OUTER HOUSE, COURT OF SESSION

[2020] CSOH 96

CA163/19

OPINION OF LORD CLARK

In the cause

ROBERT GORDON KIDD

Pursuer

against

(FIRST) LIME ROCK MANAGEMENT LLP; (SECOND) LIME ROCK MANAGEMENT LP; (THIRD) LIME ROCK PARTNERS V, LP; (FOURTH) HAMISH HECTOR LAWRENCE ROSS; (FIFTH) JASON SMITH; (SIXTH) LEDINGHAM CHALMERS LLP; (SEVENTH) MALCOLM LAING; and (EIGHTH) RODNEY ALPHONSIOUS MAGILL HUTCHISON

Defender

Pursuer: Smith QC, Johnston QC, MacLeod; Harper MacLeod LLP
First to fifth defenders: McBrearty QC, McKenzie; Gilson Gray LLP
Sixth to eighth defenders: Dunlop QC, Paterson; CMS LLP

27 November 2020

Introduction

[1] In this action, the pursuer claims damages in the sum of $210m for loss said to have been suffered as a result of actings by the defenders, including an alleged conspiracy to facilitate a breach of fiduciary duty by another individual. At the material time, that individual was a solicitor and member of the firm Paull & Williamsons LLP ("P&W") which later merged with another firm and became Burness Paull LLP ("BP"). In a previous action, the pursuer sued P&W and BP for $210m in damages, for loss said have been suffered as a

result of the conduct of that individual. The action against P&W/BP was settled. In the present case, among other things, the defenders contend: firstly, that the current action is incompetent, on the basis that the previous claim was for the same loss and a settlement was reached in full satisfaction of that loss; secondly, that the pursuer's averments on the alleged wrongdoing are lacking in specification and are irrelevant; and, thirdly, that the pursuer's claim has been extinguished by prescription and there are no relevant averments contesting that position. The action called before me for a debate on these three issues.

Background

The transaction

[2] The pursuer was formerly the sole shareholder of ITS Tubular Services (Holdings) Limited ("ITS"), a company incorporated in Scotland. ITS and its subsidiary companies operated in the oil industry. In 2007, the pursuer resolved to sell part of his shareholding. ITS then employed two new directors, one of whom was Mr Jeff Corray, who was appointed as CEO of the company on 1 October 2007. Mr Corray was authorised to identify potential investors. In February 2008, the pursuer and ITS jointly instructed P&W to represent their interests in negotiation of the terms and implementation of any agreement reached with any proposed investor. P&W accepted instructions to act for both. Mr Kenneth Gordon, a solicitor and member of P&W, dealt with the matter. In due course, the Lime Rock Group ("Lime Rock") expressed an interest in purchasing shares from the pursuer. On 26 September 2009 the pursuer sold part of his shareholding in ITS to a company (the third defender in the present action) within Lime Rock. Following the completion of the share purchase transaction, the operational performance of ITS deteriorated. On 19 April 2013, ITS went into administration.

The pursuer's action against P&W/BP

[3] For some time prior to 2009 entities within Lime Rock had been clients of P&W and in particular of Mr Gordon. The pursuer was not aware of the relationship between P&W or Mr Gordon and Lime Rock. In December 2012, P&W entered into the merger, noted above, and BP was created. In 2015, the pursuer raised a commercial action against P&W and BP. The background to the case and the parties' respective contentions are set out comprehensively in the Opinion of Lord Tyre: *Kidd* v *Paull & Williamson LLP* 2018 SC 221. The pursuer contended that there had been fraudulent misrepresentation, breach of fiduciary duty and professional negligence. In broad terms, the claim proceeded on the basis that Lime Rock, like the pursuer and ITS, was a long-standing client of P&W and its predecessor. The pursuer averred that it was not open to P&W to act for Lime Rock in respect of the proposed transaction. He averred that Mr Gordon was at all times aware of the improper nature of his conduct, and for that reason acted covertly, taking active steps to conceal what he was doing from the pursuer and ITS. In particular, it is said that he arranged for solicitors from Ledingham Chalmers to "front" the negotiation on behalf of Lime Rock, while himself providing advice, so as to convey the impression that Lime Rock were being advised by (and only by) Ledingham Chalmers, and so as to conceal the fact that Mr Gordon was advising them. The pursuer sought $210m in damages or as equitable compensation. After a debate, Lord Tyre held that the averments alleging fraudulent misrepresentation were irrelevant. A diet of proof was fixed on the remaining issues. Shortly prior to the proof, the defenders in the action produced documents which the pursuer alleged showed that Mr Gordon intended to act on both sides of the proposed transaction and that he had concealed this and acted (as had been referred to in an email from Mr Gordon) as "unofficial counsel" to Lime Rock. The defenders denied substantial

parts of the pursuer's averments but, following upon production of the documents, nevertheless accepted that the actions of Mr Gordon caused a conflict of interest. In relation to causation and loss, the pursuer averred *inter alia* that under Lime Rock's management the business of ITS deteriorated and he lost the entire value of his interest in ITS. Had he been made aware of the conflict of interest, he would not have proceeded with the transaction and the value of his interest would not have been impaired. As a result:

> "…the pursuer would have achieved an exit at full value of about $220m no later than the end of 2011 (or, but for the involvement of Lime Rock, for substantial value at any point in time prior to the appointment of the administrators). But for the involvement of Lime Rock, ITS would not have been placed into administration, and the pursuer would have concluded a voluntary sale of the company at a price reflective of its unimpaired value."

Under the transaction (in which he transferred 34% of his shareholding to Lime Rock) he had received a cash payment of $10m. Deducting that from the market value of his whole shareholding, now said to have been lost, resulted in the claim for $210m.

The settlement agreement

[4] In February 2018 a settlement agreement was reached between the pursuer, P&W and BP. The pursuer had also raised separate proceedings against Mr Corray, in a commercial action and a petition. The action against Mr Corray sought damages in the sum of $210m, for the same loss, alleging breaches of fiduciary duty and negligence in his capacity as an agent for the pursuer. The petition was brought under section 1 of the Administration of Justice (Scotland) Act 1972 seeking recovery of documents and in addition to Mr Corray the respondents included the first and fourth defenders in the present action.

[5] The relevant provisions of the "Confidential Settlement Agreement" between the pursuer, P&W and BP are as follows:

"WHEREAS:-

1. The Pursuer has raised proceedings against the Defenders at the Court of Session, Edinburgh, under Court reference number CA211/2015 (hereinafter "the Primary Action")
2. The pursuer has also raised proceedings against Jeffery Corray (hereinafter "Corray") at the Court of Session, Edinburgh, under (i) Court reference number CA9/16 (hereinafter "the Corray action") and (ii) P826/15 (hereinafter "the Corray petition").
3. Parties have agreed to terms for the full and final settlement of the Primary Action and wish to record the terms of settlement on a binding basis in this Settlement Agreement.

