Hilary Term
[2015] UKSC 1
On appeal from: [2012] CSIH 23

JUDGMENT

McGraddie (Appellant) *v* McGraddie and another (Respondents) (Scotland) (Costs)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Reed

JUDGMENT GIVEN ON

28 January 2015

Heard on 10 July 2013

Appellant
Andrew Smith QC
Jonathan Brown

(Instructed by McClure Naismith LLP)

Respondent
The Lord Davidson of Glen Clova QC
Eric Robertson
(Instructed by Balfour & Manson)

Respondent
Richard Keen QC
Stuart Buchanan
(Instructed by HBM Sayers)

LORD NEUBERGER: (with whom Lady Hale and Lord Reed agree)

1. This judgment concerns an issue arising out of a judgment given in this Court relating to an unfortunate dispute between a father, the pursuer, and son, the first defender.

2. In their bare essentials, the facts are as follows. In February 2007, the pursuer gave the first defender a cheque for £285,000. The first defender and his partner spent about £85,000 of this sum on various items. They used the remaining £200,000 to purchase a house ("the house") in Stewarton, East Ayrshire, in their own names for £285,000, the balance of the purchase being raised by way of mortgage. The parties then fell out, and the pursuer began proceedings seeking the conveyance of the house to him, on the ground that the £285,000 had been paid to the first defender to buy a property for the pursuer.

3. The proceedings came before the Lord Ordinary, Lord Brodie, who rejected the defenders' case that the £285,000 had been a gift from the pursuer, and accepted the pursuer's case that the house had been put into the defenders' names without his knowledge or authority – [2009] CSOH 142. Accordingly, the Lord Ordinary granted the pursuer substantially the relief which he sought - [2010] CSOH 60. (The pursuer also succeeded in relation in relation to another property, a flat in Glasgow, but nothing hangs on that for present purposes.)

4. The defenders appealed, and the Extra Division allowed their appeal, essentially on the ground that they considered that the Lord Ordinary should have concluded that the £285,000 had been intended to be a gift by the pursuer to the first defender – [2012] CSIH 23. The pursuer appealed and, for reasons given by Lord Reed, this Court allowed his appeal against the decision of the Extra Division and reinstated the Lord Ordinary's decision – [2013] UKSC 58, [2013] 1 WLR 2477.

5. In the normal way, we then invited the parties to make submissions on the form of order and expenses, which in England and Wales are referred to as costs. There is no problem about the form of the order, but the submissions identified an issue arising out of the pursuer's claim for the expenses of the appeal which has caused the Court some concern.

6. The defenders were legally aided in the Inner House and in the Supreme Court, but the pursuer was not. Accordingly, the pursuer seeks an order that the Scottish Legal Aid Board ("the Board") pay his expenses pursuant to section 19(1) of the Legal Aid (Scotland) Act 1986. This enables the court to make such an award in relation to "the whole or any part of any expenses incurred by [a legally unassisted party] (so far as attributable to any part of the proceedings in connection with which another party was a legally assisted person)". By virtue of section 19(3), the court can make such an order in relation to expenses of an appeal if "an order for expenses might be made in the proceedings, apart from this Act", and "the court is satisfied that it is just and equitable in all the circumstances that the award should be paid out of public funds".

7. There is no problem about the basic issue of whether such an order should be made in this case. The Board should clearly be required to pay the pursuer's costs both in the Inner House and in this Court. With all due respect to the Inner House, for the reasons given by Lord Reed it was unfortunate that the Board decided to support the appeal against the decision of the Lord Ordinary, and it would be simply unjust if the pursuer was out of pocket as a result of that appeal. Indeed, as the pursuer's advocate points out, but for the grant of legal aid to the defenders to appeal to the Inner House there would in all probability have been no appeal against the decision of the Lord Ordinary.

8. Further, it seems plain that the defenders would be unable to meet the pursuer's costs, or any significant proportion of them. Accordingly, we have no hesitation in concluding that this is an appropriate case for the exercise of the section 19 jurisdiction. Although the Board did not formally concede this, it is only fair to record that they sensibly limited their submissions on this aspect to explaining that their funding of the defenders' appeal to the Inner House was based on advice from counsel, pointing out that one should be wary of relying on hindsight, and suggesting that there was nothing particularly exceptional about these proceedings.

