set out in *Caparo*.

[15] The imposition of a duty of care in this case would involve an "explosive" expansion of the law. Local authorities and other public bodies make administrative decisions every day. It would impose a significant burden on those making such decisions if they were to owe a duty to take care for the financial wellbeing of those effected by their decisions. In that respect the proposed development of the law could not be categorised as incremental.

[16] Secondly, the duty of care averred by the pursuer did not meet the *Caparo* test.

[17] With reference to Lord Bridge's speech in *Caparo* at pages 620H to 621A there was no proximity between a body making an administrative decision and an applicant such as the pursuer.

[18] Neither was the fair, just and reasonableness test satisfied. Where a public body issues reasons for its decision those reasons must be adequate. If the reasons are inadequate the party concerned has a remedy in judicial review. It follows that the pursuer had a remedy in judicial review if he considered the reasons given by the defender for its decision to be inadequate. In these circumstances it would not be fair, just or reasonable to impose a common law duty of care upon the defender.

[19] Furthermore properly categorised the pursuer's claim is for pure economic loss. There is no suggestion that the pursuer has suffered any loss of, or damage to, its property as a result of the alleged breach of duty. Where only economic loss is sustained the circumstances in which the law will impose a duty of care are much narrower. Reference was made to pages 619B to F, 620H to 621B and 621D to F of Lord Bridge's speech in *Caparo*. A duty to take care to avoid purely economic loss only existed where the defender knew

that its statement would be relied upon by the pursuer for the purpose of entering into a specific transaction or a transaction of that kind. The type of situation in which a duty had been imposed was where the defender had knowledge or expertise which was imparted to the pursuer.

[20] The defender referred to the cases cited at paragraph 7(a) of its written submissions (*Hedley Byrne & Co Limited* v *Heller Partners Limited* [1964] AC 465; *Caparo Industries Plc* v *Dickman* [1990] 2 AC 605; *Smith* v *Eric S Bush* [1990] 1 AC 831; *Cramaso LLP* v *Viscount Reidhaven's Trustees* 2014 SC (UKSC) 121; *Playboy Club London Ltd* v *Banca Nazionale del Lavoro SpA* [2018] 1 WLR 4041; *Royal Bank of Scotland Plc* v *Bannerman Johnstone Maclay* 2005 SC 437 and *NRAM Ltd* v *Steel* 2018 SC (UKSC) 141). In all of these cases advice was given by a professional person, eg an accountant in *Hedley Byrne & Co Limited,* which was relied upon by the claimant in relation to a specific transaction or a transaction of a particular kind. It was accepted that a public body could come under a duty to take care to avoid economic loss if the appropriate circumstances existed. Here though the factual circumstances were far removed from the circumstances which could instruct a duty of care. There was no underlying transaction which the pursuer was contemplating entering into.

[21] The defender also referred to the cases cited by the pursuer at paragraph 8 of its written submissions (*Ministry of Housing and Local Government* v *Sharp* [1970] 2 QB 223, *Davy* v *Spelthorne BC* [1984] AC 262, *Welton* v *North Cornwall DC* [1997] 1 WLR 570 and *Wokingham BC* v *Arshad* [2023] PIQR P5). In *Ministry of Housing and Local Government* a transaction was contemplated. The defendant had issued a certificate which it knew would be relied upon by the plaintiff. That factual matrix was consistent with the circumstances in which the authorities had held that a duty of care should exist. It did not matter that the

defendant was a local authority. All of the other cases cited by the pursuer as being closely analogous involved similar situations. They are all distinguishable from the present case.

[22] Finally under this heading the defender referred to the use of the phrase "the voluntary assumption of responsibility" in *Hedley Byrne*. It is clear from the speeches of all of the Lords in *Caparo* that this phrase should not be taken as a test for the establishment of a duty of care in cases of negligent statement.

[23] In summary, on the duty point, the defender submitted that the pursuer's case is irrelevant because the averments cannot establish that a duty of care was owed by the defender to the pursuer.

[24] Even if a duty of care was owed by the defender to the pursuer it was submitted that there are no relevant averments of breach of duty.

[25] The defender referred to the pursuer's averments in Article 4 of condescendence:

> "In the June 2020 representations the defenders represented that the pursuer's application had been refused for want of evidence that self catering accommodation was the primary source of income for the pursuers. In the March 2023 representations, the defenders represented that the pursuers' application had, in fact, been refused for want of evidence that the pursuers were actively trading. On the hypothesis that the true reason that the pursuers' application was refused was that given in March 2023, the reason given in June 2020 was false."

[26] These averments are flawed for two reasons. Firstly, there can be more than one reason for refusal of an application. Secondly, the averments proceed on the basis of a hypothesis. Central to the hypothesis is the email sent by the defender to the pursuer dated 30 June 2020. It is claimed that this email misrepresents why the decision was made, ie it misrepresents the actual reasons for the decision. However, it is clear from the words used in the email that the defender had not made any decision in relation to the pursuer's application. The email of 30 June 2020 was not a refusal of the application but rather a request for further information. On that basis all that the pursuer offers to prove is that

there was a misrepresentation as to why the application was not progressed. There is no discrepancy between the defender's communications in June 2020 and March 2023. Accordingly, the pursuer's case is bound to fail as there are no relevant averments that any duty owed by the defender to the pursuer was breached.

[27] The pursuer's averments of loss are contained within Article 4 of condescendence. It is averred inter alia: "Had they been asked to demonstrate that they actively traded at the salient time they could and would have evidenced this."

[28] There is no specification of what evidence the pursuer would have produced.