AGREED TERMS

1. DEFINITIONS AND INTERPRETATION

In this Settlement Agreement, unless the context otherwise requires, the following words and expressions have the following meanings:

"**Close Family Members**" means the Pursuer's wife, sister, brother in law, children and the spouses or civil partners of his children

"**Related Parties**" means in respect of any party to this Settlement Agreement any parents, subsidiaries, affiliated entities, all related corporate and operating entities, successors, transferees, representatives, principals, agents, officers, partners, members, employees or directors of that party.

"**The Parties**" means the pursuer, the first and second defenders, and the former partnership of Paull & Williamsons and the various partners thereof from time to time.

"**The Proceedings**" means the Primary Action, the Corray Action and the Corray Petition.

2. SETTLEMENT TERMS AND RELEASE AND AGREEMENT NOT TO SUE OR APPEAL

2.1 Without any admission or acceptance of liability on the part of the Parties or any of their Related Parties, the following settlement terms have been agreed, in particular in return for the release and agreement not to sue set out in this clause.

2.2 Subject to the terms of clause 2.6, the Defenders will pay to the Pursuer the sum of £19million, such payment to be made by ~~same day~~ bank transfer to the client account of the Pursuer's solicitors, Levy & McRae Solicitors LLP. Payment will be made by 21st February 2018, failing which interest will run thereon from that date at the rate of 8% a year.

2.3 The Pursuer and Defenders will share equally between them the cost of the instruction of McNeill & Cadzow relative to the preparation of the electronic bundle to be used at the proof in the Primary Action.

2.4 No other sum of money, whether referable to damages, interest, expenses or otherwise, is payable as between the Parties. In particular, to the extent that they have not already been paid, any awards of expenses in favour of any party hereto are hereby waived irrevocably. For the avoidance of doubt no party shall be obliged to repay any sum already paid in respect of an award of expenses.

2.5 This Settlement Agreement is entered into in full and final settlement of, and the Parties hereby irrevocably release and forever discharge, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether in law or equity and whether or not presently known to the Parties which the Parties and/or their Related Parties or any of them ever had, may have or hereafter can, shall or may have against each other, arising out of or connected with the Proceedings and/or the underlying facts relating to the Proceedings (all of which are hereinafter referred to as the "**Released Claims**").

2.6 The Parties warrant and represent to each other that they have not assigned or transferred of [*sic*] any action, claim, right or demand or other matter relating to the Released Claims, and they hereby acknowledge that the warranty and representation made under this clause 2.6 by the pursuer is a condition precedent to the Defenders obligation to make payment to the Pursuer in terms of clause 2.2. For the avoidance of doubt, the Pursuer shall be at liberty to assign the right to payment arising under clause 2.2 hereof.

3. PURSUER WARRANTIES AND UNDERTAKING

The Pursuer hereby warrants and undertakes that

3.1 he is not presently aware of having any claims or rights of action against the Defenders or the former partnership of Paull & Williamsons and the various partners thereof from time to time;

3.2 without prejudice to his entitlement to negotiate with Corray on the terms relating thereto regarding the question of expenses, he will not further pursue the Corray Action or the Corray Petition and rather will abandon or otherwise bring to a conclusion same by no later than 10th July 2018 without any demand for payment being made of or accepted from Corray, and will if requested to do so exhibit such documents as may reasonably be required to vouch that he has done so."

The agreement goes on to deal with other matters, including confidentiality, the terms of a press release, severance, an entire agreement clause, costs, governing law and jurisdiction. These further provisions are not of any particular relevance for present purposes.

The present action

[6] In this action, raised in December 2018, the pursuer seeks damages in the sum of $210m from the eight defenders, who are said to be jointly and severally liable for the pursuer's loss. The key elements of the pursuer's main averments on alleged wrongdoing are referred to in the section below dealing with relevancy and specification. At this stage, it

suffices to note that the first to fifth defenders are entities and individuals involved in the Lime Rock Group. The sixth defender, Ledingham Chalmers LLP, is said to have been procured by Mr Gordon to act for Lime Rock relative to the negotiations and proposed transaction in early 2009 and the seventh and eighth defenders were partners in that firm. The pursuer avers that all of the defenders were aware that Mr Gordon was acting in breach of his fiduciary duty to the pursuer (and indeed to ITS) and that they conspired to facilitate that breach, to deceive the pursuer by the false representation that each side was being independently advised and to procure, by such fraudulent means, the completion of the transaction. Other related allegations are noted below. In the debate, the arguments were presented for and against the first to fifth defenders, as one group, and the sixth to eighth defenders as another group; no point was taken as to any distinct features of the case against any particular individual defender within either of these groups. In relation to loss and damage, the pursuer avers:

> "As a result of the Defenders conspiring to commit a fraud, the Pursuer has suffered loss and damage. The Pursuer was induced by the wrongful conduct of the Defenders outlined above to complete the transaction. Had they not acted in the wrongful manner condescended upon, he would not have completed the transaction. At the time of completion of the transaction, the Pursuer's shareholding in ITS had a value of at least US $220m. Upon completion of the transaction, his remaining shareholding was virtually worthless on account of the immediate loss of rights…As condescended upon above, the only cash benefit that he had obtained was payment upon completion of the transaction of the sum of US $10m…His losses are therefore measured by the difference in value of his shareholding from the time immediately prior to completion of the Transaction to the time immediately following its completion, less the US $10m he received as cash. That sum is no less, but probably significantly more, than US $210m."

In respect of this alleged loss, the pursuer seeks reparation or, in the alternative, equitable compensation.

[7] At the debate, senior counsel for each group of defenders moved to delete averments and parts of their pleas-in-law alleging abuse of process. On behalf of the pursuer, the court

was advised that the averments on section 11(3) of the Prescription and Limitation (Scotland) Act 1973 were no longer relied upon and should be deleted. These unopposed motions were granted.

Issue 1: Competency

Submissions for the first to fifth defenders

[8] The action was incompetent, because the pursuer had received full satisfaction for the loss he claims to have suffered at the hands of the defenders, via the settlement agreement, with the result that his cause of action against the present defenders has been extinguished. Reference was made to *Erskine's Institute of the Law of Scotland* III.i.15; *Balfour* v *Baird & Sons* 1959 SC 64; *Jameson* v *Central Electricity Generating Board* 2000 1 AC 455; and *Heaton* v *Axa Equity and Law Life Assurance* [2002] 2 AC 329. *Jameson* and *Heaton* were relied upon by the Inner House in *Duncan* v *American Express Services Europe Ltd* 2009 SLT 112. The approach to contractual construction was well-recognised, Reference was made to several authorities on that matter.