9. The point which the Board does take arises from the fact that the pursuer took out so-called After the Event Insurance ("ATE insurance") against his potential liability for the defenders' expenses if he lost his appeal to this Court and was ordered to pay the defenders' expenses. The premium which the pursuer paid for the ATE insurance was £40,000, and it protected the pursuer up to a maximum liability of £100,000. The pursuer contends that the £40,000 ATE premium should be recoverable as part of his expenses, whereas the Board contends that this is impermissible as a matter of law.

10. The relevant provisions are as follows. Rule 46(1) of the Supreme Court Rules ("the SCR") permits the Court to make "such orders as it considers just in respect of the costs of any appeal", and rule 51 limits any recoverable costs to those which were "reasonably incurred and reasonable in amount". Practice Direction 13 ("PD 13"), para 1.3 provides that "the assessment of costs" is governed by the SCR, supplemented by the Rules and the Practice Directions which supplement Parts 44 to 47 of the Civil Procedure Rules ("the CPR") of England and Wales "with appropriate modifications for appeals from Scotland and Northern Ireland". The basis of assessment of costs is dealt with in para 3(1) of PD 13, which provides that, where costs are assessed on a standard basis (as in this case) the court "will not allow costs which have been unreasonably incurred or which are unreasonable in amount". To the same effect, rule 42.10 of the Rules of the Court of Session in Scotland provides that "only such expenses as are reasonable for conducting the cause in a proper manner shall be allowed".

11. If the ATE premium can properly be regarded as part of the pursuer's expenses, then it seems to me clear that it was a liability which was "reasonably incurred" (rule 51 of the SCR and para 3.1 of PD 13) and cannot be said to fall foul of rule 42.10 of the Rules of the Court of Session ("rule 42.10"). Furthermore, at least on the facts of this case, I cannot see a good policy reason for depriving the pursuer of reimbursement of the ATE premium if he would otherwise be entitled to it. He was not an especially rich person, and it was perfectly reasonable and sensible to protect himself in this way before embarking on an appeal to this Court to establish his ownership of a property and to vindicate his rights, even though it involved a substantial premium.

12. However, the problem which is said by the Board to stand in the pursuer's way is that, as a matter of principle, the ATE premium is not properly an item of expenses – or, to use the English equivalent, an item of cost – which is recoverable from the other party.

13. There is obvious force in this. So far as the SCR themselves are concerned, the expression "costs of any appeal" in rule 46(1) does not naturally extend to the cost of an ATE premium, which appears to me to be extraneous to the costs of the appeal, even though it was plainly closely linked to the appeal itself, at least from the pursuer's financial perspective. In the absence of any express provision permitting it, one would not expect an ATE premium, taken out to protect the person who turns out to be the successful party against liability for costs in case he loses, to be recoverable from the unsuccessful party. It is simply not part of the costs of the appeal, as a matter of ordinary language.

14. Further, it seems unlikely that, in the absence of an express provision so stating, the rules would have envisaged that a losing party's liability for a substantial sum should depend on the successful party's appetite for, and financial ability to take, the risk of losing and paying costs. It also seems to me that, if the successful party had taken out insurance to protect him against the costs of litigation generally (sometimes known as Before the Event, "BTE", Insurance), there would be no question of the BTE premium, or any part of it, being recoverable as part of that party's costs of proceedings. While it does not ineluctably follow that an ATE premium should not be recoverable as part of the costs, it would be somewhat surprising if wholly different considerations applied to the recoverability of ATE and BTE premiums.

15. This conclusion is confirmed when one turns to both the position as it appears to be in Scotland and in England and Wales.

16. Thus, turning to the language of the Scottish Rules of Court, it is hard to say that the ATE premium was a sum incurred "for conducting the cause" within rule 42.10. It was a sum incurred by the pursuer to enable or assist him to conduct the cause, to protect him against any potential liability for expenses as a result of conducting the cause, but it was not, as a matter of ordinary language, a sum incurred "for conducting the cause".

17. This conclusion is reinforced by a carefully reasoned decision of Lord Carloway in the Outer House in *McNair's Executrix v Wrights Insulation Co Ltd* 2003 SLT 1311, where he had to consider the very issue, and held that an ATE premium was not a recoverable expense. He made the point at the end of para 9 that "in a party and party taxation" (the equivalent of a standard assessment) "what is reasonably undertaken to conduct a cause cannot normally vary according to the economic circumstances or needs of the litigant". Lord Carloway immediately went on to say that the premium could not fall within rule 42.10, as it had been incurred as a result of "an extrajudicial step adopted, no doubt quite reasonably and legitimately …, to protect the economic interests of the client" and "as such it is not recoverable as an expense of process".

