

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2024] SC ABE 26

ABE-CA11-23

JUDGMENT OF SHERIFF PHILIP MANN

in the cause

DAVID BOOTH

Pursuer

against

DANIEL LEITH DONALD

Defender

ABERDEEN, 30 May 2024

The sheriff, having resumed consideration of the cause, Finds in fact as follows:

1. The pursuer is David Booth who resides at the address given in the instance. He is a property developer.
2. The defender is Daniel Leith Donald who resides at the address given in the instance. He is a property developer specialising in purchasing properties, obtaining planning permission for their development and selling them on for a profit.
3. The pursuer was sequestrated on 18 September 2013 at the instance of the Royal Bank of Scotland PLC. Gordon Malcolm MacLure of Johnston Carmichael LLP was appointed as his Trustee in Sequestration.
4. The Royal Bank of Scotland PLC were the pursuer's heritable creditors in respect of the two properties hereinafter referred to and known as Caldonia and Northlasts, respectively.

5. As at the date of his sequestration the pursuer owned a property known as Caldonia, Malcolm Road, Peterculter (hereinafter referred to as "Caldonia"). This was a property which had potential for residential housing development. Planning permission for two replacement houses had been obtained by a company called The Property Booth Limited of which the pursuer was the sole shareholder.

6. Upon the pursuer's sequestration Caldonia vested in his trustee in sequestration.

7. Another property known as Northlasts Farm (hereinafter referred to as "Northlasts") was owned by the pursuer as at the date of his sequestration. This property also vested in his trustee in sequestration.

8. In the course of 2018 and 2019 the pursuer negotiated with the trustee in sequestration on behalf of a limited company known as Northlasts Limited to purchase Northlasts from the trustee for a sum of £220,000. This was a price which was below the market value of the property. It reflected the fact that there was an agricultural tenancy affecting the property, the tenant being the pursuer's father. It also reflected that the trustee would drop an action which he had raised in this court for reduction of the agricultural tenancy and that the pursuer would drop an action of damages against the Royal Bank of Scotland which related to the alleged premature calling up of the bank's securities over Northlasts and Caldonia.

9. By the summer of 2019, the purchase of Northlasts had not been completed. At this time the pursuer was approached by Graeme Ross who had been a business development manager with the Royal Bank of Scotland PLC and who suggested that he meet with the defender to discuss the potential development of Caldonia.

10. A series of meetings took place thereafter between the parties in the course of which it was agreed that the defender would fund the purchase of Caldonia from the trustee in

sequestration for a price of £930,000; that the defender would apply his business acumen to securing planning permission for a housing development on Caldonia; and that any profits from the sale thereafter of Caldonia, after taking account of all costs met by the parties individually, would be split equally between the parties. It was further agreed that a new limited company would be set up by the parties to be called Caldonia Developments Limited; that the parties would be equal shareholders in the company; and that title to Caldonia would ultimately be vested in Caldonia Developments Limited.

11. The defender's agreement to fund the purchase of Caldonia included meeting all associated costs such as Land and Buildings Transaction Tax (hereafter "LBTT") and registration dues.

12. Both Caldonia and Northlasts were subject to an agricultural tenancy which the pursuer had granted in favour of his now deceased father. The pursuer informed the defender, and the defender thus knew, that that was the case.

13. It was an implied term of the agreement between the parties that all investments by the parties individually towards the project would be recorded in the books of the company as directors' loans. That together with each party owning 50% of the shares of the company would ensure that the profits from the development and sale of Caldonia after the costs of funding the project had been repaid to the parties, would be equally split between the parties.

14. Meanwhile, the pursuer negotiated the purchase of both Northlasts and Caldonia from his trustee in sequestration for a combined price of £1,150,000 comprising the previously agreed figure of £220,000 for Northlasts and a further £930,000 for Caldonia. The price for Caldonia was agreed after more than one attempt by the pursuer, at the

suggestion of the defender, to secure the property for a lower sum. The highest valuation that the pursuer had obtained for Caldonia was £650,000.

15. The pursuer had secured a loan from Barclay's bank of £220,000 to cover the price of Northlasts. This was on behalf of the said Northlasts Limited which had been formed to take title to Northlasts. The Royal Bank of Scotland PLC had agreed to discharge the securities which they held over Northlasts and Caldonia if the properties were purchased from the trustee for the combined price of £1,150,000.

16. The agreement between the pursuer, the trustee in sequestration and the Royal Bank of Scotland PLC was that the trustee would simply relinquish his interest in the two properties and that the bank would discharge their securities in exchange for the agreed amount of £1,150,000. This meant that the properties would simply re-vest in the name of the pursuer.