[9] The following factual and legal context was of relevance. Firstly, the pursuer's claim in the action against P&W/BP was for $210m, but the defenders in that action contended that nothing was due, on the basis of various arguments as set out in the pleadings. Secondly, as both parties knew, the pursuer had commenced litigation against Mr Corray, also for $210m, relating to Mr Corray's involvement in the transaction. P&W/BP were at risk of a contribution claim being made against them by Mr Corray if that action had been able to continue. Thirdly, again as both parties knew, at the time of the settlement the pursuer was in possession of the key documents ("Inventory Z") and had been since October 2016. Fourthly, there was no suggestion that the pursuer had raised any proceedings or made any

claims against anyone other than Mr Corray in relation to the circumstances in which he had entered into the transaction.

[10] Considered in that context, it was clear from the plain wording of the settlement agreement that the parties to it intended that the sum paid was to be in full satisfaction of the pursuer's claim. It was entered into in "full and final settlement" of the P&W/BP action. That was consistent with the sum paid being in full satisfaction of the pursuer's claim, not partial satisfaction of it. The actual amount of the settlement was not a relevant consideration, because it will have involved concessions on both sides. The pursuer's subjective intention, afterwards expressed, was not relevant. The pursuer agreed not to continue with his action against Mr Corray, the only other person at the time against whom he had made a claim relating to the circumstances in which the transaction was concluded, thereby protecting P&W/BP from a possible contribution claim. This was consistent with the sum paid being in full satisfaction. If the pursuer's interpretation was correct, the defenders could then seek contribution from P&W/BP (and perhaps others). The net result would be that P&W/BP would be involved in litigating in relation to the very same factual issues which they agreed to end their litigation with the pursuer over. That was not a commercially sensible interpretation.

[11] In the absence of any averments as to the factual matrix, no evidence was required for the purposes of properly construing the settlement agreement. That exercise should be done in the context of the pleadings in the earlier action and in the current case. The nature and extent of the loss sought in the earlier action was exactly the same as sought against the present defenders, calculated in exactly the same way. That loss was being sought on the basis that the present defenders are joint wrongdoers alongside Mr Gordon, contributing to the same loss. This was precisely in the same territory as in *Jameson*.

[12] The pursuer's suggestion that the reference in the settlement agreement to Mr Corray points to an intention to continue with claims against other parties had no merit. Further, the absence of an all-encompassing indemnity by the pursuer did not assist. While in one sense it was otiose to include the reference to the claim against Mr Corray, one could understand why, pragmatically, the parties wanted to do so. In *Heaton* there was a known claim against another party and the absence of a mention of that party in the settlement agreement was significant, but the only known claim here was tied-up and dealt with. If anything, the present circumstances were stronger than *Jameson*, which involved concurrent wrongdoers; here they are alleged to be joint wrongdoers.

[13] The pursuer's position that the sum accepted was woefully inadequate when compared to the $210m claimed was of no relevance: *Carrigan* v *Duncan* 1971 SLT (Sh Ct) 33. The pursuer's points that in the action against P&W/BP a limitation clause was pled and that there were difficulties in relation to causation were also of no relevance. The pursuer's only answer was to ask the court to interpret the settlement agreement as amounting to particular satisfaction of his loss, that is, the part of it for which the defenders in the P&W/BP actions were responsible. But the agreement did not bear that interpretation. It was for full and final settlement of the same loss as now claimed.

Submissions for the sixth to eighth defenders

[14] On the pursuer's averments the defenders were joint wrongdoers with Mr Gordon. By the settlement agreement the pursuer discharged *inter alia* Mr Gordon from any claims arising out of or connected with the proceedings, on the basis of payment accepted in full and final settlement of the losses claimed therein. In the present action the pursuer seeks damages for the same loss claimed by him in the P&W/BP action and indeed, the pursuer

seeks to prove his loss by reference to expert evidence obtained for the purposes of the P&W/BP proceedings. Having obtained full satisfaction for his loss in the P&W/BP proceedings, the pursuer may not now pursue the defenders in the present action for the same loss. Reference was made to *Erskine,* III.i.15; *Clark* v *Urquhart and Stacey* [1930] AC 28 and in particular to *Jameson* v *Central Electricity Generating Board*. In that case, Lord Hope had cited, with approval, a line of Scottish authority, including *Balfour* v *Baird & Sons* and *Carrigan* v *Duncan*. The issue fell to be determined by the interpretation of the settlement agreement in its relevant factual context. The losses claimed in the P&W/BP proceedings and the instant case are the same; they are coincident and indivisible. This was in contrast to the position in *Heaton*.

[15] There was nothing within the settlement agreement to suggest that what the pursuer agreed to accept was in partial satisfaction only of his claim for damages. On the contrary, in terms of paragraph 3 of the preamble, it was confirmed that the settlement was a "full and final settlement of" the P&W/BP action. The pursuer, P&W and BP were settling on a "full and final" basis all claims arising out of or connected with that action or the underlying facts relating thereto. The pursuer's averred position that the present action is "based on a different legal basis to that advanced in the first claim" was nothing to the point. If these defenders conspired with Mr Gordon in a breach of fiduciary duty they are jointly and severally liable for the pursuer's loss. If that loss has been repaired, no claim remains. The pursuer also averred that "BP/P&W neither sought nor obtained the release of any other person". Again, that did not assist the pursuer. The pursuer did not expressly reserve any claim in the settlement agreement (see *Dillon* v *Napier, Shanks & Bell* 1893 1 SLT 55). The pursuer had not averred that any other claim or litigation was known to the defenders in the P&W/BP action and thus played any part in the settlement negotiations. The absence of

such knowledge meant those defenders could only expressly provide for the action and petition in respect of Mr Corray. Absent any reservation of right by the pursuer (which would no doubt have been resisted by P&W/BP) the settlement agreement had the effect of discharging those jointly and severally liable for the pursuer's loss. Reference was made to *Jameson* and the views expressed by Lord Clyde (at 474-475).

[16] The pursuer quite plainly agreed to accept what he stipulated as being full compensation for the value of his claim, so as to exhaust any right to pursue it further in any direction. In return, P&W/BP and Mr Gordon were discharged from any possible liability in contribution. Were it otherwise, the result of the raising of this action would be an entitlement on the part of the defenders to seek contribution from P&W/BP and Mr Gordon such that the peace obtained, at substantial cost, from the settlement agreement would count for nothing. The pursuer's averments that the settlement agreement was a negotiated settlement "for significantly less than the true losses sustained by the pursuer" created a *non sequitur*. If the pursuer received full satisfaction it follows that he received what his claim was worth. The pursuer's *ex post facto* protestation that his claim was worth more was nothing to the point: *Carrigan* v *Duncan*. The pursuer relied upon *Steven* v *Broady Norman & Co Ltd* 1928 S.C. 351 but that case did not cover the current situation. The pursuer's claim was thus extinguished when he settled the P&W/BP proceedings and that rendered the present action incompetent.

[17] The submissions on behalf of the other defenders were adopted. Now putting forward a claim for fraudulent conspiracy, in which one of the conspirators was Mr Gordon, did not square with clause 3.1 of the settlement agreement. A defender does not have to obtain an indemnity against a claim in circumstances which are not known and may be

unknowable. *Heaton* did not involve any departure from *Jameson* but involved matters that were distinguishable.