18. In the law of England and Wales, the position appears to be the same, at least in the absence of a statutory provision to the contrary. In *Callery v Gray (No 1)* [2001] EWCA Civ 1117, [2001] 1 WLR 2112, paras 45, 54 and 55, and in *Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 1 WLR 2142, para 6, the Court of Appeal consisting of Lord Woolf CJ (who was only in *(No 1)*), Lord Phillips MR and Brooke LJ, plainly took the view that, in the absence of a specific statutory provision expressly permitting the same (section 29 of the Access to Justice Act 1999), an ATE premium paid by the successful

party would not have been recoverable as part of his costs. When the cases went to the House of Lords, it is clear that Lord Hoffmann and Lord Hope (with whom Lord Bingham and Lord Nicholls agreed) took the same view – [2002] UKHL 28, [2002] 1 WLR 2000, paras 41 and 50. While it is only fair to say that there was no argument on the issue, the view of a number of eminent judges on the issue of the recoverability of an ATE premium as costs is clear.

19. In my view, therefore, (i) as a matter of principle, (ii) in the light of the terms of the relevant court rules, and (iii) on the basis of consistent judicial authority on both sides of the border, the law is clear. In the absence of agreement or a specific statutory sanction (either expressly or through valid delegated legislation) to the contrary, a successful party to litigation cannot recover an ATE premium, however reasonable it was to have incurred it, as part of his costs or expenses of legal proceedings.

20. Statutory law in England and Wales has been altered from the time when the 1999 Act was passed, and there would have been a time when an ATE premium would have been recoverable as part of a successful party's costs. However, that is of no assistance to the pursuer in this appeal because (i) at the time relevant to this case, the premium would have been irrecoverable in English law, and (ii) in any event, although the point has not been argued, it seems unlikely that English law would apply: it appears from para 1(3) of PD 13 that it would be Scottish law.

21. I regret the conclusion in this case, because it seems to me unjust that the pursuer should be out of pocket to the tune of the £40,000 ATE premium. He should be able to recover the £40,000 from the Board, given that he reasonably incurred that sum in connection with rightly seeking to challenge in this Court the result of an appeal to the Inner House which was a questionable appeal, which had only been brought because of the support of the Board.

22. For the reasons I have given, I would award the pursuer his expenses of the appeals to the Inner House and to this Court in these proceedings against the Board, but, with regret, I would direct that those expenses should not include the ATE premium of £40,000 paid by the pursuer.

Trinity Term
[2013] UKSC 58
On appeal from: [2012] CSIH 23

JUDGMENT

McGraddie (Appellant) *v* McGraddie (AP) and another (AP) (Respondents) (Scotland)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Wilson
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

31 July 2013

Heard on 10 July 2013

Appellant
Andrew Smith QC

Jonathan Brown
(Instructed by McClure Naismith LLP)

Respondent
The Lord Davidson of Glen Clova QC
Eric Robertson
(Instructed by Balfour & Manson)

Respondent
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Stuart Buchanan
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LORD REED (with whom Lord Neuberger, Lady Hale, Lord Wilson and Lord Hughes agree)

1. In the sets of *Session Cases* in the Advocates Library, the volumes for 1947 fall open at *Thomas v Thomas* 1947 SC (HL) 45; [1947] AC 484, where one finds in the speech of Lord Thankerton at pp 54 and 487-488 what may be the most frequently cited of all judicial dicta in the Scottish courts:

> "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

2. The principles stated in *Thomas v Thomas* had, even then, long been settled law: the speech of Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36-37, where he said that an appellate court should intervene only it is satisfied that the judge was "plainly wrong", is almost equally familiar. Accordingly, as was said by Lord Greene MR in *Yuill v Yuill* [1945] P 15, 19, in a dictum which was cited with approval by Viscount Simon and Lord Du Parcq in *Thomas* at pp 48, 62-63, 486 and 493 respectively, and by Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1, para 17:

> "It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."