17. The trustee in sequestration and the bank set a deadline of 6 November 2020 for settlement of the purchase of the two properties.

18. One of the meetings between the parties took place in the offices of Burnett Legal, Solicitors, on 30 October 2020. The meeting was attended by Douglas Burnett, the defender's solicitor, and by Graeme Ross.

19. The meeting took place over two sessions, one in the morning and one in the afternoon. In the morning the defender suggested that the title to Caldonia be taken directly into the name of Caldonia Developments Limited. This was after an unsuccessful attempt by the defender to get the pursuer to agree to have the title taken in name of another company of which the defender was sole shareholder and which company had significant tax losses that the defender considered could be used in some way to advantage.

20. After the morning session the pursuer contacted the trustee in sequestration to request that the purchase of Caldonia be effected by a transfer of title to Caldonia Developments Limited. The trustee in sequestration refused to agree to this proposal. The meeting was reconvened in the afternoon at the pursuer's request and it was agreed that the parties would go along with the trustee in sequestration's preference and that the transfer of title to Caldonia Developments Limited would be effected thereafter.

21. As a consequence of the fact that title to Caldonia would first vest in the pursuer before being transferred to Caldonia Developments Limited Douglas Burnett suggested at the meeting of 30 October 2020 that the pursuer grant a standard security in favour of the defender for the purchase price of £930,000. He explained that the defender's investment for the purchase would be at risk whilst title was vested in the pursuer and if some unforeseen event were to occur which would prevent the pursuer transferring title to Caldonia Developments Limited. Douglas Burnett stated that the standard security would not be registered on the basis that title would more or less immediately be transferred to Caldonia Developments Limited. Despite initial reservations, the pursuer agreed to grant such a standard security in the belief, based on Douglas Burnett's representation, that the standard security would not be registered. It was the stated intention of both parties that the standard security would be destroyed, without having been registered, once title to Caldonia was transferred to Caldonia Developments Limited.

22. Subsequent to the meeting on 30 October 2020 the pursuer approached the defender to advise him that there would be a delay in the drawdown of the loan funds from Barclays Bank in respect of Northlasts. As a consequence, it would not be possible to provide the trustee in sequestration with the whole of the agreed £1,150,000 by the deadline of 6 November 2020. The defender agreed to provide a further sum of £220,000 to the pursuer

to enable him to settle in full with his trustee. This was to be a loan repayable in early course upon release of the funds by Barclays Bank in respect of Northlasts.

23. Thereafter Gemma Perfect, a solicitor who was assisting the pursuer in respect of the transactions, prepared a standard security for £1,150,000 by the pursuer in favour of the defender over Caldonia. This was signed by the pursuer on 2 November 2020. Said standard security required to be redrawn on account of an error in the pursuer's address. The re-drawn standard security was signed by the pursuer and delivered to Douglas Burnett on 6 November 2020. The standard security narrated that the pursuer would repay the money to the defender when called upon to do so. This reflected the purposes behind the standard security, namely that it would be relied upon partly in the event of a supervening circumstance preventing the pursuer transferring title to Caldonia to Caldonia Developments Limited and partly to secure the sum of £220,000 until the pursuer repaid that sum to the defender following the drawdown of the loan funds from Barclays Bank in respect of Northlasts. The standard security contained a clause consenting to registration, which also reflected the foregoing purposes. Douglas Burnett proceeded to register this standard security.

24. The undertaking given by Douglass Burnett not to register the standard security related to a standard security which was to be granted by the pursuer in favour of the defender to reflect the position as at the meeting on 30 October 2020 that the defender would be making available the sum of £930,000. It did not relate to the standard security signed by the pursuer on 2 November 2020 and again on 6 November 2020 securing the increased sum of £1,150,000.

25. There was no suggestion at the meeting of 30 October 2020 that Caldonia Developments Limited would grant a standard security in favour of the defender once

title to Caldonia had been transferred to it. Nonetheless, Douglas Burnett attached a draft of such a standard security to an email from him to Gemma Perfect on 01 November 2020. That draft provided that the money would be repaid by the company to the defender when called upon to do so. That did not reflect the terms of the agreement between the parties, namely that Caldonia would be developed and that any profits after repayment of the investments made by the parties individually would be shared equally between the parties, in other words that the parties would benefit from their respective 50% shareholdings after repayment of directors' loans. In the event, that draft standard security was never progressed and the terms thereof were never agreed.