Submissions for the pursuer

[18] The primary position for the pursuer was that he retained the right to proceed with his claim against the current defenders notwithstanding the settlement with P&W/BP. The only issue remaining was whether the settlement was in fact for full value of the claim and not whether it was intended to be for full value. That issue could only be determined after the court considers what the full value of the claim actually is and then gives credit for the principal sum already paid over to the pursuer. If, and only if, the full value of the claim was less than the sum already paid could it be said that the claims against the current defenders were barred. In support of that primary position, particular reliance was placed upon *Steven* v *Broady Norman & Co Ltd* and reference was made to *Duncan* v *American Express Services Europe Limited*. Applying that approach, the fact that the pursuer had obtained a settlement sum in the P&W/BP action by agreement was an irrelevance and failed to address the true issue. The terms of the settlement agreement were nothing to the point. The parties to the present case were in agreement that the current defenders are claimed by the pursuer to be joint and several wrongdoers. As to whether there was in fact payment of the full amount of the losses or even whether there was intended to be complete satisfaction of the debt, there is a clear dispute of fact that cannot be determined without proof: the question could only be answered once it is known how much the pursuer's claim is actually worth. It was acknowledged that if a settlement fully compensates an individual for his losses, he cannot sue another party for that loss. There was no dispute, therefore, with the proposition in *Erskine*, III.i.15, which must be read as a whole. It supported the view that if, and only if,

the damage suffered is in fact compensated fully, the pursuer is barred from making a further claim. That was the view taken in *Steven* v *Broady Norman & Co Ltd*. In the present case the defenders were seeking to introduce into Scots law a rule, derived *inter alia* from *Jameson* v *Central Electricity Generating Board* and *Heaton* v *Axa Equity & Law Life Assurance Society*, that is inflexible and based upon English procedures. *Carrigan* v *Duncan* could be distinguished as being difficult to reconcile with the other authorities.

[19] If that primary submission was not accepted, a useful description of the position in England is contained in *Foskett on Compromise* (9th ed., para 69 *et seq*). Reference was also made to *Watts Count Nikolai Tolstoy-Miloslavaski* v *Baron Aldington* [1999] L & TR 578 and *Ansari* v *Knowles* [2012] EWHC 3137. In the present case the agreement to settle was confidential as between the parties. At no time were the current defenders involved in negotiation of the agreement. The specific reference to abandonment of the action against Mr Corray pointed to consideration being given to the rights of third parties and co-delinquents, but not to those of the current defenders. If the defenders were correct, had the wrongdoing of Mr Gordon been discovered after settlement of the claim against P&W/BP, the pursuer would be unable to sue the joint and several delinquents for a delinquency of which he was unaware. That would be manifestly unjust and wrong and would result in him being barred from making a claim on the basis of waiver of a right he did not know he had. It was clear that in light of both *Jameson* and *Heaton* the courts in England focus upon the question of whether the settlement obtained was intended to be compensation for the full extent of losses. The injustice that *Heaton* mentioned was to avoid a claimant obtaining his losses twice (see *Wright* v *Barts Health NHS Trust* [2016] EWHC 1834 QB; and *Appleby* v *Northern Devon Healthcare NHS Trust* [2012] EWHC 4356).

[20] In the present case, if the court adopted the approach from the English case law, it was plain that the pursuer could not have intended that the settlement was in full satisfaction of his claim to the exclusion of all others. On any view, the settlement sum was woefully inadequate in comparison to the sum sued for and that was supported by expert evidence. The pursuer avers that Lime Rock itself valued the company at over $160m in equity value and in excess of $300m for enterprise value. Moreover, as a matter of contractual interpretation, it was clear that the settlement agreement does not extend to provide a contractual release of the defenders from their liabilities as joint and several delinquents. The defenders are not parties to the compromise and other joint and several delinquents are given an express release; the parties were aware of the contents of Inventory Z, which implicated the defenders as delinquents. In addition, the defenders' position failed to take into account the reality that a negotiated settlement has regard to a number of factors that affect the decision to settle. P&W/BP argued that there was a limit on their liability, albeit that was disputed by the pursuer. The extent of insurance cover was unknown. Causation was in issue as were a number of other matters. The court could not, without proof on such matters, take the view the sheriff had reached in *Carrigan* that the intention in settlement of the first action was the exclusion of all other defenders from later claims. The absence of a reservation of the right to sue others was not relevant. Nothing could be taken from it to suggest that it was intended to discharge the current defenders from claims which could otherwise have been made. It was correct that in answering the question as to whether the pursuer has had his losses met, one should concentrate on what the settlement agreement means. It was absolutely clear that it was designed to regulate rights *in personam* and not *in rem*. It was an illegitimate exercise to ask why P&W/BP would have agreed if it meant they could be drawn back into litigation. The basic rules of construction should be

applied. If it was a bad bargain for P&W/BP, it was a good bargain for Mr Kidd. In terms of context, a party who suffers loss can keep suing until his losses are made good, proceeding against all joint wrongdoers. That was the first basic rule. If he obtains a decree against one, then until that is satisfied in full he is entitled to pursuer the joint wrongdoers. When dealing with settlement, it is if (and only if) the agreement can be taken as either expressly or by clear implication fixing the losses and denouncing any right to claim against a third party that it can be held to be in full satisfaction.

[21] The reasoning in the case of *Jameson* had to be seen in light of the decision in *Heaton*. A party may accept a limited sum for a number of reasons. If the defenders were correct then the pursuer had given up a substantial right. There were parts of the agreement which clearly indicated that all Mr Kidd was doing was settling his differences with the defender and he was not fixing his loss and barring himself from suing any other party for that loss. The recital made clear that this was just a settlement of the former action and not of all claims the pursuer may have for his losses. In the definitions section there was no reference to co-delinquents or co-tortfeasors or anything of that kind. Section 2 made clear that the settlement was in the sum of £20m, to include the £1m interim payment ordered by Lord Tyre. It was simply unknown how this assessed Mr Kidd's loss. The £20m was partly for expenses and for that reason alone one could not say that was discharging his claim. There was no split between losses and expenses. Clause 2.5 was of critical importance. The emphasis is on "each other". It could have said "against any party or co-delinquent" or just left out the reference to each party but it did not. This was just a settlement between these parties and not a measure of the pursuer's loss. As was pointed out by Lord Bingham in *Heaton* (para [9]) there are a number of ways in which the defenders could have protected themselves, not included here. If there had been an indemnity that would point to the

settlement agreement not being about all losses. But there was a warranty and if the present defenders sought a contribution from P&W/BP then P&W/BP could use the warranty. If this agreement was to settle all the claims then the warranty is superfluous. Further, if the claims had been settled in their entirety there would be no need to abandon against Mr Corray. The reference to that matter was because the pursuer had a valid claim against him. This recognised that there was a residual claim and was a direct pointer to the agreement not settling the entire loss of Mr Kidd. The opportunity to take the same point regarding others was not taken.