3. The reasons justifying that approach are not limited to the fact, emphasised in *Clarke* and *Thomas,* that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in *Anderson v City of Bessemer* 470 US 564 (1985), 574-575:

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one: requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the "main event" … rather than a "tryout on the road." … For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception."

Similar observations were made by Lord Wilson in *In the matter of B (a Child)* [2013] UKSC 33; [2013] 1 WLR 1911, para 53.

4. Furthermore, as was stated in observations adopted by the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235 at para 14:

> "The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged."

5. While the law is not in doubt, its application has been inconsistent. From time to time it has proved necessary for its application to be considered at the highest level, in Scotland as in other jurisdictions.

6. In the present case, *Clarke* and *Thomas* were cited in the opinion of the Extra Division ([2012] CSIH 23) in the time-honoured fashion. Counsel for the appellant however began his submissions by reminding the court of the words of Lord Hope in the case of *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1 at para 16:

> "The rule which defines the proper approach of an appellate court to a decision on fact by the court of first instance is so familiar that it would hardly be necessary to repeat it, were it not for the fact that it appears in this case to have been overlooked."

Whether there has indeed been a failure to follow the proper approach is the issue which this court has to decide.

The background circumstances

7. Lord President Dunedin remarked of the facts of *Brownlee's Executrix v Brownlee* 1908 SC 232 that the story seemed more like the closing scenes of the life of Père Goriot than the history of a middle class family in Glasgow. The present case prompts similar reflections.

8. The pursuer and his wife left Scotland many years ago and lived in the United States. They had two sons: Rodger, the first defender, and Daniel, from whom they had long been estranged. The first defender lived in Scotland with his partner, the second defender, and their son, Richard. In 2005 the pursuer's wife became terminally ill, and she and the pursuer decided to return to Scotland. They asked the first defender, who is a property developer, to find a suitable property for them, and he did so, finding a newly-built flat in St Helen's Gardens, Glasgow. The pursuer transferred the funds required to purchase the property into the first defender's bank account, and the first defender made the arrangements for the purchase and the conveyancing. Unknown to the pursuer, he arranged for the title to the property to be taken in his own name as proprietor.

9. The pursuer and his wife moved into St Helen's Gardens on 1 January 2006. She died six days later.

10. In February 2007 the pursuer gave the first defender a cheque in his favour for £285,000. The reason for his doing so is in dispute, as I shall explain. The first defender paid the cheque into a bank account. He and the second defender then used about £200,000 from the account, together with £90,000 raised by way of mortgage, to buy a newly-built house in Lochrig Court, Stewarton, taking title in

their own names. They spent the balance of the £285,000 on cars, the repayment of debts, the decoration of their existing house in Glasgow in preparation for its sale, and on finishings for the house in Lochrig Court.

11. Later in 2007 the pursuer began the present proceedings, in which he sought a number of remedies, including the conveyance of the properties in St Helen's Gardens and Lochrig Court to himself. In his pleadings, he maintained that the first defender had acted without his authority in taking title to the properties in his own name, in the case of St Helen's Gardens, or in his and the second defender's names, in the case of Lochrig Court. In response, the first defender maintained that the pursuer had instructed that title to St Helen's Gardens was to be taken in his (the first defender's) name; and he and the second defender maintained that the £285,000 had been a gift.

The Lord Ordinary's Opinion

12. In an opinion on the substantive issues in the case ([2009] CSOH 142) which, if I may respectfully say so, seems to me to have been careful and fair, the Lord Ordinary, Lord Brodie, summarised the salient points in the evidence and then set out his assessment of the witnesses. It is clear that he found none of the principal witnesses entirely satisfactory. That is of course a familiar situation, perhaps especially in cases concerned with family disputes.

13. Nevertheless, the Lord Ordinary considered that the pursuer was "a confident witness, capable of being firm and even robust in the face of cross-examination", and that "there was an energy in his responses that had an air of conviction about it". He acknowledged that the pursuer's evidence "lacked much in the way of specifics or circumstantial detail" in relation to the second transaction and that he had forgotten some matters. The pursuer also appeared to contradict himself as to why he had paid £285,000 (rather than some other figure) to the first defender:

> "At one point he indicated that this was the price that he had been advised by the builder's sales representative. At other points he emphasised that this was the price that the first defender had told him was required for the purchase of the property."

