Hilary Term
[2015] UKSC 13
On appeal from: [2013] CSIH 75

JUDGMENT

Carlyle (Appellant) *v* Royal Bank of Scotland Plc (Respondent) (Scotland)

before

Lord Neuberger, President
Lord Kerr
Lord Clarke
Lord Reed
Lord Hodge

JUDGMENT GIVEN ON

11 March 2015

Heard on 20 November 2014

Appellant
Roddy Dunlop QC
Alasdair N McKenzie
(Instructed by MBM Commercial LLP)

Respondent
Richard Keen QC
Alastair Duncan QC
(Instructed by Brodies LLP)

LORD HODGE: (with whom Lord Neuberger, Lord Kerr, Lord Clarke and Lord Reed agree)

1. This appeal is concerned with oral discussions between a property developer and his bank about funding a development at Gleneagles, Perthshire. The central issue in the case, which went to proof before the Lord Ordinary, Lord Glennie, in 2009, was whether, on an objective assessment of what the parties said to each other, the bank intended to enter into a legally binding promise to advance sums in the future to fund not only the purchase of two development plots but also the construction of a house on each plot.

2. In considering that issue, because the matter is raised on appeal, the court must have regard to the limited power of an appellate court to reverse the findings of fact of the judge who has heard the evidence. Those limits are well known. The House of Lords discussed them in *Thomas v Thomas* 1947 SC (HL) 45. More recently this court has reiterated those limits in *McGraddie v McGraddie* 2014 SC (UKSC) 12 and *Henderson v Foxworth Investments Ltd* 2014 SC (UKSC) 203; [2014] 1 WLR 2600 and the Judicial Committee of the Privy Council has made similar comments in *Beacon Insurance Company Limited v Maharaj Bookstore Ltd* [2014] UKPC 21, at paras 11-17. Those limits apply equally in this court as in other appellate courts.

The bank's action

3. The Royal Bank of Scotland Plc ("the bank") lent Mr Carlyle funds to purchase a development plot but later refused to fund its development. The bank raised an action against him for payment of £1,449,660 and interest on 14 August 2008. Mr Carlyle defended the action and counterclaimed for damages, including for alleged lost profit on the development, in a sum that exceeded what the bank claimed from him. Mr Carlyle depended on bank finance for the proposed development. He alleged that because, as the bank knew, the vendor of the plots of land would insist upon a right to buy back the plots if they were not promptly developed, he had sought and obtained an unequivocal commitment from the bank to fund not only the purchase of the plots but also their development. Having received that commitment, he entered into missives to purchase a plot but the bank, in breach of its promise, refused to fund its development.

4. The Lord Ordinary by order dated 6 October 2009 allowed a preliminary proof before answer of the issues (a) whether or not a collateral warranty was

given to Mr Carlyle as averred on Record and (b) whether the bank was personally barred from seeking payment of the sums which it claimed. The latter issue is no longer live.

5. Mr Carlyle was ordered to lead at the proof. He gave evidence himself and called as witnesses his accountant, Colin Hamilton, and the bank's principal representative in the transaction, Helen Hutchison, who was the assistant director of commercial banking at its Motherwell branch. The bank chose to lead no evidence although its employees, Rebecca Young and Mark McClymont, were also involved in the transaction. In an interlocutor dated 10 May 2010 the Lord Ordinary declared that the bank was in breach of "a collateral warranty in terms of which [it] bound [itself] to make development funding of £700,000 sterling available to [Mr Carlyle] by way of loan for the purposes of the development of plot 5, Queen's Crescent, Gleneagles Hotel, Perthshire".

6. The bank appealed that decision but the hearing of the reclaiming motion was delayed by the difficulties which Mr Carlyle faced in obtaining legal representation after his estates were sequestrated on 2 November 2009 and he failed to obtain the recall of his sequestration. By interlocutor dated 12 September 2013 the Second Division of the Inner House allowed the bank's reclaiming motion, recalled the Lord Ordinary's interlocutor and continued the cause to ascertain the terms of the decree for payment to be pronounced in favour of the bank. Mr Carlyle appeals to this court.