Reply for the first to fifth defenders

[22] The pursuer's position, that this was an *inter partes* agreement that did not discharge claims against co-delinquents and the pursuer should not be taken as impliedly having given up any right, was a fallacy, as it concentrated upon the giving up of a right. The point for the court was to conclude on a proper consideration of the agreement whether the pursuer obtained full satisfaction. One would not expect to see these defenders mentioned at all. In *Heaton* Lord Bingham was not saying that the very existence of an indemnity meant there is not full satisfaction. There must be a competent further action and a defender in a settlement agreement may want to protect itself from even an incompetent further action. The existence of such a clause did not mean that the settlement was not in full. In the present case, an undertaking was agreed, relating to the single party against whom a claim had been made, Mr Corray. It would be an absurd outcome that there might be another action in respect of which the defenders in the earlier action could be brought back in. The parties had done everything possible to tie down any claims known at the time of settlement agreement. The contribution point was just about testing the commercial

purpose or common sense, not the subjective intention. The court must interpret the agreement as a whole and take into account the commercial purpose of the agreement. There was no requirement for evidence and in particular nothing was needed on the true value of the claim. The question was not whether the pursuer had given up his right; it was whether he has obtained full satisfaction. There was a full and final settlement of the primary action which sought the loss and those words are effectively conclusive.

Reply for the sixth to eighth defenders

[23] The submissions of senior counsel for the other defenders were adopted. The suggestion by senior counsel for the pursuer that the pursuer could keep on suing in serial litigations did not represent the law. It was accepted by the pursuer that serial litigation is not competent if preceded by decree after a proof and it is also not permissible if the decree is after acceptance of a tender. But there was no material difference between a tender and a settlement agreement. There was nothing in the case law suggesting that the court should consider whether the settlement agreement involved renouncing any right to claim against a third party. The only question was whether there has been full satisfaction of the loss. The argument for the pursuer that because the settlement agreement included expenses the plea to competency could never be a good one involved a *non sequitur*. The pursuer could not avoid the jurisprudence by saying that the settlement sum was inclusive of expenses. The emphasis placed upon the words in clause 2.5 "against each other" was a wrong analysis. The question was about full satisfaction. As to the indemnity, one explanation of why there is none is because it was not needed. The parties have settled on a full and final basis and there is no possibility of anyone claiming against anyone else. All that clause 3.1 did was to say there is nothing beyond the primary action. The authorities did not support the

pursuer's position that £19m was inadequate. There was no basis for an inquiry into alleged inadequacy, although the defenders in the case against P&W/BP had an expert report that Mr Kidd had suffered no loss. The argument that there is no express or implied abandonment or waiver again looked at matters the wrong way round.

Issue 1: Decision and reasons

Relevant legal principles

[24] In the primary submission for the pursuer it was argued that the position in Scots law is set out in *Steven* v *Broady Norman & Co Ltd*, where particular views were expressed that ran counter to the position in English law. The defenders here were said to be seeking to introduce into Scotland an inflexible rule which is based upon English procedures and derived from *Jameson* v *Central Electricity Generating Board* and *Heaton* v *Axa Equity and Law Life Assurance.* I find serious difficulties with that contention. While *Jameson* and *Heaton* are English cases, those decisions were approved of and applied by the Inner House in *Duncan* v *American Express Services Europe Limited*. Of itself, that suffices to show the relevance of the English cases. Moreover, when one looks at the full picture of how the law has developed, the same result is reached. In *Steven* there was reference to, and reliance upon, the principle expressed by *Erskine* at III.i.15, which emphasises whether satisfaction of the claim has been achieved. The central point in *Steven* was that a decree in absence, which was unsatisfied, did not preclude a second action based upon vicarious liability for the actings of the defender in the first action. Thus, there was no satisfaction of the claim that could bar the second action. The case did make clear that merely because the defender in the second action was a joint wrongdoer did not of itself result in the second action being incompetent. It is principally in that regard that *Steven* sought to deviate from the position in England at

that time.

[25] In *Balfour* v *Baird & Sons*, the Lord Ordinary and the Inner House reached the opposite result to that in *Steven*, but under reference to that case and by application of the same principle: in the first action the pursuer had received full satisfaction of his loss and his claim was therefore extinguished. The decision in *Carrigan* v *Duncan* proceeded on that same basis, although it involved the acceptance of a tender in the first action, which was viewed by the court as being in full satisfaction of the claim, thus rendering the second action incompetent. In *Jameson,* Lord Hope of Craighead (at 475C *et seq*) cited *Carrigan,* with approval, and explained how it applied the proper principle. In *Heaton* Lord Rodger of Earlsferry referred to the criticisms of the decision in *Jameson* in *Foskett, The Law and Practice of Compromise*, (5th ed., para 6-49) and by the New Zealand Court of Appeal in *Allison* v *KPMG Peat Marwick* [2000] 1 NZLR 560 but noted that in the case before the court both sides proceeded on the basis that *Jameson* was correctly decided. That was clearly the view of all of the judges in *Heaton*. In reaching his conclusions, Lord Rodger cited with approval a number of the Scottish cases referred to above. For these reasons, I reject the contention for the pursuer that Scots law takes a different approach from that in *Jameson* and *Heaton* and I do not require to examine the earlier cases in any greater detail, given that the legal position is fully set out in those two authoritative decisions.

[26] In *Jameson*, the court made clear that the circumstances were not within the territory of the English joint tortfeasors' rule. The deceased had developed mesothelioma and had sued his employer. He claimed to have been exposed to asbestos at various premises, two of which were occupied and run by CEGB. He settled his claim against the employer for £80,000, the agreement stating it to be a full and final settlement. It was not in dispute that £80,000 was below the full extent of liability if the court had awarded damages. His widow

then sued the other concurrent wrongdoer, CEGB, in respect of loss caused in the same period of exposure. The question was whether the settlement agreement barred that second action. The conclusion was that in properly construing the settlement agreement he had obtained full satisfaction, even though he had settled below the full liability, and so his cause of action against CEGB was extinguished.

[27] On the reasoning of the House of Lords in *Jameson* and *Heaton* the basis for a settlement agreement barring further action is not that it is to be taken as discharging the other wrongdoer. Rather, the question is whether the claimant is to be understood as having received full satisfaction for the loss. It is not necessary for me to set out in detail the reasoning in *Jameson*, as it suffices to note how it was dealt with in *Heaton.* In that case, Lord Bingham (at para [4]) made it clear that when an action is settled by a compromise agreement "If £x is agreed or taken to represent the full value of A's claim against B, A cannot thereafter maintain an action against C in tort in respect of the same damage…". The reason was that in any action against C, A could not allege or prove any damage, and damage is of course a necessary ingredient in an action of this kind. However, a sum agreed to be paid under a compromise agreement may or may not represent the full measure of B's liability to A, so that:

> "While it is just that A should be precluded from recovering substantial damages against C in a case where he has accepted a sum representing the full measure of his estimated loss, it is unjust that A should be so precluded where he has not" (para [5]).