[29] Furthermore it is averred in Article 4 that:

> "Alternatively, and in any event, the pursuers have lost the chance of providing such further evidence (which they would have done if they had been told accurately the reasons that their application had been refused) and having their application reconsidered on the basis of all such evidence."

[30] The weaker alternative rule, as explained in *Haigh & Ringrose Ltd* v *Barrhead Builders Ltd* 1981 SLT 157 applies to this averment. The pursuer does not offer to prove that the application would have been granted on reconsideration. There is no averment as to what further evidence would have been submitted nor of how the eligibility criteria for the grant would have been met. The case is irrelevant for these reasons too.

[31] In conclusion the defender invited me to sustain its third plea in law and dismiss the action.

The pursuer's submissions

[32] The pursuer adopted its written submissions, No 13 of process.

[33] The court should only dismiss an action of damages for alleged negligence on the grounds of relevancy in rare and exceptional cases (see *Miller* v *South of Scotland Electricity Board* 1958 SC (HL) 20 at p 33).

[34] It is accepted that the decision made by the defender could have been challenged by judicial review. However, that does not mean that the pursuer does not have a remedy in damages against the defender at common law (see *Davy* v *Spelthorne BC* 1984 AC 262 per Lord Fraser at p275 A - B and per Lord Wilberforce at p278 E – H and p279 A - B).

[35] Put simply, the approach to be adopted in deciding whether a duty of care exists is to determine first of all whether the case is a novel case. If the case is a novel one the *Caparo* test should be applied.

[36] This is not a novel case. It is a straightforward case of negligent misrepresentation. The fact that the defender is a local authority does not make the case a novel one. Following the approach in *Commodity Solution Services Ltd* v *First Scottish Searching Services Ltd* 2019 SC (SAC) 41 (per Sheriff Braid pp52 – 53, paragraphs 30, 31 and 33) the court should seek to identify a feature or features of a case which is or are legally novel rather than factually novel.

[37] The pursuer also referred to the Court of Appeal's decision in *Ministry of Housing and Local Government* v *Sharp and Another* [1970] 2 QB 223 and in particular to Lord Denning's judgment at p265G - 266D and p268E - G. There Lord Denning states that if a public officer is given an official duty (such as the registrar in *Ministry of Housing and Local Government*) he is personally responsible for seeing that the duty is carried out.

[38] The defender's submission that for a duty of care to exist there had to be a specific transaction in contemplation is made in the context of the claim being a claim for pure economic loss. The argument is based on Lord Bridge's explanation of the law in *Caparo*.

However, with reference to the summary of the arguments at p610B - C of the report it is clear that the comments about a specific transaction were made in the context of that case.

[39] At p638 A - E of *Caparo*, Lord Oliver explains what can be taken from the *Hedley Byrne* case in relation to the conditions which give rise to a duty of care. He identifies four conditions as being required to establish the necessary relationship between the maker of a statement or giver of advice and the recipient. The first of these conditions is that the advice be required for a purpose, whether particularly specified or generally described, which was made known, either actually or inferentially, to the adviser at the time the advice was given. The remaining three conditions focus on the purpose for which the advice is required and do not refer to the advice being required for a specific transaction. Accordingly, all that the pursuer has to establish in this case is that the statement made by the defender was required by the pursuer for a purpose.

[40] The purpose in this case was so that the pursuer can know the true reasons for the defender's decision and take such steps as it can to challenge the decision. It is clear from the emails sent by the pursuer to the defender contained within No 5/2 of process that the pursuer wanted to understand the true reason for the refusal of the application.

[41] Even if it is necessary to point to a specific transaction which the pursuer was contemplating entering into the pursuer has made relevant averments. The specific transaction in question is the pursuer's instruction of his solicitor. At Article 4 of condescendence the pursuer avers that:

> "The defenders, as the decision makers, knew or ought to have known that the reasons given by them for the refusal of the pursuers' application would be relied upon by the pursuers. In particular, the defenders knew or ought to have known that the reasons given (sic) them for the refusal of the pursuers' application would be relied upon by the pursuers to determine whether to provide further evidence in support of their application or a further or renewed application, or alternatively, to

decide whether to challenge the defenders' decision by complaint, judicial review or otherwise"

[42] In fact the Small Business Grant Fund has now been closed. No further grants are available under the Fund. Accordingly, there would be no point in the pursuer seeking judicial review of the defender's decision now.

[43] In summary, on the duty issue, the principles relating to the duty to take care to avoid making a negligent statement were summarised in the judgement of Neill LJ in *McNaughton Ltd* v *Hicks Anderson & Co* [1991] 2 QB 113 at p122B - 127B. All of the features required to give rise to a duty of care owed by the defender to the pursuer were present in this case (see the pursuer's written submissions at paragraph 6)

[44] In relation to the issue of breach of duty the pursuer submitted that it was irrelevant that there may be more than one reason for a decision. What mattered was that only one reason for the defender's decision was communicated to the pursuer in June 2020. A different reason was given for refusal of the application in March 2023.

[45] It is accepted that the pursuer's case proceeds on a hypothesis. The pursuer is entitled to proceed on that basis given that it does not know the actual reason for refusal of the application. The pursuer is entitled to assume that the second email sent by the defender in March 2023 stated the correct reason for refusal of the application. That is a perfectly valid hypothesis in the circumstances.