The Lord Ordinary's findings of fact

7. As the Lord Ordinary's findings of primary fact were not in dispute, I will summarise them in order to set out the circumstances.

8. Mr Carlyle was a property developer and had enjoyed the support of the bank since 1991. In 2005 he set up a property development company, Carlyco Limited ("Carlyco") to purchase and develop a site at Stewartfield Grove, East Kilbride.

9. In February 2007, Mr Carlyle learned that Gleneagles Hotel proposed to sell two plots of ground at Gleneagles, Perthshire. He proposed to purchase and develop one plot (plot 5) and that Carlyco should purchase and develop the other (plot 2). He and Colin Hamilton prepared a presentation for the bank. On 26 March 2007 they met Ms Hutchison, who represented commercial banking, and Ms Young, who represented private banking. Their proposal

was that plot 2 would be purchased for £975,000 and plot 5 for £1,250,000 and that the build cost of each plot would be £700,000. They discussed the requirement in the sales brochure that the dwelling house on each plot had to be wind and watertight and all external finishes and hard landscaping completed by 31 March 2011 so that there would not be half-completed houses when the Ryder Cup was staged at Gleneagles golf course. The vendor proposed to secure this requirement by a buy-back clause which, in the event of non-completion on that date, entitled it to re-purchase the site at the original purchase price. The purchaser was not allowed to sell the plots to others unless developed. The buy-back clause was discussed and the note of the meeting made it clear that Mr Carlyle "specifically and clearly stated" that, if the bank was to provide funds for the deposits on the plots, "then the balance [of the purchase price] for the plots and the Build/Development Costs must be provided as they needed to be built". Mr Carlyle asked for "a full commitment on the proposal or nothing". The note recorded that Ms Hutchison and Ms Young understood this, were enthusiastic about the proposal and would push for its approval by the bank's head office. Both Mr Carlyle and Mr Hamilton gave evidence confirming this account of the meeting. Mr Carlyle explained that the funding would be in three stages: deposit, land purchase, and build costs. He gave evidence that he asked the bank not to give him money for the land unless it also gave him money to build. He explained that Ms Hutchison said that the bank would have an appetite for the project, that it would involve both commercial and private banking with the former taking the lead, that she would refer it to head office and that she was aiming to get 100% funding for the project.

10. On 28 March 2007, Mr Carlyle and Carlyco submitted qualified offers to purchase the plots. Mr Carlyle then worked on design options over several weeks during which he had telephone conversations with Ms Hutchison or Ms Young. On 24 April 2007 Mr Carlyle emailed Ms Hutchison to inform her that the vendor would accept his offers at £995,000 for plot 2 and £1,350,000 for plot 5. He required a commitment in principle as the vendor was pressing for completion of the missives and the payment of a 5% deposit. Towards the end of May Ms Hutchison and Ms Young advised that they could advance the deposit moneys in early June. Mr Carlyle informed Ms Young in a telephone call that the deposit money was of no use unless he also got the purchase money and the development funding and that he needed a commitment to the whole proposal. He gave evidence that Ms Young responded that the bank knew that he had made that clear from the outset. When he spoke on the telephone with Ms Hutchison on 5 June 2007 he again made clear his position that the bank should not give the deposit money unless everything was agreed and she replied that the bank would not give money only for the land as that would not make sense for it, especially with the buy-back clause. He informed her that he would not pay even the deposit until the bank confirmed that it would provide the development funding.

11. The crucial finding of fact relates to a telephone call on 14 June 2007. In para 15 of his opinion the Lord Ordinary stated:

> "On 14 June 2007 Ms Hutchison telephoned [Mr Carlyle]. [He] described her manner as enthusiastic. … she said: 'You'll be pleased to know it's all approved, Edinburgh are going for it for both houses'. … On the strength of this conversation, he instructed Fiona Bryson, his and Carlyco's solicitor, to pay the deposits on the plots. At that point he became committed to the project."