Lord Bingham went on (at para [9]) to say:

> "In considering whether a sum accepted under a compromise agreement should be taken to fix the full measure of A's loss, so as to preclude action against C in tort in respect of the same damage…the terms of the settlement agreement between A and B must be the primary focus of attention, and the agreement must be construed in its appropriate factual context. In construing it various significant points must in my opinion be borne clearly in mind:

> (1) The release of one concurrent tortfeasor does not have the effect in law of releasing another concurrent tortfeasor…
>
> (2) An agreement made between A and B will not affect A's rights against C unless either (a) A agrees to forgo or waive rights which he would otherwise enjoy against C, in which case his agreement is enforceable by B, or (b) the agreement falls within that limited class of contracts which either at common law or by virtue of the Contracts (Rights of Third Parties) Act 1999 is enforceable by C as a third party.
>
> (3) The use of clear and comprehensive language to preclude the pursuit of claims and cross-claims as between A and B has little bearing on the question whether the agreement represents the full measure of A's loss. The more inadequate the compensation agreed to be paid by B, the greater the need for B to protect himself against any possibility of further action by A to obtain a full measure of redress.
>
> (4) While an express reservation by A of his right to sue C will fortify the inference that A is not treating the sum recovered from B as representing the full measure of his loss, the absence of such a reservation is of lesser and perhaps of no significance, since there is no need for A to reserve a right to do that which A is in the ordinary way fully entitled to do without any such reservation.
>
> (5) If B, on compromising A's claim, wishes to protect himself against any claim against him by C claiming contribution, he may achieve that end either (a) by obtaining an enforceable undertaking by A not to pursue any claim against C relating to the subject matter of the compromise, or (b) by obtaining an indemnity from A against any liability to which B may become subject relating to the subject matter of the compromise."

Lord Bingham then stated that, for the reasons given by Lord Mackay of Clashfern, on construing the terms of the compromise agreement it could not be taken as representing the full measure of the respondents' loss. As a result, the compromise agreement in that case did not extinguish or exhaust the claims which were being pursued.

[28] Lord Mackay (at para [40]) made reference to *Jameson*, noting that the agreement in that case stated that it was "in full and final settlement and satisfaction of all the causes of action in respect of which the plaintiff claimed in the statement of claim". If a person sued in that action was liable for causing the disease, his liability was for the full extent of the damage which Mr Jameson suffered. While the House of Lords had by majority held that

Mr Jameson's agreement in the settlement precluded a claim by him against the defendant (Lord Browne-Wilkinson and Lord Hoffmann having agreed with Lord Hope), Lord Clyde supported that result but on somewhat different grounds. Lord Mackay said (at para [41]):

> "I read the majority decision as authority for the proposition that where an action is founded on specified damage suffered by the claimant and the existence of that damage is essential to the success of the action, if the claimant has entered into an agreement under which he accepts a sum as full compensation for that damage, the action cannot proceed. Whether a particular agreement has that effect is a question of construction of the words, in the light of all the relevant facts surrounding it."

He went on to note that in *Jameson*, if the employer had responsibility for the damage caused by exposure to asbestos, the employer was responsible for the whole of that damage and that damage was the sole basis of the claim. In the case before him, the damage claimed against the appellants was not coincident with the damage claimed in the earlier case which was the subject of the settlement and so the second action was not precluded.

[29] Lord Rodger of Earlsferry under reference to *Jameson*, noted (at para [79]) that:

> "whether a sum accepted in settlement of a claim is intended to fix the full measure of a claimant's loss so as to preclude any further proceedings depends on the proper construction of the particular compromise agreement in the light of all the relevant facts surrounding it."

Developing the point, he observed (at para [81]):

> "In considering whether a settlement agreement has this effect, the proper question is whether, when construed against the appropriate matrix of fact, the terms of the settlement show that the parties intended that the agreed sum should be in full satisfaction of the wrong done to the claimant. In that connection, an indication in the agreement—whether express or implied—that the claimant envisages the possibility of further proceedings against another wrongdoer may, of course, be of significance—but only as a pointer to the conclusion that the parties did not intend that the agreed sum should be in full satisfaction of the harm suffered by the claimant. Equally an indication in the agreement to the opposite effect will be a pointer that the parties intended that the agreed sum should constitute full satisfaction. In either event, the court will draw the appropriate conclusion as to the effect of the agreement on any claims against another wrongdoer.
>
> While the language used by the parties must always be carefully analysed for any light that it throws on their intention, the language of a settlement agreement will

> only rarely be entirely fresh, with every word selected for the particular proceedings. More often, such an agreement will incorporate language derived from a form of settlement used on previous occasions by the advisers of one or other of the parties. In *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, 269, para 38 Lord Hoffmann alluded to the variety of possible formulae, of greater or lesser complexity and prolixity, which are to be found in such agreements. Since the defendant's advisers will wish to do everything to eliminate the risk of any further proceedings against their client and since the plaintiff will not usually be contemplating any further proceedings against that defendant, the language chosen to express the finality of the settlement between the parties will often be fairly comprehensive, as in the present case. Moreover, a settlement agreement is likely to contain much the same kind of language irrespective of whether or not the settlement is, objectively, favourable to the defendant or to the claimant. Indeed, the worse the settlement from the claimant's point of view, the more the defendant may feel the need to use sweeping language to protect himself against possible future proceedings. For these reasons, the background matrix of fact may often be particularly important when interpreting a compromise agreement and deciding whether the parties intended the agreed sum to be in full satisfaction of the damage to the claimant. The present case and *Cape & Dalgleish v Fitzgerald* [2002] UKHL 16 illustrate the point."

Having regard to the relevant circumstances surrounding the settlement agreement, Lord Rodger concluded that it should not be interpreted as having been intended to be in full satisfaction of the respondents' loss and damage.

[30] As is well-known, the principles in relation to construction of contracts are set out in *Rainy Sky* v *Kookmin Bank Co Ltd* [2011] 1 WLR 2900, *Arnold* v *Britton* [2015] UKSC 36 and *Wood* v *Capita Insurance Services Ltd* [2017] UKSC 24, and these have been endorsed by the Inner House (see eg *HOE International Ltd* v *Andersen* 2017 SC 313 *and Ashtead Plant Hire Company Limited* v *Granton Central Developments Limited* [2020] CSIH 2). Commercial or business common sense can be an important factor (see eg *Midlothian Council v Bracewell Stirling Architects* [2018] PNLR 25). As Lord Hodge explained in *Luminar Lava Ignite Limited* v *MAMA Group plc* 2010 SC 310 (at para [42]) while evidence of prior negotiations is generally inadmissible, evidence of the factual background to the contract is relevant where]the facts are known to both parties and those facts can cast light on either (a) the

commercial purpose or purposes of the transaction objectively considered; or (b) the meaning of the words which the parties used in their contract. As Lord Hodge further explained, the two cases very often overlap, because the ascertained commercial purpose may give meaning to particular words or phrases. The task is therefore to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It was also made clear in *Arnold* v *Britton* (*per* Lord Hodge at para [74]), that there is much to be said for the practice of requiring parties to give notice in their written pleadings both of the nature of the surrounding circumstances on which they rely and of their assertions as to the effect of those facts on the construction of the disputed words (under reference to Lord Drummond Young in *MRS Distribution Ltd* v *DS Smith (UK) Ltd* at para [14]; see also *HOE International Ltd* v *Andersen* at para [26]).