Nevertheless, the Lord Ordinary stated:

> "On the central issue of whether the pursuer had made two substantial gifts to the first and second defenders, the demeanour of

> the pursuer and the content of his answers to questions did not suggest someone who was telling other than the truth."

As to the pursuer's character, the Lord Ordinary "discerned nothing to suggest that the pursuer would be particularly generous".

14. The Lord Ordinary's assessment of the first defender was markedly different:

> "The content of the first defender's evidence and the manner in which he gave it raised sharp questions as to whether he was a witness in whom the court could have confidence."

The first defender's presentation in the witness box was indeed such that, after he had given evidence, his counsel sought to amend the pleadings so as to aver that the first defender had an autistic spectrum disorder. The Lord Ordinary described the first defender's presentation as "casual, even when talking about his mother's terminal illness". He appeared to have felt an antipathy towards the pursuer from a time preceding the events in question. He described his own reaction to his mother's wish that family assets should go to Richard: "I said, 'What do I get?' He was always the golden-eyed boy". He did not always seem to understand his counsel's questions, and at points his presentation suggested that his abilities might be impaired by medication, although there was no reason to believe that he was in fact taking medication.

15. In relation to the first transaction, the first defender gave conflicting evidence on the question whether the pursuer had given him an instruction that title to St Helen's Gardens should be taken in his name. Perhaps more importantly, the Lord Ordinary stated:

> "I was left with the impression that the first defender did not fully appreciate the central importance of the pursuer's wishes in the matter and whether the pursuer had communicated his wishes to him. Indeed, he seemed to suggest that the pursuer's wishes were irrelevant."

The Lord Ordinary stated that he ascribed this to "a complete inability to come to a view as to what would be reasonable in particular circumstances".

16. The Lord Ordinary concluded that the first defender "was not a witness upon whom I could rely". The matter went however beyond the credibility of the first defender's evidence. The Lord Ordinary added:

> "This is particularly so when it came to his accounts of interactions with other people and the inferences to be drawn from these interactions. To an extent this case is about the reasonable interpretation of what was said and done in a particular social context. I have no confidence in the first defender's ability to come to such a reasonable interpretation."

In other words, not only could the first defender's evidence in court not be relied upon, but even outside the court he could not be relied upon to have understood and acted upon what the pursuer had said to him.

17. The Lord Ordinary was less forthright in relation to the second defender, but nevertheless made clear his reservations. He gave two reasons for doubting her credibility. First, he noted that both she and the first defender departed in their evidence from the account, given in their averments, that the pursuer had suggested that the cheque should be used to buy the house at Lochrig Court and had reserved the house with the builders: an account which could only have been based upon precognition. Secondly, he noted that she gave confident evidence about an aspect of the new account of events, only to alter her account when confronted unexpectedly with documents which demonstrated that her earlier evidence could not be correct.

18. The Lord Ordinary concluded that Richard, who had been diagnosed with Asperger's Syndrome, was an honest but not necessarily reliable witness. It was not clear that he was able clearly to distinguish between what he believed to be the case and what he knew from his own experience. In very large part he was recounting what he had been told by his parents. The Lord Ordinary regarded his evidence as adding little or nothing.

19. In relation to St Helen's Gardens, the Lord Ordinary accepted that the first defender had taken title to the property without any instructions to do so, and in the absence of any indication that the pursuer intended to make him a gift of the property.

20. In relation to Lochrig Court, the Lord Ordinary observed that the accounts of the parties were diametrically apart, and that each side accused the other of lying. He stated that he "had regard to [what] might be seen as the inherently

unlikely nature of the deceit which the pursuer alleges was practised upon him by the defenders", in that the defenders could hardly conceal from him their occupation of Lochrig Court. He stated that "there is also the point … that it is not entirely clear why the pursuer should have found it necessary, after having been re-established in Scotland for a year, to employ the first defender to arrange for the purchase". On the other hand, it was not in doubt that the first defender had been so employed in connection with St Helen's Gardens. On that occasion, the first defender had acted in breach of trust in taking title to the property in his own name. That was relevant to the question whether he had also acted dishonestly in connection with Lochrig Court. The critical consideration however was the credibility of the principal witnesses:

> "Critically, there is the question of whose evidence I find more likely to be credible and reliable. For the reasons given … I prefer the pursuer over both the first and the second defender."

The Lord Ordinary added:

> "I do not find any of the other evidence materially to undermine the specifics of the pursuer's account or his evidence more generally".