Counsel, clarifying that finding, informed this court that the deposits were paid on 14 June 2007, which was before the conclusion of the contract to purchase plot 5.

12. The Lord Ordinary also recorded Ms Hutchison's evidence to the effect that Mr Carlyle was told on various occasions that funding for the development would be advanced. She knew of the buy-back clause and was aware that the bank would need to fund the development costs. She recalled Mr Carlyle saying to her that the bank should not give any funding unless it agreed to fund the development costs. She thought that she had spoken only of approval of funding the purchase of the plots in the telephone conversation of 14 June 2007. Her position was that the bank had "an appetite" to fund the development but that the level of funding had not been discussed. She stated that there was a general understanding that there would be development funding at some level, but that the details had to be worked out. In her credit submission to headquarters she had commented that the bank would be approached for future development funding but she had not submitted a request for development funding before the purchase of the plots.

13. The Lord Ordinary accepted the evidence of Mr Carlyle and Mr Hamilton as credible and reliable. He preferred Mr Carlyle's evidence to that of Ms Hutchison where they differed and in particular preferred Mr Carlyle's account of the telephone conversation on 14 June 2007. In findings of secondary fact (which the bank contests) he stated at para 32 of his opinion that Mr Carlyle was fully justified in believing from the telephone conversation of 14 June 2007, set in the context of the previous discussions, that the bank was committing itself to advancing the purchase price and providing a facility for the build cost. He held (para 33) that Ms Hutchison's statement on 14 June 2007 would have made this clear to Mr Carlyle and that Ms Hutchison ought to have realised this even if she did not intend to convey that impression. He concluded (para 41) that the bank had committed itself to provide funding for the development of plot 5 in an amount up to £700,000.

14. Lord Glennie also recorded the evidence on subsequent events. On 20 June 2007 Ms Hutchison telephoned Mr Carlyle and on the following day he met her to sign indicative terms for the provision of £2.35m to fund the purchase of the two plots. The indicative terms proposed that the facility be reduced to £700,000 by the sale of another development which Mr Carlyle had undertaken at Countess Gate, Bothwell and personal funding by private banking of the purchase of plot 5. It listed as securities the existing securities over the Bothwell development and proposed standard securities over the two plots at Gleneagles as well as a personal guarantee by Mr Carlyle for Carlyco's indebtedness.

15. In this action the court is not concerned with the lending to Carlyco but only with the sums advanced to Mr Carlyle personally. On 24 and 25 July 2007 in two loan agreements for £845,000 and £560,000 respectively, the bank gave Mr Carlyle secured personal loans to fund the purchase of plot 5. The repayment date was 12 months after draw down and the loans were "interest-only mortgages" secured over the Bothwell development and plot 5. Interest was at 2% over the bank's base rate.

16. Shortly after Mr Carlyle concluded missives to purchase plot 5, Ms Hutchison left her employment at the bank. Mr Carlyle drew down the loan funds and acquired plot 5. He communicated with Mr McClymont, who in December 2007 asked him when he would need the development funding. He also communicated with Ms Hutchison's successor, Louise Burnet, and also Ms Young. In June 2008 he was told that banking management had been transferred to specialised lending services in Edinburgh. After further discussions the bank made it clear in August 2008 that it would not provide funding for the development. It promptly called in the loan and commenced this action.

17. The Lord Ordinary, for completeness, also discussed the bank's internal documents between paras 26 and 30 of his opinion. They showed how bank officials thought that sale of a property at Countess Gate, Bothwell would remove Mr Carlyle's personal borrowing and with the sale of Carlyco's Stewartfield development contribute to the funding of the Gleneagles project, thereby reducing what the bank would have to provide. The documents included a sanction summary sheet dated 2 May 2007 which showed that private banking were prepared to provide £2.01m for plot 5, which included the estimated £700,000 needed to develop the site, and that it would receive the sale proceeds of 11 Countess Gate, Bothwell.