[46] There is a clear discrepancy between the defender's communications in June 2020 and March 2023. The email of 30 June 2020 refers to "the primary source of income for the applicant". The letter of 13 March 2023 states that "4U2 Ltd was not actively trading". Different words are used. It matters not whether the email of 30 June 2020 is treated as a

refusal or failure to progress the application. What matters is that the statement was inaccurate.

[47] On the issue of loss, the pursuer submitted that it had made relevant averments of loss. It was averred in Article 4 that if the true reason for refusal had been disclosed appropriate evidence would have been produced and the application would have been granted. Even if the pursuer's primary case is irrelevant it still has a relevant claim for loss of chance. The averments which are criticised by the defender are relevant averments of the loss of a chance of having the application granted. There is no weaker alternative.

[48] In conclusion the pursuer invited me to repel the defender's first and second pleas in law and quoad ultra to allow parties a proof before answer of their averments under reservation of both parties' third pleas in law.

Decision

[49] In their submissions, parties analysed the case under the headings of duty, breach and loss. I shall adopt the same approach in explaining the reasons for my decision.

Duty

[50] In *Robinson* v *Chief Constable of West Yorkshire Police* (supra) the Supreme Court held that the tripartite test set out in *Caparo Industries PLC* v *Dickman* and *Others* (supra) should not be regarded as the test of whether or not a duty of care is owed in all cases. The court should first of all consider whether the case is a novel one in which the duty of care has not been recognised in previous cases (per Lord Reed in *Robinson* at paragraph 27).

[51] Only in a novel case should a court then consider whether the law should be developed to recognise the existence of the duty of care claimed. Development should take

place in an incremental way. The court should also consider whether it is fair, just and reasonable to impose a duty in the circumstances.

[52] *Commodity Solution Services Ltd* v *First Scottish Searching Services Ltd* 2019 SC (SAC) 41 is a recent example of how the principles explained in *Caparo* and *Robinson* should be applied to determine whether a duty of care exists. Following the approach adopted by Sheriff Braid as he then was in *Commodity Solution* at paragraph 31 it is necessary first of all to consider whether the case is a novel one. To do that the legally significant features of the present case should be determined and compared with the legally significant features of previous cases.

[53] The pursuer's case is one of negligent misrepresentation. The negligent misrepresentation is averred to have been made by the defender when giving its reasons for an administrative decision. The claim is for pure economic loss. These are the legally significant features of the case.

[54] It is accepted by the defender that in appropriate cases a public body can owe a duty of care to a party to avoid making a negligent misrepresentation. What is in issue is whether those circumstances exist in this case. The pursuer argues that its case is not a novel one as it falls within the established parameters of a claim for damages for negligent misrepresentation. The difficulty with that proposition is that it ignores the factual and legal context in which the allegedly negligent misrepresentation was made. The pursuer was unable to cite any case in which the court has imposed a duty of care on a public body to avoid causing economic loss when issuing its reasons for an administrative decision. That in itself renders the case a novel one.

[55] Following *Commodity Solution* the next step in the analysis of whether a duty of care is owed is to consider previously decided cases to see if they are analogous.

[56] The pursuer cites four cases which it claims are closely analogous: *Ministry of Housing and Local Government* v *Sharp* [1970] 2 QB 223, *Davy* v *Spelthorne BC* [1984] AC 262, *Welton* v *North Cornwall DC* [1997] 1 WLR 570 and *Wokingham BC* v *Arshad* [2023] PIQR P5.

[57] In *Ministry of Housing and Local Government* v *Sharp*, the Ministry of Housing had paid compensation of £1,828 to the proprietor of land. A compensation notice was registered in the register of local land charges. Planning permission was subsequently granted so that the £1,828 became repayable by any future purchaser to whom notice was given. A clear search was given by the registrar following a search negligently carried out by a clerk. Two key issues arose in relation to liability: (1) whether the registrar, as keeper of the register, was under a duty towards the Ministry (and if so, whether that was an absolute duty or one of reasonable care); and (2) whether the searcher, for whom the local authority was vicariously liable, owed a duty in tort to the Ministry. The judge at first instance found neither the registrar nor the local authority liable. The majority of the Court of Appeal allowed the appeal only in so far as it related to the local authority, but refused it in so far as it related to the registrar

[58] As Sheriff Braid observed at paragraph 39 of *Commodity Solution*, the most detailed judicial explanation of the decision in *Sharp* is by Lord Mance in *Customs and Excise Commissioners* v *Barclays Bank plc* [2006] UKHL 28. At paragraph 110 of the *Customs and Excise* case Lord Mance stated:

> "The closest case to the present…is *Sharp*. But the statutory scheme there was aimed at protecting persons in respect of property purchases and so far as necessary for that purpose, overriding other proprietary interests. Again, it would have been incongruous if a person relying on such a certificate to his detriment could have a claim because of the closeness of the situation to *Hedley Byrne*, but the minister whose cause of action for reimbursement was extinguished had none (cf per Lord Denning MR at p 268H and Salmon LJ at p 278F–H). I consider that…*Sharp* was rightly decided. It was referred to without disapproval in the speeches of both Lord Templeman and Lord Griffiths in *Smith* v [*Eric S*] *Bush* [(a firm)…The result reached

> was eminently fair, just and reasonable. The role of land registrar was established as a public service to keep accurate records and provide reliable information. The information was to enable buyers to be secure in the property rights they acquired but concomitantly to override other property interests in the public interest in order to achieve this, even though such security and overriding occurred through negligence of the registrar or a clerk fulfilling his function. It would be unjust if no compensation could be obtained for the adverse consequences on property rights of negligence of an official performing such a service in the public interest."