21. In a subsequent opinion ([2010] CSOH 60) the Lord Ordinary dealt with the question of the appropriate remedies.

The Opinion of the Extra Division

22. In the Inner House, the first defender did not contest the Lord Ordinary's findings and conclusions in relation to St Helen's Gardens. The challenge was directed to the findings and conclusions relating to Lochrig Court.

23. The opinion of the Extra Division, delivered by Lady Paton [2012] CSIH 23, took as its starting point the Lord Ordinary's statement that he did not find any of the other evidence materially to undermine the pursuer's account. The Extra Division then proceeded to identify a number of aspects of the evidence which they regarded as materially undermining the pursuer's account. They concluded, on that basis, that the Lord Ordinary went "plainly wrong" when he stated that he did not find any of the other evidence materially to undermine the specifics of the pursuer's account or his evidence more generally. On that basis, they concluded that they were entitled to overturn his decision and to substitute their own decision. In that regard, they relied on the same aspects of the evidence as supporting the

defenders' account and accordingly establishing, on a balance of probabilities, that the pursuer had made a gift of £285,000 to the first defender.

24. The aspects of the evidence which were considered to undermine the pursuer's account, and to support the defenders', were the following:

> 1. "By February 2007, the pursuer had been living in Scotland for over a year. He was well able to choose his own home, and to instruct a lawyer. It is less clear why, in these circumstances, he would delegate the choice and purchase of a new home to his son."
>
> 2. "Furthermore … the pursuer … had never been in the house at 6 Lochrig Court at any time, either before or after the purchase. … He had seen only the show house."
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> 3. "As for the purchase itself, the sum required for settlement on 13 April 2007 was £290,768.89. … In our view it is significant that, on the evidence available, it is not possible to reconcile the figure of £285,000 with the ultimate settlement figure of £290,768.89."
>
> 4. "It is also of significance that the pursuer gave two explanations as to why the cheque was for a figure of £285,000. At first he stated that £285,000 was what the builders wanted. Later however he said that it was his son who told him that the 'end figure' of £285,000 … was needed to buy the house."
>
> 5. "Once the house at Lochrig Court had been purchased, the pursuer made no attempt to move in and live there. … It was the defenders and their teenage son Richard who began to occupy Lochrig Court in about May 2007. On the evidence, the pursuer was fully aware that they had done so, and did nothing to try to prevent or challenge that development."
>
> 6. "The defenders spent the £285,000 in a quite open and uninhibited manner. … Such behaviour was, in our view, wholly inconsistent with a surreptitious scheme whereby the first defender deliberately disobeyed his father's clear instructions to purchase a home for him and to take the title in his name."

7. “For the defenders and their son openly to occupy Lochrig Court is again inconsistent with such a scheme, as their occupancy of the new house could not but arouse suspicions and result in the scheme being discovered.”

8. “Perhaps of less significance than the other facts referred to above, the figure of £285,000 bore a relationship to the nil rate tax level for inheritance tax at the time the cheque was given.”

25. The following comments can be made about these points, taking them in the same order:

1. The Lord Ordinary expressly considered this point: see para 20 above.

2. The pursuer gave evidence that the show house “was the same as the house”. It was never put to him that it was somehow remarkable to buy a newly built house having seen only the show house, and it is far from clear why the Extra Division considered it to be implausible. The reality is that new houses are bought on that basis every day: that is the purpose of show houses.

3. The Lord Ordinary was well aware of the difference between the amount paid by the pursuer to the first defender and the final settlement figure. He considered the matter most fully in his opinion dealing with remedies [2010] CSOH 60, stating, at para 8:

“The selection of the figure of £285,000 came, on the evidence, from the first defender. He told the pursuer what was needed for the purchase of 6 Lochrig Court and the pursuer paid over what he was asked to pay. The pursuer explained that if he had been asked to pay another sum he would have paid it. The effective discount in the purchase price due to the seller's meeting the stamp duty obligation meant that it was by no means obvious that the pursuer should have appreciated that there was any shortfall as between the purchase price and what he paid.”

That is a complete answer to the point.