26. It was an implied term of the agreement between the parties that the standard security granted by the pursuer in favour of the defender would be discharged upon repayment to the defender of the sum of £220,000 and transfer of the title to Caldonia by the pursuer to Caldonia Developments Limited. It was not a pre-condition of the discharge of the standard security that Caldonia Developments Limited would grant a standard security in favour of the defender.

27. With the knowledge and acquiescence of the defender, the pursuer relied on the agreement that the title to Caldonia would be registered in name of Caldonia Developments Limited and that the standard security would be discharged upon that event occurring in doing the following, namely (1) granting the standard security; (2) accepting the funds from the defender; (3) acquiring title to Caldonia from his trustee in Sequestration at a price considerably in excess of the highest valuation that he had received for the property. His position was materially affected. If the defender were to withdraw from the agreement regarding registration of the title to Caldonia in name of Caldonia Investments Limited and discharge of the standard security the pursuer would be adversely affected to a material

extent in that (a) he would remain registered proprietor of Caldonia, the value of which is considerably less than the price paid for it, and he would have a liability to maintain it and to pay council tax in respect of it; (b) he would have a personal obligation to pay the sum of £930,000 to the defender regardless of the considerably lower value of Caldonia; (c) he would have a personal obligation to cover any shortfall arising upon sale of Caldonia following call-up of the standard security.

28. The pursuer signed a disposition by him in favour of Caldonia Investments Limited and delivered the same to the defender. By this time the sum of £220,000 had been repaid to the defender by the pursuer. The defender refused to settle the LBTT due on the transaction; to register the disposition; and to grant a discharge of the standard security.

29. The defender has sought to attach conditions over and above transfer of the title to Caldonia to Caldonia Developments Limited to the grant of a discharge of the standard security by him. None of these conditions is warranted by the agreement between the parties.

30. The defender has lost interest in the project and wishes to back out of his agreement with the pursuer for the development of Caldonia and to recover his investment of £930,000.

31. The defender instructed the dissolution of Caldonia Developments Limited without the knowledge or consent of the pursuer. Caldonia Developments Limited was subsequently restored to the Register of Companies upon application by the pursuer to this court.

32. The defender has called up the standard security, prompting the pursuer to raise these proceedings.

33. The standard security has been produced in this process.

Finds in fact and law as follows:

1. No fraud has been perpetrated by the defender or Douglas Burnett by registering the standard security granted by the pursuer in favour of the defender.
2. The parties as the controlling minds of Caldonia Developments Limited having agreed that title to Caldonia be vested in Caldonia Developments limited, that company is to be taken as having consented to title to Caldonia being so vested.
3. The defender has an obligation to register the disposition in favour of Caldonia Developments Limited after funding payment of the associated costs, including LBTT and registration dues.
4. The defender has an obligation to grant a discharge of the standard security granted by the pursuer in his favour and registered on 9 November 2020 once the disposition in favour of Caldonia Developments Limited has been registered.
5. The defender's actions in refusing to pay LBTT and register the disposition in favour of Caldonia Developments Limited and thereafter calling up the standard security represent an illegitimate attempt by the defender to withdraw from the agreement between the parties for the acquisition and development of Caldonia.
6. The agreement between the parties relating to the registration of title to Caldonia in name of Caldonia Developments Limited and discharge of the standard security is a contract falling within section 1(2)(a) of the Requirements of Writing (Scotland) Act 1995. In terms of sections 1(3) and 1(4) of the said Act the defender is not entitled to withdraw from that agreement on the ground that it is not constituted in writing.

THEREFORE:

Repels the pursuer's first plea in law and assoilzies the defender from the pursuer's first crave (in so far as that has not been implemented); Sustains the pursuer's sixth plea in law and Ordains the defender to grant a discharge of the standard security granted by the pursuer in favour of the defender and registered on 9 November 2020 under Title Number ABN95368 within a period of seven days following the registration of the disposition by the pursuer in favour of Caldonia Developments Limited, all in terms of the pursuer's second crave; sustains the pursuer's second plea in law and Interdicts the defender from taking any steps to exercise any remedies that would otherwise be available to the defender arising from non-compliance with the Calling-Up notice dated 14 February 2023 served in relation to the standard security granted by the pursuer in favour of the defender and registered on 9 November 2020 over subjects known as Caldonia, Malcolm Road, Peterculter, Aberdeen AB14 0NX registered in the Land Register of Scotland under Title Number ABN95368 (which erroneously describes the postcode as AB1 0NX) or otherwise exercising any rights the defender derives from the standard security, all in terms of the pursuer's third crave; sustains the pursuer's fourth plea in law and Ordains the defender to register a disposition of the pursuer's right, title and interest to the said heritable property in favour of Caldonia Developments Limited, all in terms of the pursuer's fourth crave; sustains the pursuer's fifth plea in law and Ordains the defender to pay any Land and Buildings Transaction Tax payable on the transfer of the pursuer's right, title and interest to the said heritable property in favour of Caldonia Developments Limited, all in terms of the pursuer's fifth crave; Repels all other pleas in law of the parties, including their preliminary pleas for want of insistence; Reserves the question of expenses and fixes 7 June 2024 at 9:30am via Webex as a hearing thereon;