[59] It can be seen that Lord Mance regarded it as important that the negligent act of the clerk which was complained of in *Sharp* was carried out in the course of performing a statutory function. The position in the present case is different. When issuing reasons for its decision to the pursuer the defender was not performing a statutory function in the way the clerk in the *Sharp* case was.

[60] The second case cited by the pursuer is *Davy* v *Spelthorne*. In this case the defendant served an enforcement notice upon the plaintiff in respect of his use of premises within its area. The plaintiff did not appeal against the enforcement notice and the time for appeal expired. The plaintiff raised proceedings against the defendant seeking an injunction, damages for negligence and an order setting aside the notice on the basis that he had not appealed against the enforcement notice because of negligent advice tendered by the defendant or its officers. The Court of Appeal ordered that the claims for injunction and setting aside be struck out on the basis that they raised questions of public law which could only be determined by judicial review. The defendant appealed seeking to have the remaining claim for damages for negligence struck out. The grounds of appeal were that the damages claim was barred by the terms of section 243(1) of the Town and Country Planning Act and that the plaintiff was asserting a public law right which could only be pursued by judicial review. The House of Lords dismissed the appeal. It held inter alia that the

plaintiff's action did not raise any issue of public law since he was not seeking to impugn a public authority's decision but was bringing an ordinary action of tort.

[61] As stated by Lord Fraser at p269E - F the most important issue in *Davy* was whether a person with a cause of action against a public authority, which is connected with the performance of its public duty, was entitled to proceed against the authority by way of an ordinary action, as distinct from an application for judicial review. Much of the discussion in the speeches is concerned with this issue. There is no detailed discussion of the legal basis of the plaintiff's claim against the defendant. Although *Hedley Byrne* and other negligent advice cases were cited in argument none of these cases are discussed in the speeches. In addition, a different feature in *Davy* to the present case is that in *Davy* the plaintiff's claim was based on negligent advice which he alleged the defendant or its officers had tendered to him. There is no suggestion in the present case that the defender gave negligent advice to the pursuer.

[62] In *Welton* v *North Cornwall DC* an environmental health officer employed by the defendant inspected the plaintiff's guest house and advised him that substantial building work needed to be carried out to the premises to ensure that they complied with statutory regulations. In fact, the requirements stipulated by the officer were vastly in excess of what the regulations required. The plaintiff sued the defendant claiming damages for the unnecessary expenditure he had incurred as a result of the negligent misstatements of its officer. The claim succeeded at first instance. The defendant's appeal was dismissed by the Court of Appeal who held that that in purporting to impose detailed requirements, enforced by threat of closure and close supervision, the officer had assumed a responsibility to take care in the statements he made to the plaintiff as to the alterations necessary to secure compliance with the relevant food legislation, knowing that they would rely on the accuracy

of those statements. Since the officer had been acting outside his statutory powers and duties it was unnecessary for the court to consider whether the imposition of a duty of care was in the circumstances fair, just or reasonable, or contrary to public policy.

[63] It is apparent from all three of the judgments in *Welton* that the Appeal Court's decision was based upon application of the principles stated in *Hedley Byrne* (per Rose LJ at p580D; per Ward LJ at p583C - E and per Judge LJ at p588H - 589A). Indeed, as observed by Lord Justice Ward the position of the plaintiff in Welton was stronger than that of plaintiffs in other cases where advice had been tendered negligently. Lord Justice Ward took the view that the officer had imposed detailed requirements upon the plaintiff rather than simply tendering advice. Following his analysis and application of the principles in *Hedley Byrne*, Lord Justice Rose considered the issue of statutory duty. In particular, he explored whether the existence of a statutory duty incumbent upon the defendant excluded the application of a common law duty of care under *Hedley Byrne* principles. In analysing this issue he commented that:

> "When considering the impact of statutory duty on the relationship in the present case, it seems to me that there are at least three categories of conduct to which the existence of the defendants' statutory enforcement duties might have given rise. First, there might be conduct specifically directed to statutory enforcement, such as the institution of proceedings before the justices, the service of an improvement notice and the obtaining of a closure order, in an emergency or otherwise. Such conduct, even if careless, would only give rise to common law liability if the circumstances were such as to raise a duty of care at common law (see per Lord Browne-Wilkinson in *X (Minors)* v. *Bedfordshire County Council* [1995] 2 A.C. 633, 735); and such a duty is not raised if it is inconsistent with, or has a tendency to discourage due performance of, the statutory duty: see per Lord Browne-Wilkinson in *X (Minors)* v. *Bedfordshire County Council*, at p. 739. Secondly, there is the offering of an advisory service: in so far as this is merely part and parcel of the defendants' system for discharging its statutory duties, liability will be excluded so as not to impede the due performance of those duties: see per Lord Browne-Wilkinson in *X (Minors)* v. *Bedfordshire County Council*, at p. 763. But, in so far as it goes beyond this, the advisory service is capable of giving rise to a duty of care; and the fact that the service is offered by reason of the statutory duty is immaterial: see per Lord Browne-Wilkinson, at p. 763. Thirdly, there is the conduct which is at the heart of this case,

> namely the imposition by Mr. Evans, outwith the legislation, of detailed requirements enforced by threat of closure and close supervision."