The decision of the Inner House

18. The Second Division (the Lord Justice Clerk, Lady Dorrian and Lord Bracadale) disagreed with the Lord Ordinary. They held:

(i) that on a proper objective analysis Ms Hutchison's telephone statement on 14 June 2007 was simply informing Mr Carlyle of an internal decision to approve the funding in principle (paras 57 and 61);

(ii) that the prior transactions between the bank and Mr Carlyle and also the events after the telephone conversation of 14 June 2007 (in particular the signing of the indicative terms and the written loan agreements) showed that the bank was not under any legal obligation until there was a written loan agreement (paras 57 and 62-63); this was consistent with normal banking practice (para 60); and

(iii) that the alleged promise or warranty was not legally effective as the parties had not agreed terms that were essential to the loan contract including maximum draw down, interest rates, time of draw down, method and time of repayment, and securities (para 58).

The Second Division also commented on a pleading point, namely that Mr Carlyle had pleaded a collateral warranty rather than a promise to provide the full funding for plot 5 (para 59). But the court did not decide the appeal on the basis of that point.

The bank's case on appeal

19. In his defence of the Inner House's opinion in this appeal, Mr Richard Keen QC for the bank addressed the guidance in *Thomas v Thomas* and other cases on the role of an appellate court. He submitted that the Lord Ordinary was not entitled on the evidence to find in fact that the bank had made an oral commitment to provide the funding for plot 5. He submitted, first, that the Lord Ordinary had accepted Mr Carlyle's evidence that characterised what Ms Hutchison said in the telephone call on 14 June 2007 as an agreement "in principle" to the funding. That was a primary finding of fact which, he submitted, could not support an inferential finding of an intention on the bank's part to be legally bound by an oral promise in the telephone call. Secondly, he stressed that at the time of the alleged promise, the cost of developing plot 5 was unknown; thus there was no agreement as to the amount of the loan. There was no evidence from Mr Carlyle that the bank had agreed to advance up to £700,000 for the development; that sum was merely an early estimate of the development cost. Thirdly, he submitted that

there was no basis for the Lord Ordinary's finding (in para 40 of his opinion) that Mr Carlyle was entitled on 14 June 2007 to take the view that the bank had already taken into account the extent of his overall indebtedness to it. That could not be so: the bank needed to ascertain the outcomes from Carlyco's and Mr Carlyle's developments at Stewartfield, East Kilbride and Bothwell respectively, before it could ascertain the extent of Mr Carlyle's indebtedness.

Discussion

(i) The role of the appellate court

20. Were I deciding the matter at first instance and if the findings of fact record all the material evidence, I think that I might have shared the view of the Second Division (a) that the statement by Ms Hutchison on 14 June 2007 did no more than communicate to Mr Carlyle that the bank had reached a decision in principle to provide funding for the development of the two plots and (b) that the parties were required to take further steps to create a legally binding obligation on the bank to advance that funding.

21. But deciding the case as if at first instance is not the task assigned to this court or to the Inner House. It is not appropriate to restate at any length in this judgment the dicta from prior cases which this court recently set out in *McGraddie v McGraddie* (at paras 1-4) and discussed in *Henderson v Foxworth Investments Limited* (at paras 61-68). In *Thomas v Thomas* the House of Lords re-asserted the need for an appellate court to defer to the findings of fact of the first instance judge unless satisfied that the judge was plainly wrong (Lord Thankerton at p 55, and Lord MacMillan at p 59). Lord Du Parcq expressed himself differently but to similar effect when he quoted (at pp 62-63) Lord Greene MR in *Yuill v Yuill* [1945] P 15 (at p 19):

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

Lord Reed summarised the relevant law in para 67 of his judgment in *Henderson* in these terms:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material

> error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

When deciding that a judge at first instance who has heard the evidence has gone "plainly wrong", the appeal court must be satisfied that the judge could not reasonably have reached the decision under appeal.