Application of these principles

The factual matrix

[31] I begin by considering whether in this case there is any need to hear further evidence, over and above what is already before the court, in order to reach a view on the proper construction of the words in the settlement agreement. It was submitted for the pursuer that on the question of whether there was in fact payment of the full amount of the loss, or even whether there was intended to be complete satisfaction of the debt, that could only be answered once it is known how much the pursuer's claim is actually worth. I see no force in that submission. The authorities do not support the proposition that, settlement having been agreed on specific terms, the true actual value of the claim is a relevant factor (see eg *Jameson per* Lord Hope at 475H).

[32] The pursuer also referred to evidence having been required in *Duncan* v *American Express Services Europe Limited*. The relevance of the factual matrix to the question of construction of the settlement agreement is abundantly clear from the authorities noted above, but the key cases were decided without the need for proof, largely because the court was aware of the relevant background. It is therefore necessary to look more closely at *Duncan* in order to discern why proof was seen to be required. Put very broadly, the pursuer sought damages from his credit card supplier (Amex), on the ground that an unauthorised individual had been permitted to make payments from the credit card account. The pursuer had earlier sued the Clydesdale Bank, in relation to the same unauthorised individual having withdrawn sums from the bank and paid them into the credit card account. That earlier case was settled. The court noted (at para [48]) that counsel for the pursuer submitted that the losses claimed from Clydesdale were entirely separate to those claimed from Amex and the court went on to address that point, before concluding (at para [50]): "while there may well be an overlap between the claims against Amex and Clydesdale, the two are by no means identical". The court then said:

> "[51] In the passages quoted above, Lord Hope said in *Jameson v Central Electricity Generating Board* that the answer would be found ''by examining the terms of the agreement and comparing it with what has been claimed'', and Lord Bingham in *Heaton and others v AXA Equity and Law Life Assurance Society Plc* said that ''the agreement must be construed in its appropriate factual context''. These passages support the view we have come to, which is that it is not possible to construe the agreement in the present case without proof of its factual matrix, in particular the losses suffered by the pursuer on each of the Amex and the Clydesdale accounts, and the details of the claim made by him against Clydesdale, as referred to in recital (b) in the preamble to the agreement… It may be that the terms of the pursuer's initial claim against Clydesdale and any ensuing correspondence will serve to resolve this dispute.
> [52] …there are, in our view, sufficient uncertainties in relation to the background to suggest that evidence should be led before any answer could confidently be given."

Thus, the losses suffered on each account were relevant to the crucial issue about whether the claims were for the same loss. There was also a need to identify whether the loss dealt with by the settlement agreement overlapped with the loss claimed in the case against Amex. Very importantly, the details of the claim made against the bank were not before the court. Here, it is clear that the claims are for the same loss and the court has the full details of the claim made in the earlier action and the relevant circumstances surrounding the settlement agreement. We are thus in a similar position to that in *Jameson*, *Heaton* and *Carrigan* which were all decided without evidence being led.

[33] In *Heaton* (para [5]), Lord Bingham explained that:

> "Where a sum is agreed which makes a discount for the risk of failure or for a possible finding of contributory negligence or for any other hazard of litigation, the compromise sum may nevertheless be regarded as the full measure of B's liability".

However, he went on to add that the settlement sum may be fixed for other reasons than being the full measure of A's loss. He gave these examples:

> "it may be known that B is uninsured and the £x represents the limit of his ability to pay; or A may wish to pocket a small sum in order to finance litigation against other parties; or that it may be that A is old and ill and prefers to accept a small sum now rather than a larger sum years later; or it may be that there is a contractual or other limitation on B's liability to A".

In the pursuer's Note of Argument in the present case reference is made to the averments of the defenders in the case against P&W/BP on limitation of liability and it is also said that the extent of insurance cover was unknown and that causation was in issue, as were a number of other matters. However, in the present case there are no averments that the agreed sum gave a discount for any particular matters, nor are there any averments of facts or reasons known to both parties supporting the fixing of a sum less than the full measure of the pursuer's loss. Subjective intentions are of course irrelevant. Further, there is no wording in the settlement agreement that is averred by the pursuer to have a particular meaning

because of what was known to the parties at the time of the agreement. For example, there is simply no suggestion in the pleadings that the clause relied upon by P&W/BP as resulting in a limitation was a relevant factor for the purposes of construing words in the agreement (and indeed there was no actual submission that this had in any way affected the fixing of the sum).

[34] In any event, it was simply not made out in the submissions for the pursuer that these issues were of any relevance. The defenders in the P&W/BP action contended that consequential loss was excluded and that a limitation clause restricted liability to £5m. The pursuer contested the limitation clause on several grounds. Also, it was accepted by those defenders that insofar as the pursuer had sustained loss and damage as a result of deliberate and wilful breach of duty (which appears to have become the admitted position) the limitation of liability had no application. In relation to causation, the defenders' averments in the P&W/BP action give reasons for the decline in the business of ITS and the value of its shares, which would have arisen even if the shares had not been sold. These causation issues, if they are of any substance, would not affect only the claim in that action but would arise in a claim against any defender for the loss in value of the shares. No issue of causation specific to the P&W/BP action and which could have resulted in a discounted figure being agreed was identified. The pursuer's averment about Lime Rock's view of the value of ITS at the time of the transaction relates to the actual value of the claim and is not argued to be linked to the meaning of any language in the agreement. The exercise of construing the settlement agreement falls to be carried out against the relevant background, including the pleadings in the earlier action. The issue before me is about the meaning of relatively straightforward language in the settlement agreement, as arose in cases such as *Jameson* and *Heaton*. As the case law, including *Duncan,* makes clear, there may be

circumstances in which further evidence of the factual background is required but I have been given no basis in the pleadings and no other reason to conclude that the present case is within that category.