FOR THE AVOIDANCE OF DOUBT, NEITHER PARTIES NOR AGENTS SHOULD ATTEND AT COURT IN PERSON AS THIS HEARING IS PROCEEDING BY VIDEO LINK USING THE CISCO WEBEX VIDEO PLATFORM;

Parties should e-mail the Sheriff Clerk at aberdeencivilteam@scotcourts.gov.uk not later than 4pm two working days prior to the said hearing with their e-mail and telephone contact details in order to make arrangements for the hearing and with their written submissions, or alternatively a joint, agreed position with regard to the orders sought at the hearing, for consideration by the Sheriff.

NOTE

Introduction

[1] This action arises out of a joint venture entered into by the parties, both property developers, relating to the acquisition of subjects known as Caldonia, Malcolm Road, Peterculter (hereafter "Caldonia") from the pursuer's trustee in sequestration and the proposed subsequent development thereof for profit. The property was owned by the pursuer as at the date of his sequestration and vested in the trustee in sequestration as at that date.

[2] The dispute centres around whether or not the defender is obliged to register a disposition of the property by the pursuer in favour of a limited company known as Caldonia Developments Limited; whether or not the defender is obliged to fund associated costs such as Land and Buildings Transaction Tax and registration dues; and whether a standard security granted by the pursuer in favour of the defender to secure the purchase price of Caldonia falls to be reduced on the ground of fraudulent misrepresentation or, alternatively, whether or not the defender is bound to grant a discharge thereof.

[3] The pursuer also seeks interdict to prevent the defender proceeding with a calling up of the standard security.

The proof

The witnesses etc

[4] I heard evidence over 3 days between 4 and 6 March 2024. Although the proof was set down as a proof before answer neither party made any submissions in support of their preliminary pleas and for the sake of good order I have repelled these for want of insistence.

[5] Both parties gave evidence. In addition, the pursuer called Gordon MacLure, his trustee in sequestration, Gemma Perfect, a solicitor and Graeme Ross, a retired business development manager, to give evidence. In addition, the defender called his solicitor Douglas Burnett to give evidence. All of the witnesses had previously sworn an affidavit or provided a signed statement of their evidence and they supplemented these with their oral evidence.

[6] In addition, parties entered into a joint minute of admissions in terms of which, *inter alia*, they agreed that witness statements provided by William Young and Barney Crockett would stand as their evidence in chief without need for cross examination and without the necessity for their attendance at proof.

Credibility and reliability

[7] I did not find the defender to be credible and reliable. It became perfectly clear during his evidence that he no longer wished to be involved in the joint project with the pursuer and his whole focus was on recovering the money which he had put up in order to acquire Caldonia. He doggedly maintained that he had put up the money as a loan to the

pursuer and was unwilling to countenance any contrary suggestion. The defender's stance was wholly at odds with the other evidence which clearly suggested that the purpose of his putting up the money was not to earn a return from interest payments on a loan to the pursuer but to allow him to share in the capital appreciation of Caldonia which would result from its development. His evidence seemed to me to be self-serving and calculated towards achieving return of his money and nothing else. For the foregoing reasons I treated the defender's evidence with caution and was prepared to accept his evidence only when it coincided with other evidence which I accepted.

[8] I found the remaining witnesses who gave evidence in court to be credible in that they were doing their best to assist the court. None of them, however, could be said to be wholly reliable, which is understandable given that they were recalling events involving quite fluid discussions which had taken place some time ago. I treated all of the evidence with care. The evidence of William Young and Barney Crockett was not particularly relevant to the issues in dispute in this action.

The evidence

[9] Rather than rehearse the evidence in detail I have, for the sake of brevity, chosen to structure this note by discussing the principal issues in dispute and setting out my conclusions having regard to the evidence only as necessary.

Counsels' submissions

[10] Counsel's written submissions are in process. They supplemented these with oral submissions at a hearing on 28 March 2024. Oral submissions did not depart to any significant extent from the written submissions. I found Counsels' submissions to be

extremely helpful and I am grateful to both for the care that they took in their preparation and, I should say, for the care they took in the presentation and conduct of the proof.