22. The rationale of the legal requirement of appellate restraint on issues of fact is not just the advantages which the first instance judge has in assessing the credibility of witnesses. It is the first instance judge who is assigned the task of determining the facts, not the appeal court. The re-opening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be negligible benefit in terms of factual accuracy. It is likely that the judge who has heard the evidence over an extended period will have a greater familiarity with the evidence and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence. On these matters see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, Lord Wilson at para 53; the US Supreme Court in *Anderson v City of Bessemer* 470 US 564 (1985), pp 574-575; and the Canadian Supreme Court in *Housen v Nikolaisen* 2002 SCC 33, para 14, to all of which Lord Reed referred in paras 3 and 4 of *McGraddie*.

(ii) The opinion of the Second Division

23. In my view Mr Roddy Dunlop QC was correct in his submission that the Second Division has disagreed with the Lord Ordinary on questions of fact without facing up to the restricted role of the appellate function on such questions.

24. The Second Division referred to evidence which the Lord Ordinary had not recorded in his judgment, including certain provisions in the indicative terms which Mr Carlyle signed on 21 June 2007 which required the satisfaction of conditions precedent (para 16) and certain terms in the loan agreements which he signed on 24 and 25 July 2007 which stated among other things that the borrower was not bound by the loan until he had signed the agreements (para 19). The court stated, correctly, that those documents could not be

dismissed as mere "paperwork" which was how a businessman such as Mr Carlyle might have viewed them. But they do not undermine the Lord Ordinary's findings of fact as (a) there is no basis for thinking that the Lord Ordinary had not considered their terms and (b) Lord Glennie's finding that there was a binding undertaking on 14 June 2007 to provide both purchase finance and development funding is not inconsistent with the view that that undertaking was superseded - but only so far as the purchase finance - by the subsequent loan agreements of 24 and 25 July 2007.

25. I turn to the three grounds of the Second Division's decision which I summarised in para 18 above. The first ground was that on a proper analysis of the parties' dealings and in particular the telephone call, at most Ms Hutchison was informing Mr Carlyle of a decision in principle and not creating a legal obligation to advance millions of pounds. This overlaps with the second ground as the Second Division prayed in aid the prior dealings of the parties in which the bank agreed in principle to provide funding and then negotiated separate funding packages for the purchase of land and for its development. The court held that the subsequent signing of the indicative terms and the loan agreements for the purchase price in the Gleneagles transaction followed the same pattern. In my view it was open to the Lord Ordinary to have interpreted the evidence in that way and conclude that there was no binding commitment; but he did not have to. It was not suggested that Mr Carlyle was exposed to buy-back clauses in the earlier transactions. Further, the fact that parties envisage or agree that their agreement will be set out in a formal contract does not by itself prevent their agreement from having legal effect until then (*Stobo Limited v Morrisons (Gowns) Limited* 1949 SC 184, Lord President Cooper at p 192). Instead Lord Glennie in assessing the objective meaning of the telephone call on 14 June 2007 gave weight to the unusual circumstances of the buy-back clause, to Mr Carlyle's repeated requests for a commitment to fund both purchase and development and to the bank's undisputed knowledge of those requests. It cannot be said that the evidence could not support the Lord Ordinary's view. Absent some legal error elsewhere in his reasoning, there was a reasonable basis for his finding that on an objective analysis the bank made a legally binding promise to fund the development of plot 5 in the telephone call of 14 June 2007.

26. The second ground rested in part on the improbability, in the absence of special circumstances, that a bank would bind itself to advance up to £3.745m (to Mr Carlyle and Carlyco) without setting out the terms and conditions of the loans in writing. It also rested on Mr Carlyle's awareness that he would have to sign a loan agreement before he received funding and his subsequent signing of the indicative terms and then the loan agreements to fund the purchase price. In relation to the first point it is notorious that the prudence which historically has been attributed to Scottish bankers was not always in

evidence in commercial and mortgage lending in the years leading up to financial crisis in 2008. As regards the second point, the parties' knowledge throughout the transaction that the bank would prepare formal loan agreements before it advanced funds is an indicator which could point against the earlier creation of binding legal obligations. But, as I have said, that is not conclusive; in each case it is a question of fact (*Stobo Limited* at p 192). The Lord Ordinary was entitled to conclude that Mr Carlyle sought and obtained from the bank a legally binding commitment to provide funding for the purchase and the development in order to enable him to commit himself to pay the deposit and buy the plot. His and the bank's shared knowledge that the commitment would eventually be superseded by more detailed loan agreements in relation to the purchase price and then in relation to the development of the site did not prevent the earlier commitment from having effect as a legally binding promise.