4. The Lord Ordinary considered this point: see para 13 above.

5. This point does not accurately reflect the evidence. At one point during his examination in chief the pursuer was asked if he knew when the

defenders had moved in and answered "May, June". His other evidence suggests that he was referring to the date when entry was taken (which was in fact 13 April 2007), not to the date when the house began to be occupied: when asked why he did not move into the house at Lochrig Court, he answered that it was because it was not ready, as the first defender wanted to do tiling work. The defenders' own evidence was that they had carried out work on the house after taking entry, and had not begun to reside there until 2008. It was admitted in their pleadings that they had been living at their house in Glasgow in September 2007, when the proceedings commenced. It was never put to the pursuer that the defenders had moved into Lochrig Court and lived there openly without challenge from him: unsurprisingly, since no-one suggested that that was what had happened.

6. This point appears to be equally insubstantial. Since the £285,000 was less than the cost of completing the transaction, there was no surplus left over. The funds spent in an open and uninhibited manner were generated by the defenders' raising a mortgage on the property. On the pursuer's evidence, he did not know that they had done so until after he consulted lawyers: his understanding was that the money he had paid the first defender had been used in its entirety to buy the house.

7. The Lord Ordinary considered this point: see para 20 above.

8. This point is puzzling. The nil rate band was of no possible significance to an inter vivos gift: it applies only on death. A gift inter vivos would be a potentially exempt transfer whatever its amount. Nor was the nil rate band relevant to the estate of the late Mrs McGraddie, which had passed to the pursuer and was therefore exempt from inheritance tax. It might have been relevant if a deed of variation had been entered into, but there was no such deed, and the nil rate band applicable in that eventuality would not in any event have been £285,000, Mrs McGraddie having died during an earlier tax year. Although the defenders gave evidence that they thought that the gift, as they maintained it to be, had possibly been motivated by the pursuer's desire to minimise inheritance tax, the pursuer's own evidence was that he knew nothing about inheritance tax planning. The Lord Ordinary considered the inheritance tax implications and stated that, while they were not to be ignored, he "would not regard them as sufficiently compelling to point to gift as the most likely underlying explanation for the transaction".

26. The points which had substance were therefore that it was not entirely clear why the pursuer employed the first defender to arrange for the purchase of Lochrig Court, that he gave two explanations of where the figure of £285,000 came from, that he was sooner or later going to discover that the defenders had occupied the

house, and (for what it was worth) that a gift of £285,000 would potentially result in a saving of inheritance tax.

27. Each of those points had been expressly taken into account by the Lord Ordinary in reaching his conclusion as to the pursuer's credibility. Indeed, even if he had not mentioned them, he would be presumed to have taken the whole of the evidence into consideration: *Thomas v Thomas* 1947 SC (HL) 45, 61; [1947] AC 484, 492 per Lord Simonds. In those circumstances, the words of Viscount Simon in *Thomas* at pp 47 and 486 are relevant:

> "If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight."

28. In a case where the court was faced with a stark choice between irreconcilable accounts, the credibility of the parties' testimony was an issue of primary importance. The Lord Ordinary found that the pursuer was a credible witness on the central issue, notwithstanding a number of aspects of the evidence which could be regarded as detracting from his credibility, including the aspects mentioned in para 26. The question whether the pursuer's evidence was to be regarded as credible and reliable having regard to the other evidence in the case was pre-eminently a matter for the Lord Ordinary.

29. The weight of the evidence adverse to the pursuer's credibility had of course to be considered in the context of the evidence as a whole. The Extra Division however focused solely on those particular aspects of the evidence. There is no indication in their opinion that they gave any weight to the extent to which the Lord Ordinary's conclusion was affected by the way in which the principal witnesses gave their evidence: a matter which the Extra Division were unable to assess for themselves from the printed record. Yet it is plain, as explained at paras 13-14, that this aspect of the evidence had an important bearing on the Lord Ordinary's assessment of credibility. There is no indication that they considered the significance of the Lord Ordinary's assessment of the characters of the pursuer and the first defender: that the former did not appear to be particularly generous, while the latter was incapable of coming to a reasonable interpretation of what had been said and done by other people, and did not appreciate the central importance of the pursuer's wishes in the matter. Those findings had an evident bearing on the likelihood, on the one hand, of the pursuer's having made a gift of £285,000, and

on the other hand of the first defender's having acted contrary to the pursuer's instructions. There is no indication that they considered the significance of the unchallenged finding that the first defender had acted in breach of trust in relation to the purchase of St Helen's Gardens: a finding which evidently bore on the likelihood of his having done so again when a second opportunity presented itself. Nowhere in their opinion did they subject the evidence of the defenders to the checking against other evidence which they carried out in relation to the evidence of the pursuer.