Counsel will, I hope, forgive me for not setting out their submissions in detail. As already indicated I have chosen to structure this note by discussing the principal issues in dispute and setting out my conclusions. I have referred to submissions only where necessary.

The general framework of the agreement between the parties

[11] I do not think that it was controversial that the parties had agreed that Caldonia would be acquired with money put up by the defender; that a limited company known as Caldonia Developments Limited would be formed and that title to Caldonia would ultimately be vested in it; that title to Caldonia would initially re-vest in the pursuer before being transferred to the limited company; that the parties would each have a 50% shareholding in the limited company; that the parties would seek to develop Caldonia by obtaining planning permission for the erection thereon of a small housing development and that the defender would take the lead in that process employing the skills, experience and contacts which he had built up in that area of expertise; and that the profit from developing Caldonia, after repayment to the parties of their financial contributions to the project would be split equally between the parties through the vehicle of their shareholdings in the limited company.

Disputed issues

Does the standard security granted by the pursuer and registered by Douglas Burnett fall to be reduced on account of a fraudulent misrepresentation?

[12] This was perhaps the most significant dispute between the parties, not least because if there was a fraudulent misrepresentation it could have a seriously detrimental impact on Douglas Burnett's reputation and standing as a solicitor.

[13] I could only hold there to have been fraud if there was the clearest of evidence to that effect. The evidence which I heard did not clearly establish that there had been a fraud. In fact, I am satisfied that no fraud was perpetrated by either the defender or Mr Burnett.

[14] There is no doubt that the defender, through Douglas Burnett, sought a standard security from the pursuer to secure the sum of £930,000 in the period between the pursuer acquiring title to Caldonia from his trustee in sequestration and the pursuer then transferring title to Caldonia Developments Limited. It was sought to provide security in the event that some event were to occur - being "hit by a bus" was the phrase that was used - which would prevent the pursuer transferring title to the limited company. There is no doubt that the pursuer, after initial reluctance, agreed to grant such a standard security. There is no doubt that Mr Burnett indicated and thus undertook that such a standard security would not be registered except upon such an event occurring.

[15] However, it is crucial to understand that the security which was eventually signed by the pursuer and registered by Mr Burnett was not the standard security that was in contemplation when the undertaking was given.

[16] The standard security eventually granted and registered was for a higher sum including a bridging loan by the defender to the pursuer in the sum of £220,000 to enable the pursuer to pay the price of Northlasts in the absence of the funding from Barclay's Bank and

thus preserve the deal for the purchase of Caldonia and Northlasts as a single transaction with the trustee in sequestration.

[17] There was a dispute as to whether the additional funding by the defender had been agreed prior to the discussion on the standard security in respect of which Mr Burnett gave the undertaking. Mr Ross said in his signed statement that it was, but all of his discussion about the undertaking was in reference solely to Caldonia and about the need to safeguard the funds put up for Caldonia pending transfer of title to the limited company. Having observed Mr Burnett in the witness box I simply do not find it credible that he would have given an undertaking not to register a standard security that included what was indisputably a loan in respect of Northlasts. It is simply not credible that Mr Burnett would have committed a fraud by registering a standard security in respect of which he had given such an undertaking.

[18] I prefer the evidence which suggests that the agreement between parties for the additional funding to be put up by the defender was not agreed, or finally agreed, until after the meeting on 30 October 2020. I can refer to an email from Douglas Burnett to Gemma Perfect dated 1 November 2020 in which he refers to the pursuer having to get more funds from the defender.

[19] It follows that Mr Burnett was perfectly entitled to register the standard security which was eventually signed by the pursuer (and, it has to be noticed, prepared by Gemma Perfect on his behalf). There was no fraud committed by the defender or by Mr Burnett. The standard security does not fall to be reduced on that account.

Responsibility for LBTT and associated costs of acquisition of Caldonia

[20] I am satisfied on the evidence of the pursuer and Mr Ross that the defender agreed to meet the costs of acquiring Caldonia. He was in a much better financial position to do so than the pursuer. The agreement between the parties was that title to Caldonia would be transferred to the limited company immediately upon its being re-vested in the pursuer. Title could become vested in the limited company only if a disposition by the pursuer in its favour was registered in the land register. The disposition could be registered in the land register only if LBTT and any other relevant taxes and the registration dues were paid. The defender's agreement to fund the acquisition of Caldonia by the limited company necessarily carried with it an agreement to fund the associated costs without payment of which there could be no acquisition by the company.