[64] *Wokingham BC* v *Arshad* is the most recent case cited by the pursuer as being closely analogous. This case concerned a taxi driver who held a taxi license issued by the Council. He bought a replacement taxi and was given certain advice by the Council about steps which were required to bring the vehicle up to the appropriate standard. He claimed inter alia that the advice given to him was negligent and that his taxi licence was suspended as a result. He claimed damages from the Council for psychiatric illness, consequential loss and aggravated and exemplary damages. At first instance Mr Arshad was found entitled to general damages for psychiatric illness. His claims for consequential loss and aggravated and exemplary damages were dismissed. The Council appealed. In delivering his judgment in the High Court, Mr Justice Bourne held that the trial judge was correct in finding that it was fair, just and reasonable to impose a duty of care to avoid economic loss which would be a reasonably foreseeable consequence of negligence. There was no obstacle to recovering damages where bad advice led to a person entering into a flawed transaction which caused them to suffer loss of a foreseeable kind. However, the psychiatric injury claimed by the plaintiff was not so reasonably foreseeable to make it appropriate for the local authority to owe a duty of care to him in that respect. On that basis the Council's appeal was allowed.

[65] It is clear from Mr Justice Bourne's judgment that he treated the case as one in which the Council had given advice to Mr Arshad outside any form of statutory certification. As such he regarded the case as falling within the second of the categories of conduct identified by Lord Justice Rose in Welton (see paragraph 61 above). The case was an example of the *Hedley Byrne* duty extending to a statement made by a local authority official in the context

of, but nevertheless outside, a statutory regulation process (*Wokingham BC* at p197, paragraph 36).

[66] I have summarised the facts and what I consider to be the legally significant features of the four cases cited by the pursuer. I do not consider any of these cases to be closely analogous to the circumstances of the present case. In *Sharp* the negligent act complained of occurred in the course of the performance of a statutory function. In both *Welton* and *Wokingham* the context was advice tendered or requirements imposed by a public authority outwith the permitted exercise of its statutory duties. The ratio of *Davy* v *Spelthorne* is concerned with the interaction of a remedy for damages at common law with the right to pursue a public law remedy by judicial review. In none of the cases cited by the pursuer has the court imposed a duty of care on a public body to avoid causing economic loss when issuing its reasons for an administrative decision. For these reasons I do not regard the imposition of a duty of care upon the defender in this case as being an incremental development in the law.

[67] The defender submitted that even if the duty of care averred by the pursuer was regarded as an incremental development in the law the duty nonetheless did not meet the fair, just and reasonableness test set out in *Caparo*. The pursuer had a remedy in public law if it considered that the reasons given by the defender for its decision were inadequate. In such circumstances the pursuer could seek judicial review of the defender's decision. To impose a common law duty on the defender for negligent misstatement would impose a radical new burden on public authorities.

[68] In response the pursuer cited passages from the speeches of Lord Fraser (page 275A - B) and Lord Wilberforce (pages 278E - H and 279A - B) in *Davy* v *Spelthorne* (supra). The essence of these passages was that in that particular case there was no reason why the

plaintiff could not have a remedy in damages for breach of a common law duty of care and a public law remedy for injunction and setting aside of the enforcement notice. I do not consider that *Davy* v *Spelthorne* assists the pursuer. All that can be taken from that case in the present context is that where the facts permit a pursuer may have a remedy in damages as well as a remedy in judicial review.

[69] An odd feature of this case is that there is a gap of more than two and a half years between the defender's email of 30 June 2020 (contained within No 5/2 of process) and the defender's letter of 14 March 2023 (No 5/3 of process). It is not clear what, if anything, passed between the parties during this period in relation to the consideration of the pursuer's application for grant assistance. There is nothing in the pursuer's first inventory of productions which sheds any light on the position. Neither of the parties referred to the time gap in their written or oral submissions. In any event I cannot speculate on the position. What was important however was that the pursuer accepted in the course of its submissions that it did have a remedy in judicial review.

[70] The fact that the pursuer had a remedy in judicial review is significant. The pursuer refers to his remedy in judicial review in his own pleadings in Article 4 of condescendence at page 6 of the record. What is also significant is the effect that imposing a common law duty upon the defender in these circumstances would have upon public authorities. Public authorities and other public bodies make administrative decisions on a daily basis. To impose a duty of care on such bodies to avoid causing a party economic loss when issuing the reasons for their decisions would place an undue burden on them. For these reasons I do not consider that it would be fair, just and reasonable to impose a duty of care upon the defender in the circumstances of this case.

[71] The defender submitted that there was another reason why the pursuer's averments of duty were irrelevant. The focus of this submission was on the requirement for there to be a sufficiently proximate relationship between the parties to give rise to a duty of care to avoid economic loss for a negligent misstatement. The defender referred to Lord Bridge's speech at p621D - F of *Caparo* where he stated:

> "Hence, looking only at the circumstances of these decided cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the "limit or control mechanism . . . imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence" rested in the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the "proximity" between the plaintiff and the defendant, that the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (e.g. in a prospectus inviting investment) and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind".

[72] The defender submitted that Lord Bridge spelled out in this passage that the liability of a defender for a negligent misstatement which causes pure economic loss is limited to a situation in which the pursuer relies upon the misstatement for the purposes of a transaction or transactions of a particular kind.

[73] The pursuer argued that Lord Bridge's comments had to be interpreted in light of the particular circumstances of *Caparo* which was a "transaction" case. It founded upon the comments made by Lord Oliver in relation to the Hedley Byrne test at p. of the report where Lord Oliver states:

> "What can be deduced from the *Hedley Byrne* case, therefore, is that the necessary relationship between the maker of a statement or giver of advice ("the adviser") and the recipient who acts in reliance upon it ("the advisee") may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the

> advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive, but merely that the actual decision in the case does not warrant any broader propositions."