27. The Second Division's third ground was stated in para 58 of their opinion. It included this statement:

> "Without specification of the essential elements of [the provision of banking facilities] (including the maximum draw down, interest rates, time of draw down, method and time of repayment and securities), there could be no concluded agreement capable of enforcement."

Mr Dunlop QC challenged this statement as a legal error. He referred to the decision of the House of Lords in *Neilson v Stewart* 1991 SC (HL) 22 in which it was held that in Scots law the contract of loan implied an obligation to repay and did not require express terms as to the rate of interest or the date of repayment. In this case the parties to the loan were clearly identified and the parties had proceeded on the basis that Mr Carlyle would need up to £700,000 for the development of plot 5. Mr Keen QC did not dispute that it was possible to have a valid contract of loan without an express statement of the elements which the Second Division had listed. He suggested in his written case that the Second Division had been considering what the parties would have treated as essential to their bargain in this case and not what were the bare essentials of a contract of loan in the general law.

28. I think that Mr Keen QC was correct in his interpretation of what the Second Division was saying in para 58 as it is very unlikely that they disregarded *Neilson v Stewart*, to which they were referred, or thought that the listed elements had to be specified in all contracts of loan. But that does not assist the bank. While it was Ms Hutchison's evidence that she understood that the details of the loan had still to be worked out after the bank's decision to

support the purchase and development of plot 5, neither party gave evidence of any understanding that it was necessary to agree these elements in this transaction before legally binding obligations could arise or of the communication of that understanding to the other party. The Second Division spoke of what the informed observer would expect. In other words the court made its own assessment of what was needed in this case to create a binding contract of loan. The court did not address whether and if so why the Lord Ordinary was not entitled to reach a contrary conclusion on what was an issue of fact, namely whether on an objective assessment the bank intended to make a legally binding promise to provide development funding.

29. I am therefore satisfied that the Second Division did not have an adequate basis for overturning the Lord Ordinary's findings of fact. In reaching that view I do not shut my eyes to the relatively ill-defined nature of the obligation to provide the development funding. The Lord Ordinary addressed the issue of legal certainty at para 42 of his opinion and reached the view, with which I agree, that it would have been possible to frame a decree of specific implement to require the bank to make available a facility of up to £700,000. He expressed the view that the rate of interest was never going to be an issue as the parties knew the rates applied to other loans. He also stated that the term of the loan was not likely to be a real issue. While he did not explain the latter comment, I interpret it as referring to the known time constraints on the development of the plot and to the fixing of a reasonable period for the completion and sale of the house. I detect no error in this. Once he was satisfied that the bank had had the intention to make a legally binding promise, he was entitled and indeed required to look for ways to give effect to that promise. In *Fletcher Challenge Energy Limited v Electricity Corporation of New Zealand Limited* [2002] 2 NZLR 433, the Court of Appeal of New Zealand stated in the majority judgment at para 58:

> "The Court has an entirely neutral approach when determining whether the parties intended to enter into a contract. Having decided that they had that intention, however, the Court's attitude will change. It will then do its best to give effect to their intention and, if at all possible, to uphold the contract despite any omissions or ambiguities (*Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503; [1932] All ER 494, *R & J Dempster Ltd v The Motherwell Bridge and Engineering Co Ltd* 1964 SC 308 and *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495)."

I agree with that statement which supports Lord Glennie's approach, although there may need to be further evidence in the next stage of this case about the prior dealings between the parties and any shared understandings in order to determine what terms are to be included by implication.