[21] The pursuer and Mr Ross gave evidence, which I accept, that the defender specifically agreed to meet the associated costs but even in the absence of such evidence I would have held that settlement of the associated costs by the defender was a necessary implication of his agreement to fund the acquisition.

[22] The defender's counsel pointed to an email from Gemma Perfect to Douglas Burnett on 2 November 2020 in which Gemma Perfect said that parties "had agreed to take the LBTT on the chin". He maintained that this evidenced that the parties had agreed to be equally responsible for LBTT. I do not accept that what was said in that email bears the interpretation put on it by defender's counsel. All that can be taken from that email is that whereas parties had hoped that LBTT might be avoided they now accepted that it would have to be paid. It says nothing about who was to be responsible for funding LBTT. LBTT is, in fact, a liability of the limited company upon transfer of title of Caldonia by the pursuer to the limited company. The parties as the directing minds of the company were simply

acknowledging that that liability would have to be paid. That does not detract from the fact that the defender had agreed to fund it as part of the associated costs of acquisition.

[23] Like the purchase price of Caldonia, the acquisition costs, if funded by the defender, would effectively be a loan by the defender to the limited company. In answer to a question from the bench during his evidence the defender accepted that such a loan would most probably be recorded in the books of the limited company as a director's loan.

[24] The defender is obliged to fund the costs associated with the acquisition of Caldonia by Caldonia Investments Limited, including LBTT and registration dues.

Is the defender obliged to register the disposition transferring title to Caldonia by the pursuer in favour of Caldonia Developments Limited?

[25] I do not think that it has ever been disputed that parties agreed that title to Caldonia was to be vested in Caldonia Developments Limited. Since the defender is obliged to fund the associated costs to enable that to happen it is logical that it should be the defender who should register the relevant disposition.

[26] The defender disputed his liability to register the disposition on the ground that he had not undertaken to fund the associated costs. I have already dealt with that issue. He did undertake to fund those costs and he is bound to do so.

[27] The defender's counsel also maintained that there was a further barrier to the registration of the disposition in favour of Caldonia Developments Limited, namely that such would require the consent of the limited company as a separate legal entity, if for no other reason than that it would be taking on a liability as owner of the property for payment of council tax and the like. I do not consider that counsel's argument in that regard is tenable. A limited company can only act through the controlling minds of its

directors and shareholders. The parties are the sole shareholders and directors of the company. They have agreed that title to Caldonia is to be vested in the company. It cannot be other than that the limited company concurs in that agreement. The limited company cannot, separately from the position agreed and adopted by its controlling minds, refuse to accept the registration of the disposition in its favour.

[28] Although I am not entirely clear as to the defender's counsel's submissions on the following point in relation to the disposition, to the extent that he resisted registration of the disposition in reliance upon the terms of the Requirements of Writing (Scotland) Act 1995 any such argument is untenable. The agreement for transfer of title to the limited company is a contract which falls within section 2(1)(a) of the 1995 Act. Sections 2(3) and 2(4) of that Act effectively provide a relaxation of the rule that such contracts require to be in writing by providing that if a party to the contract has acted in reliance on the contract with the knowledge and acquiescence of the other party and has thereby been affected to a material extent and would be adversely affected to a material extent as a result of withdrawal from the contract by the other party, that other party is not entitled to withdraw from the contract and the contract is not to be regarded as invalid.

[29] It could not be clearer that the pursuer acted in reliance upon the agreement that title to Caldonia would ultimately be vested in Caldonia Developments Limited. He accepted the defender's money and used it to acquire title to the property from his trustee in sequestration with a view to immediately transferring title to the limited company. He has thereby been affected to a material extent in that he has become owner of the property at a price considerably higher than valuation and will remain owner until the transfer to the limited company has taken place. It would be completely at odds with the evidence for the defender to maintain that the pursuer acted in that way without his knowledge and

acquiescence. If the defender were now allowed to withdraw from the agreement between the parties the pursuer would be adversely affected to a material extent in that he would be the owner of a property, the value of which is much less than the price paid for it, and he would have all of the liabilities of an owner in respect of the property, not to mention his obligations in terms of the standard security granted by him in favour of the defender.

[30] The defender is obliged to register the disposition in implement of the agreement between the parties.

Does the standard security granted by the pursuer in favour of the defender fall to be discharged upon registration of the disposition in favour of Caldonia Developments Limited?