[74] The pursuer submitted that Lord Oliver's statement that the decision did not warrant any broader propositions indicated that liability for making a negligent misstatement which causes economic loss was not restricted to a situation in which the pursuer had a particular transaction or kind of transaction in mind. All that the pursuer required to do was to satisfy the four conditions set out in *Hedley Byrne*.

[75] My interpretation of Lord Bridge's comments in *Caparo* about the necessity of there being a particular transaction or kind of transaction to found liability is that his comments were made in a general sense. The comments were not intended to apply only to the particular circumstances of that case. They were expressed as a limit or control mechanism on the liability of a party for causing economic loss by a negligent misstatement.

[76] It seems to me that Lord Oliver's comment that "the actual decision in the case does not warrant any broader propositions" was made about the decision *in Hedley Byrne*. If Lord Oliver had disagreed with Lord Bridge's comments about the requirement for there to be a transaction as a control mechanism it would be odd for him not to express his disagreement in his speech. In fact at p641F – G, Lord Oliver states, in referring to the case of *Smith* v *Eric S. Bush* [1990] 1 AC 831:

> "Thus *Smith* v. *Eric S. Bush* [1990] 1 A.C. 831, although establishing beyond doubt that the law may attribute an assumption of responsibility quite regardless of the expressed intentions of the adviser, provides no support for the proposition that the relationship of proximity is to be extended beyond circumstances in which advice is tendered for the purpose of the particular transaction or type of transaction and the adviser knows or ought to know that it will be relied upon by a particular person or class of persons in connection with that transaction."

[77] These comments have been interpreted in subsequent cases as endorsing the need for there to be a transaction in contemplation before a duty of care can be established.

[78] In *McNaughton Ltd* v *Hicks Anderson & Co* [1991] 2 QB 113 (a case which was cited by the pursuer) at p126, Lord Justice Neill identified a number of matters which he considered important in determining whether a duty of care existed to prevent causing economic loss by negligent misstatement. He commented that one of the most important matters to consider was the state of knowledge of the adviser. In that respect, quoting from Lord Oliver's speech in *Caparo*, he stated at p126D - G:

> "On the other hand any duty of care will be limited to transactions or types of transactions of which the adviser had knowledge and will only arise where 'the adviser knows or ought to know that the statement or advice will be relied upon by a particular person or class of persons in connection with that transaction': per Lord Oliver in the *Caparo* case [1990] 2 A.C. 605, 641."

[79] *Reeman and Another* v *Department of Transport and Others* [1997] PNLR 618 was a Court of Appeal case in which the plaintiff sought damages for their economic loss suffered as a result of the Department of Transport's negligent certification of a fishing vessel. Lord Bingham explained in his judgment that the cases show that before a plaintiff can recover compensation for financial loss caused by negligent misstatement his claim must meet a number of conditions. He identified three as being particularly important ie that the statement be plaintiff-specific, purpose-specific and transaction-specific. By transaction specific he meant that: "the statement must be made with reference to the very transaction into which the plaintiff has entered in reliance on it."

[80] Both *McNaughton* and *Reeman* are English Court of Appeal cases. In Scotland the Inner House in *Royal Bank of Scotland PLC* v *Bannerman Johnstone McLay* 2005 SC 1 SC 437 considered the scope of the *Caparo* test in the context of a claim for professional negligence against a company's auditors. At paragraph 45 the Lord Justice Clerk stated:

> "According to *Caparo Industries plc v Dickman* (supra), the relationship of proximity is established where the defender knows (1) the identity of the person to whom his advice or information is to be communicated; (2) the purpose for which that person is to be provided with the advice or information, and (3) the fact that that person is likely to rely upon the advice or information for the known purpose (*Caparo Industries plc v Dickman*, supra, Lord Bridge of Harwich at pp 620H–621B; Lord Oliver of Aylmerton at p 638C – D; cf Lord Ordinary at paras [45] – [46])."

[77] The most recent Supreme Court case cited by the defender was *Playboy Club London Ltd* v *Banca Nazionale del Lavoro SpA* [2018] 1 WLR 4041.

[81] The facts in *Playboy* were that a member of the Playboy Club sought a cheque cashing facility to enable him to exchange cheques for casino chips. The Club's policy was to seek a banker's reference before granting such a facility. To protect the privacy of its members the Club used another company in its group, Burlington Street Services Limited, to obtain references on its behalf. Burlington obtained a reference from the defendant bank which erroneously stated that the member was creditworthy. On that basis the Club granted the cheque cashing facility to the member and lost a significant sum when the member lost money at the casino tables. The Club sued the defendant bank in negligence. The claim succeeded at first instance. On appeal the Court of Appeal allowed the bank's appeal on the basis that the bank did not owe a duty of care to the Club. The only duty was owed to Burlington to whom the reference was addressed.

[82] The Supreme Court dismissed the appeal. In delivering the leading judgment Lord Sumption found that the bank did not owe a duty of care to the Club in circumstances where it had no knowledge that its reference would be communicated to anyone other than Burlington. Lord Sumption cited the passage from Lord Bridge's speech in *Caparo* (referred to at paragraph 69 above) with approval. After referring to Lord Oliver's concurring speech in Caparo he stated at paragraph 10:

> "The defendant's knowledge of the transaction in respect of which the statement is made is potentially relevant for three purposes: (i) to identify some specific person or group of persons to whom he can be said to assume responsibility; (ii) to demonstrate that the claimant's reliance on the statement will be financially significant; and (iii) to limit the degree of responsibility which the defendant is taken to assume if no financial limit is expressly mentioned."