30. Furthermore, the thrust of the Extra Division's criticism appears to be that, since the Lord Ordinary said that he did not find any of the "other" evidence "materially" to undermine the pursuer's account, it follows that he must have failed to appreciate the weight or bearing of the aspects of the evidence on which the Extra Division focused their attention. Whether that is so depends however on what he meant by "other evidence": earlier in the same paragraph of his judgment, he had mentioned all of the points summarised in para 26 above, other than the two explanations of where the figure of £285,000 had come from. It also depends on what he meant by "materially": the implication is that the pursuer's account might have been undermined to some extent, but not to an extent which the Lord Ordinary considered material. No useful purpose would however be served by pursuing these questions: the important point is that the Lord Ordinary had plainly taken the evidence in question into account and had nonetheless concluded that the pursuer was telling the truth about the central issue. It is necessary to bear in mind the point made by Lord Hoffmann, in a different but related context, in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. … An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

31. In support of their approach, the Extra Division cited the decision of the Second Division in *Hamilton v Allied Domecq plc* [2005] CSIH 74; 2006 SC 221, subsequently affirmed by the House of Lords [2007] UKHL 33; 2007 SC (HL) 142, and said that the test set out in that case had been met. That case was however concerned with a completely different issue from the present case. It was a case where the Lord Ordinary had made a critical finding, as to the making of a negligent misrepresentation, which the relevant passages in the evidence did not support. In those circumstances, the appellate court was plainly entitled to interfere: see the first sentence of the dictum of Viscount Simon in *Thomas*, cited in para 27 above. That was the context of Lord Hamilton's observation at para 85 of his opinion:

> "On the other hand, when, on examination by the appellate court of the printed evidence, it is plain that it could not constitute a proper basis for some primary finding of fact made by the judge of first instance, the appellate court has a power and a duty to reverse that finding. If findings of fact are unsupported by the evidence and are critical to the decision of the case, it may be incumbent on the appellate court to reverse the decision made at first instance."

That observation had no relevance to the present case.

32. Finally, at the hearing of the present appeal counsel for the defenders sought to persuade the court that the Lord Ordinary had in any event made a critical error in failing to give greater weight to the evidence of the defenders' son Richard. As explained at para 18 above, the Lord Ordinary described Richard as largely recounting what he had been told by his parents, and as adding little or nothing to the case. That assessment is borne out by the passages in his evidence to which the court was referred, almost all of which recounted what he had been told by his parents, or his interpretation of events in the light of what he had been told.

33. In the whole circumstances, the Extra Division had no proper basis for concluding that the Lord Ordinary had gone plainly wrong, let alone that on a re-consideration of the whole evidence the opposite conclusion should be reached. The case illustrates an important point made by Iacobucci and Major JJ, delivering the judgment of the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235, para 14, when explaining why appellate courts are not in a favourable position to assess and determine factual matters:

> "Appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole."

Conclusion

34. I would accordingly allow the appeal and invite parties to make submissions as to the appropriate form of order.

Postscript: the reasonableness of the appeal

35. There was some discussion in the printed cases of the question whether the appeal had properly been certified as reasonable. It is true that the relevant legal principles have long been settled. Nevertheless, the failure by appellate courts to

apply those principles correctly may raise a point of law of general public importance. There have been a number of recent Scottish appeals to the House of Lords in which the application of the relevant principles has been considered: they include *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1, *Simmons v British Steel plc* [2004] UKHL 20; 2004 SC (HL) 94; [2004] ICR 585 and *Hamilton v Allied Domecq plc* [2007] UKHL 33; 2007 SC (HL) 142. There have also been recent cases in this court (eg *In the matter of B (a Child)* [2013] UKSC 33; [2013] 1 WLR 1911) and in the Judicial Committee of the Privy Council (eg *Mutual Holdings (Bermuda) Ltd v Hendricks* [2013] UKPC 13) where permission to appeal was granted in relation to issues concerning the role of appellate courts in respect of findings made by the trial judge. I have also referred to recent judgments of the Canadian and United States Supreme Courts in which the relevant principles were re-stated. In the circumstances of the present case, I would not criticise the bringing of the appeal.