[31] The defender resists the discharge of the standard security on more than one ground. Firstly, he maintains that the pursuer is bound by the terms of the standard security that he signed. The standard security states that the money secured by it falls to be repaid "when requested to do so", that is on demand. He has demanded repayment of the money by serving the calling up notice. The calling up notice has not been complied with. It would be contrary to the express terms of the standard security that it be discharged without the defender having received repayment of the money secured by it.

[32] This completely fails to take account of the agreement between the parties that title to Caldonia was to be transferred to the limited company. I have already indicated that the advance of monies by the defender to the pursuer did not constitute a loan by the defender to the pursuer. The advance of monies was a necessary prerequisite of the pursuer obtaining title to the property from his trustee in sequestration with the intention, expressly agreed between the parties, that title be thereafter transferred to the limited company. If

anything, the advance of monies by the defender constituted a loan to the limited company which in all probability would be documented as a director's loan within the books of the company. The defender confirmed in evidence that there was no intention that the pursuer should be personally liable for any shortfall in the event of a sale of the property under the standard security. It follows that it was an implied term of the contract between the parties that the standard security should be discharged upon transfer of title to the limited company.

[33] The standard security was intended to serve two purposes. The first was to secure the loan of £220,000 made by the defender to the pursuer in respect of the purchase price of Northlasts. The second was to protect the defender's investment of £930,000 in the event that the pursuer "was hit by a bus" and thereby unable to transfer title to Caldonia to the limited company. The loan in respect of Northlasts has been repaid. The pursuer has signed and delivered to the defender a disposition of Caldonia in favour of the limited company. I have already indicated why I have concluded that the defender is bound to register that disposition. There remains no purpose to the standard security and it ought to be discharged. At the very least it was an implied term of the contract between the parties that the standard security should be discharged upon transfer of title to the limited company.

[34] The defender's counsel resisted discharge of the standard security on the ground that any variation of the basis upon which the standard security should be discharged required a contract that was in writing in terms of section 1 of the Requirements of Writing (Scotland) Act 1995. Counsel appeared to maintain that such a contract fell within section 1(2)(b) of the Act and was a contract in respect of which there could be no relaxation of the rule that it be in writing. I am clearly of the view that such a contract falls within section 1(2)(a) of the Act.

As already indicated, sections 1(3) and 1(4) of the Act provided such a relaxation. The requirements of those subsections are easily met in this case.

[35] In reliance on the contract the pursuer signed the standard security, thereby making himself personally liable for repayment of the money to the defender and altering his position to a material extent. It would be completely at odds with the evidence for the defender to maintain that the pursuer acted in that way without his knowledge and acquiescence. If the defender were allowed to withdraw from the contract the pursuer would be adversely affected to a material extent in that (a) he would have a personal obligation to pay the sum of £930,000 to the defender regardless of the considerably lower value of Caldonia; (b) he would have a personal obligation to cover any shortfall arising upon sale of Caldonia following call-up of the standard security. The terms of the 1995 Act are of no avail to the defender.

[36] The defender resisted discharge of the standard security on the ground that it had been agreed that the limited company would grant a standard security in his favour once title to Caldonia had been transferred to it and that therefore the standard security ought not to be discharged until the replacement standard security has been granted. The defender, through Mr Burnett, further insisted as a precondition for the discharge of the standard security that the pursuer grant in his favour a personal bond for £30,000. Resolution of these issues depends on my assessment of the reliability of Mr Burnett.

[37] Unlike Mr Ross, who was effectively a neutral party and had no reason to support the pursuer rather than the defender, Mr Burnett could not be regarded as completely impartial. I therefore took some care in assessing Mr Burnett's reliability. There was a sharp dispute between the witnesses as to whether what can be regarded as the most crucial meeting between the parties, attended by Mr Ross and Mr Burnett, had taken place on

29 October 2020 or 30 October 2020. Mr Burnett had the date of the meeting as 29 October whereas the pursuer and Mr Ross had it as 30 October.

[38] I accepted the evidence of Mr Ross that the instruction for the incorporation of the limited company was given to Gemma Perfect from that meeting and that paperwork relating to the incorporation was sent out by email that same day. Gemma Perfect's email with the paperwork was dated 30 October 2020. Mr Burnett thought that the meeting was on 29 October because that is the date of his note of that meeting which he had written on a diary page for that date.

[39] That note seemed to me to be a narrative or resume of what was agreed at the meeting rather than notes taken contemporaneously as the meeting progressed. I consider it to be probable that Mr Burnett prepared the note some time after the meeting, misremembered the date and mistakenly chose the wrong date. For all of these reasons I considered Mr Burnett's evidence of what was discussed and agreed at the meeting was less reliable than that of Mr Ross.