[83] In his concurring speech in Playboy Lord Mance observed that there are passages in the authorities which indicate that for a duty of care to arise in tort for negligent misstatement (a) the claimant must be a specific person or within a group to whom responsibility may be said to have been undertaken and (b) the purpose for which the representation is required must be specifically in connection with a particular transaction or transactions of a particular kind or must, whether particularly specified or generally described, be made known, either actually or inferentially, to the representor. The Court of Appeal held that neither (a) nor (b) was present in Playboy.

[84] Lord Mance stated that, although he agreed that the appeal should be dismissed, he did not consider that the Club should fail because it had failed to identify a particular purpose or transaction for which the representation was required. There was no reason in principle why a duty of care should not arise in relation to the unspecified purpose for which the reference was required provided that the reference was requested and given in terms showing that it was intended to be and would be relied upon.

[85] Lord Mance's comments in Playboy might suggest that there is no requirement for a specific transaction or type of transaction before a duty of care can arise for negligent misstatement causing economic loss. However two points should be noted. First of all Lord Mance's comments on this point are obiter, the leading judgment having been handed down by Lord Sumption with whom the other Lords agreed. Secondly it is clear that

Lord Mance took the view that the unspecified purpose for which the bank's reference was relied upon involved significant financial exposure.

[86] What I take from the foregoing cases is that for the necessary proximity to exist in this type of case the negligent misstatement must be relied upon in connection with a specific transaction, type of transaction or particular purpose. The terms transaction and purpose have often been used interchangeably in the authorities. What characterises the relationship of proximity however is that in the transactions which are entered into the pursuer incurs expenditure or suffers loss. For example, in *Welton* v *North Cornwall DC* (supra) the plaintiffs spent money on alterations to their guesthouse to comply with the defendant's requirements; in *Wokingham BC* v *Arshad* (supra) Mr Arshad bought a particular Ford Galaxy car in reliance on the advice tendered by the Council's employee. In the present case the pursuer submitted that the purpose that the negligent misstatement was required for was to enable it to understand the true reason for the defender's decision. The pursuer needed to know the true reason for the defender's decision so it could consider taking steps to challenge the decision. If knowledge of a particular transaction was required, the pursuer's instruction of its solicitor amounted to a transaction. In that respect the pursuer referred to its averment in Article 2 of condescendence incorporating the email chain ending 19 February 2021. In the email to the defender dated 19 June 2020 the pursuer's director Michael McFadden stated:

> "Should clarification not be forthcoming, I will pass this matter to our solicitor and request that they formally escalate as we are being prevented from accessing a much needed Government Grant; for which we satisfy ALL criteria; without justification".

[87] I am far from certain that the pursuer's averments make it sufficiently clear that it is relying on the instruction of its solicitor as a transaction for the purpose of establishing the necessary element of proximity. In any event there is a more fundamental problem for the

pursuer. As I have noted above in the transactions which are referred to in the authorities the pursuer spent money or incurred loss. As observed by Lord Sumption in *Playboy* (supra) the defendant's knowledge of the transaction is relevant inter alia to demonstrate that the claimant's reliance on the statement will be financially significant. That kind of transaction is quite different to the transaction referred to by the pursuer, ie the instruction of its solicitor. There is no suggestion that the pursuer would incur significant expense in relation to the instruction of its solicitor nor that any such expense would be causally related to any breach of duty on the part of the defender. Furthermore, the statements made by the defender were made in the course of the defender issuing reasons for its decision on the pursuer's application for a grant. The statements cannot be regarded as advice or recommendations given by the defender. In that respect the present case is distinguishable from the authorities cited by both parties where invariably the negligent misstatement occurred in the course of advice or recommendations made by the defender. In short, I do not consider that there was a sufficiently proximate relationship between the defender, as a body making an administrative decision, and the pursuer as an applicant for a grant, such as to give rise to a duty of care owed by the defender to the pursuer.

[88] It follows from the foregoing analysis that I do not consider that the pursuer has made relevant averments of the existence of a duty of care owed by the defender. For these reasons I would sustain the defender's preliminary plea and dismiss the action.

Breach

[89] The defender's secondary submission was that there were no relevant averments of breach of duty.

[90] It was submitted that the pursuer's averments were irrelevant as they proceeded on a hypothesis. I accept as a general rule of pleading that a pursuer is entitled to base its case upon a factual hypothesis provided that the hypothesis is supported by other factual averments and provided that it can justifiably claim to be in ignorance of the precise facts (see the comments about alternative averments of fact in *Macphail*: *Sheriff Court Practice* 4th Edn at paragraph 9.37). Here the pursuer avers that two different representations were made by the defender, in June 2020 and March 2023. It maintains that it cannot know what the true reason for refusal of its application was. On that basis it claims it is entitled to proceed on the hypothesis that the June 2020 representation was false. I accept that the pursuer can reasonably claim to be ignorant of the precise reason for refusal of its application. That information is peculiarly within the defender's knowledge. The reasons which the pursuer avers it was given in June 2020 and March 2023 are prima facie different reasons. On that basis I accept, that in these particular circumstances, the pursuer is entitled to proceed on the basis of a hypothesis and I would not be prepared to treat its case as irrelevant on this ground alone. However, the averred hypothesis must be supported by relevant averments of fact.

[91] The pursuer's averments of breach of duty are contained within Article 4 of condescendence. There it is averred that the defender owed the pursuer a duty to ensure, or at least to take reasonable care to ensure, the accuracy of statements made by the defender to the pursuer explaining the reasons given for the <u>refusal</u> (my emphasis) of its application.