(iii) Mr Keen QC's additional points

30. I am not persuaded by any of the additional points which Mr Keen QC raised and which I set out in para 19 above. In relation to the first, the finding of fact about an agreement in principle (para 17 of the Lord Ordinary's opinion) related to Mr Carlyle's evidence about the earlier project in Stewartfield in a context in which he was explaining why the request to sign the indicative terms in the Gleneagles transaction did not cause him concern that he might not already have a commitment from the bank. He was saying that he expected to sign such documents in the Gleneagles transaction. In my view the context of the Stewartfield transaction may have been quite different from the Gleneagles transaction as there was no evidence in the former transaction of a buy-back clause which would have prevented Mr Carlyle from selling on an undeveloped site and which caused him in the latter transaction to seek a binding funding commitment from the bank. His reference to agreement in principle or commitment in principle does not undermine his repeated assertion that he had asked for and received a clear commitment from the bank. Those phrases were in any event consistent with an understanding that the precise sum which he would require to borrow would depend upon the income which he received from his other transactions by the time he needed the development funds.

31. I accept Mr Dunlop QC's answer to the second point: the bank were well aware of the estimated cost of £700,000 and private banking processed the application to fund plot 5 on that basis before Ms Hutchison communicated the bank's decision on 14 June 2007.

32. I am also not persuaded by the third point. Until the developments at East Kilbride and Bothwell had been sold, the bank could only estimate the sale proceeds and therefore the sums it would have to advance for the Gleneagles project. But the bank took a view on the expected proceeds of those sales in estimating the likely extent of the lending required and proposed to protect itself in the interim by securities over all of the properties and the guarantee by Mr Carlyle.

(iv) A collateral warranty

33. The pleading of a "collateral warranty" became a distraction in this case. It was not used as a term of art. Either "promise" or "unilateral undertaking" would have been a suitable choice of words for the independent legal obligation which Mr Carlyle was asserting. The addition of the word "collateral" while descriptive of context, would have added nothing to the

legal analysis. As the Lord Ordinary said in para 37 of his opinion, there is no magic in a collateral contract. It is simply a contract which is governed by the same rules as other contracts.

34. Whether one views the undertaking as a promise to provide the development funds if he purchased the plot (as I prefer) or (as Mr Dunlop QC argued) as an obligation in a bilateral contract which became binding when Mr Carlyle borrowed the purchase funds and purchased the site does not give rise to a different answer to the question: "did the bank intend to enter into a binding legal commitment?".

35. In English contract law, the doctrine of consideration requires the recipient of the representation or promise to give consideration by entering into the envisaged other contract in order to make the representation or promise a binding contractual obligation. This appears to be behind the approach of the English courts to collateral contracts as in *Dick Bentley Productions Limited v Harold Smith (Motors) Limited* [1965] 1 WLR 623, Lord Denning MR at p 627; *J Evans & Son (Portsmouth) Limited v Andrea Merzario Limited* [1976] 1 WLR 1078, Lord Denning MR at p 1081F. In Scots law a unilateral undertaking that is intended to have legal effect, such as a promise, is binding without consideration passing from the promisee. The promise may but does not need to be collateral to another contract. The issue is simply whether a legally binding obligation has been undertaken. As in the formation of other contracts the court applies an objective test, asking what a reasonable outside observer would infer from all the circumstances.

36. In this case Mr Carlyle's proposal to enter into a contract to purchase plot 5 and, because of the buy-back clause, his clearly expressed unwillingness to do so unless the bank provided development funding as well as purchase funding formed important elements of the factual context in which the Lord Ordinary assessed the legal nature of the bank's statement on 14 June 2007. That was the important point. The statement that the bank would provide the development funding induced him both to contract to purchase the plot and enter into the loan agreements which funded that purchase. It is legitimate to describe the promise to provide development funding as collateral to the other agreements. But, as I have said, that does not affect the legal analysis in Scots law.

(v) The bank's application to amend

37. The bank stated in its written case that it did not insist on its minute of amendment.

Conclusion

38. I would allow the appeal, set aside the interlocutor of the Second Division dated 12 September 2013 and 3 October 2013, and remit the case to a commercial judge in the Court of Session to proceed accordingly.