[40] Whether or not there was agreement reached at the meeting of 30 October that the limited company would grant a standard security in favour of the defender to secure his advance of £930,000 once the title to the property was transferred to the limited company was a matter in dispute. I prefer the evidence of the pursuer and Mr Ross that it was not. There is no doubt that Mr Burnett drafted such a standard security and attached it to his email of 1 November 2020 to Gemma Perfect. Whilst this might suggest that the grant of a standard security was agreed I consider it to be more probable that, like the idea of a personal bond (which Mr Burnett agreed in evidence was simply something that he thought was a good idea), this was something that Mr Burnett simply considered to be a good idea for the protection of the defender and that when he came to prepare his note of the

30 October meeting he took it that his having attached the draft standard security to his email to Gemma Perfect signified that it had been discussed and agreed.

[41] Digressing slightly, it appears to me that there is no pressing need for the defender's investment in the limited company to be protected by way of a standard security. It seems to me that there is adequate protection if the property is vested in the limited company, of which the defender is a director and 50% shareholder along with the pursuer, and if the defender's investment is recorded in the books of the company as a director's loan. This should ensure that, as agreed between the parties, the defender's investment is repaid before any profits from the development of Caldonia are divided between the parties by virtue of their respective shareholdings. The defender agreed with a suggestion put to him by his counsel that the pursuer, as a director of the company, could engineer a sale by the limited company of the property without the knowledge or consent of the defender and that that meant that a standard security by the limited company in his favour would be a necessary protection in that event. I consider it to be highly unlikely that the pursuer would be able to engineer a sale of the property without the knowledge and consent of the defender.

[42] In any event, even if the idea of a standard security by the limited company in favour of the defender had been discussed at the meeting its terms had never been agreed. As drafted, the standard security did not reflect the agreement between the parties as to the development of the property and repayment of advances from profits. It follows that the grant of a standard security by the limited company to the defender was not made a precondition of the discharge of the standard security by the pursuer in favour of the defender on transfer of title to the property to the limited company.

[43] The standard security, in so far as it secured the advance in respect of the purchase price of the property, was intended only to provide the defender with the right to

repayment on demand in the event that for some supervening reason the pursuer became unable to transfer title to the property to the limited company. That was the basis upon which the standard security, in so far as it related to Caldonia, was sought and that was the basis upon which it was granted. There was never any agreement that in ordinary course the defender would have the right to repayment on demand and that the pursuer would have a personal obligation to make up any shortfall arising upon the enforced sale of the property. There may have been no express agreement between the parties that the standard security would be discharged upon transfer of the title to the property to the limited company but it is an inevitable inference that that would be so.

[44] The defender is bound to grant a discharge of the standard security.

The agricultural tenancy

[45] There was evidence that both Caldonia and Northlasts were affected by an agricultural tenancy which had been granted by the pursuer in favour of his now deceased father. There was a dispute as to whether or not the defender knew of the existence of that tenancy before he agreed to invest in the joint venture between the parties. On this point I prefer the evidence of the pursuer and Mr Ross to that of the defender, namely that the defender was advised, and knew, of the agricultural tenancy.

[46] There was no extensive discussion about the effect of the agricultural tenancy in the evidence. It is academic because the defender knew of its existence when he agreed to the joint venture, but the pursuer indicated in his evidence that he “controlled the tenant” and I took it from that that his intention was to ensure that Caldonia was freed from that tenancy. Certainly that would be as much in his interests as in the interests of the defender. Despite asserting that he did not know about the agricultural tenancy and that he would not

have entered into the joint venture with the pursuer if he had known about it, the defender has no counterclaim seeking any relevant remedy in that respect.

A general consideration

[47] It is clear that the parties have not agreed all aspects of the joint venture between them. Further discussion and agreement will be required to take the joint venture forward if that is what they wish. However, the aspects of that joint venture with which this litigation has been concerned form a discrete and severable part of that joint venture. I am satisfied that agreement on such further aspects of the joint venture were not a precondition to a binding contract on the issues with which this action is concerned (see *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG* [2010] 1 WLR 753 at paragraph 45). It is no bar to the grant of the remedies which the pursuer seeks that there remain aspects of the joint venture yet to be discussed and agreed.

Disposal

[48] For all of the foregoing reasons I have granted all of the pursuer's craves with the exception of his first crave.

Expenses

[49] There was no final discussion regarding expenses. I have fixed a hearing to determine that issue, although it might appear that it should be a simple matter of expenses following success. If parties can agree the issue they should advise the clerk of court and the matter can be dealt with administratively.