[92] For this duty to have been breached there must have been a misstatement by the defender to the pursuer of the reason for refusal of the pursuer's application.

[93] As already noted the pursuer proceeds on the hypothesis that the true reason for refusal of the pursuer's application was the reason given in the March 2023 representation,

ie that the application was refused for want of evidence that the pursuer was actively trading. On that basis it is averred that the reason given for refusal of the pursuer's application in June 2020 was false.

[94] The problem with these averments is that they are not supported by relevant factual averments. The pursuer founds on the email sent by the defender to the pursuer on 30 June 2020. This email is contained within the email string ending 19 February 2021 No 5/2 of process which is incorporated brevitatis causa into the pursuer's pleadings. The penultimate paragraph of the email of 30 June 2020 states: "Once we have the pertinent and relevant information from yourself we will be able to make a determination with regard to the grant application".

[95] Read pro veritate this email cannot amount to a refusal of the pursuer's application. It amounts to no more than a statement that the pursuer's application cannot be progressed unless further information is provided.

[96] The pursuer claimed that there was no difference between refusal of its application and a failure to progress the application. Any alleged difference is tautological. I do not agree. There is an obvious difference between refusing the pursuer's application and the defender advising the pursuer that its application will not be progressed.

[97] For the pursuer to relevantly aver breach of the averred duty it must offer to prove that the defender falsely stated the reason for refusal of its application. The averments do not offer to do that. Accordingly, I would dismiss the action for this reason as well.

Loss

[98] The defender's final submission was that even if there were relevant averments of duty and breach of duty there were no relevant averments of loss.

[99] The defender referred to the pursuer's averments in Article 4 of condescendence that:

> "Had they been asked to demonstrate that they actively traded at the salient time they could and would have evidenced this. Had such evidence been forthcoming the Defenders would have made grant assistance available to the pursuers."

[100] These averments were criticised as lacking specification as no detail was provided of what further information would be provided. I do not consider that the pursuer's averments lack essential specification on this ground alone. It is true that more detail could be provided. However, the pursuer's averments must be read as a whole.

[101] The pursuer avers in Article 4 of condescendence that on reasonable enquiry its trading position was vouched or was capable of being vouched. It explains why it was unable to trade prior to 2020 which was in part due to a rat infestation in a neighbouring property which necessitated the involvement of the defender's Environmental Health Department. It is averred that the defender had financial information about the pursuer in its own records. In addition, reference is made to a letter sent by Pillow Property Partners Limited dated 11 June 2020 which is incorporated brevitatis causa into the pursuer's pleadings. The letter from Pillow Property Partners Limited, No 5/5 of process, states that Pillow Partners manage five properties in Drumoyne Drive, Glasgow on behalf of the pursuer. The letter states that these properties are available 365 days a year solely as serviced accommodation with bookings in excess of 140 days during the financial year. Read as a whole these averments give the defender sufficient notice of its trading position and the kind of information which might have been provided on further enquiry.

[102] The defender also submitted that the pursuer's averments in Article 4 of condescendence anent loss of chance were irrelevant. The defender argued that these averments fell foul of the weaker alternative rule expressed in *Haigh & Ringrose Ltd* v *Barrhead Builders Ltd* (supra).

[103] In its written submissions the pursuer cited the *Joint Liquidators of RFC 2012 plc, Noters* 2022 SLT 9. In this case at paragraphs 43 to 45 Lord Tyre explained the current position on loss of chance claims in Scots law. He quoted from the speech of Lord Briggs in *Perry* v *Raleys* [2020] AC 352 where Lord Briggs stated:

> "For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation. This sensible, fair and practicable dividing line was laid down by the Court of Appeal in *Allied Maples Group Ltd* v *Simmons & Simmons* [1995] 1 WLR 1602…"

[104] Following the approach outlined by Lord Briggs a loss of chance evaluation is appropriate where the supposed beneficial outcome depends upon what others would have done. In the present case the outcome of the pursuer's application for grant assistance may have depended, at least to some extent, on what others would have done. The pursuer may have required to produce information from other parties to vouch for the fact that it was actively trading. For example, it may have required to produce information from Pillow Property Partners Limited and/or the occupants of the properties at Drumoyne Drive to vouch its trading position. Furthermore, although not expressly averred, it was I believe accepted that the Grant Fund was financed by the Scottish Government. In that further respect the outcome of the pursuer's application may have depended on what others would have done ie on the Scottish Government providing the finance. On that basis the pursuer has made sufficiently relevant averments that it has lost the chance of having its application reconsidered. I agree with the submission made by the pursuer that the weaker alternative rule does not apply in these circumstances. The pursuer has made sufficiently relevant

averments that is has suffered loss either on the basis that its application for grant assistance would have been granted or alternatively on the basis that it has lost the chance of having its application reconsidered. For these reasons I am not prepared to treat the pursuer's averments of loss as irrelevant et separatim lacking in specification.

Conclusion

[105] I have found that the pursuer's averments of duty and breach of duty are irrelevant. It follows that I shall sustain the third plea in law for the defender and dismiss the action.

[106] No submissions were made in relation to the issue of expenses on the basis that the position with expenses would depend on the outcome of the debate. Accordingly, I have fixed a hearing on expenses to take place on 27 February 2025 at 9.30am Glasgow Sheriff Court, 1 Carlton Place G5 9DA to call in open court. If parties are able to reach agreement on the issue of expenses, they can contact my clerk to seek to have the hearing discharged and an appropriate interlocutor pronounced.