Suggested pointers

[35] It appears to me that several of the contentions made by the parties, like certain of the points referred to by Lord Bingham, are more or less neutral rather than being pointers in favour of one party's position on construction. The reference in the settlement agreement to claims by the pursuer against Mr Corray being excluded, but there being no such exclusion of claims against the present defenders, is relied upon by the pursuer as inferring that such other claims have not been foregone or waived. The defenders argue that the only known other claim at the time of the settlement agreement was that against Mr Corray, in circumstances in which the pursuer had known for some fourteen months prior to the settlement agreement of the contents of Inventory Z, now founded upon against the present defenders. Thus, it is argued, the opportunity was there to have made a claim against these defenders and in the absence of any such claim it was quite understandable that no reference to them was made and indeed the exclusion of the only other live claim pointed towards all other claims for the same loss being excluded. In my opinion, it is not appropriate to construe the exclusion of the only other live claim as deliberately intending to leave open further claims for the same loss against others, such as the present defenders, nor is it appropriate to see it as inferring the exclusion of all other potential claims. It is plainly correct that it was open to the parties to the settlement agreement to deal with as yet unknown, but perhaps potential, future claims as well as the known claim, but the absence of any such wording (whether to exclude or leave open claims of that nature) is not a pointer

in either direction. Part of the context is of course that both parties were obviously aware of the Corray action and that it was for the same loss. There must have been some reason why the pursuer agreed to abandon his claim in the only other live action and it may be difficult to see why he wished to do so if the settlement was for a lower sum than the actual loss and if there was a desire on his part to leave open claims against others (including persons not yet identified). If the defenders here are correct that there was full satisfaction then the reference to giving up the Corray claim was not actually necessary, but it may simply be an added provision consistent with full and final satisfaction and the defenders may have wised it to be included out of an abundance of caution. Arguably there is some difficulty in seeing how the abandonment of the Corray claim fits with the settlement not being full and final; no reasons for giving it up are pled and in any event subjective intentions are of course not relevant. Overall, however, I do not view this as a clear pointer. In my view, this part of the language of the settlement agreement is broadly neutral.

[36] The settlement agreement makes clear that it is not just a full and final settlement of the action but that it includes release of claims in any way related to the proceedings or their underlying facts. This was viewed by the defenders as indicating complete freedom of P&W/BP from further claims, but of course it doesn't expressly exclude a claim for contribution by P&W/BP made by a different defender. The absence of a right of indemnity against the pursuer in favour of P&W/BP, should they be drawn into a later claim, can point in either direction: on the pursuer's approach, this factor fits with the parties to the settlement agreement not having sought to deal with the consequences of later claims; on the present defenders' approach, this factor was not needed if the settlement was in full satisfaction and hence its absence supports that position. If there was knowledge on the part of each side (derived for example from Inventory Z) about a potential claim against others, it

would be surprising for P&W/BP not to seek an indemnity. However, these points are again rather neutral and I attach no material significance to them.

[37] I also see no particular weight in the pursuer's point that the settlement agreement was confidential as between the parties; that will very regularly be the position but it does not assist in the construction of its terms. On the matter of the settlement sum having included expenses, I again do not see that as having any real relevance; the parties are highly likely to have had some insight into the matter of expenses and factored that in when agreeing the settlement sum. It is, of course, true that this was a settlement between the parties to the P&W/BP action and there is no reference to the present defenders, but as Lord Rodger said in *Heaton* one would not expect to see the defenders in a second action mentioned at all. I accept that if these defenders could seek a contribution from P&W/BP that might be taken as unlikely to be something to which P&W/BP would have agreed and arguably against commercial common sense; but on other hand it is trite that bad bargains are sometimes made and so I do not take that as a pointer in favour of the meaning contended for by the defenders.

[38] Accordingly, bearing in mind Lord Bingham's points in considering the terms of the settlement agreement, I take nothing of any material significance from the absence of specific things in the agreement and (leaving aside for the moment the terms of what I view as the key clause for present purposes, clause 2.5) I find no free-standing point which of itself points in a particular direction.

[39] While it is correct that in *Jameson* the sum to be paid was "in full and final settlement and satisfaction of all the causes of action in respect of which the plaintiff claims in the statement of claim", the use of the word "satisfaction" does not appear to have added anything to the reasoning of Lord Hope. Indeed, in a passage in his speech (at 473-4) he

appears to use "satisfaction" and "settlement" as effectively synonymous terms. The point he views as being the most significant is whether the claim that was made and now settled was for the whole amount of the loss. In *Heaton* (at para [83]) Lord Rodger also emphasises the importance of the nature of the first claim. Both Lord Clyde in *Jameson* and Lord Rodger in *Heaton* express the view that the natural and ordinary meaning of the terms of a settlement agreement may be rather unclear. While Lord Clyde then applied a particular approach, that was not endorsed by the other judges and I do not consider it as forming part of the *ratio decidendi* in that case. However, I see real force in the approach taken by Lord Rodger in *Heaton* as to the use of standard expressions in agreements of this kind and the resulting significance of the nature of the claims made in the first and second actions. In that case, the damage claimed in the actions differed and was described as not coincident. Here, it does not differ and plainly is coincident.

The key provisions of the settlement agreement

[40] Turning back, then, to the key provisions of the settlement agreement, the preamble refers to the parties having agreed terms for the "full and final settlement" of the action and their wish to record the terms of settlement on a binding basis. In clause 2.5, the words "full and final settlement" are again used. While that clause refers to a release and discharge of all and any claims and the like "against each other", these are all claims "arising out of or connected with the Proceedings and/or the underlying facts relating to the Proceedings". As I have noted, the claim for loss in that action was for loss allegedly caused as a result of the transaction entered into for the sale of part of the pursuer's shareholding. The agreement is therefore for a full and final settlement of all claims for that loss. Clause 3.1 appears to me to be of no significance because it is a warranty and undertaking about not having any claims

or rights of action against the defenders in that action or their predecessors. As the loss claimed in the action is dealt with by the settlement agreement, clause 3.1 can really only be about other claims or losses. Clause 3.2 deals with abandonment or ending the Corray action and the Corray petition "without any demand for payment being made of or accepted from Corray". As I have noted, this is not a clear pointer but, for what it is worth, is consistent with all of the losses having been settled by P&W/BP.

[41] Distilling this reasoning, the meaning of the settlement agreement is that the pursuer reached a full and final settlement, with one joint wrongdoer, of the loss claimed in the action against that joint wrongdoer. On the basis of *Jameson* and as is also accepted in *Heaton*, that precludes an action against other joint wrongdoers for that same loss. The nature and extent of the loss sought in that earlier action is the same as is now sought against the present defenders, calculated in the same way. The present action proceeds upon the basis that the present defenders conspired with, and hence are joint wrongdoers alongside, Mr Gordon, contributing to causing the same loss. The pursuer avers that the present action is "based on a different legal basis to that advanced in the first claim". However, if the present defenders are jointly and severally liable for the pursuer's loss, but that loss has been satisfied, then no claim remains. In line with the position in *Carrigan,* there is no indication at all that the payment agreed was not to be regarded as in full satisfaction of the pursuer's claim for all the loss which he sustained as a result of the wrongdoing alleged in that action. The settlement in *Carrigan* was "in full settlement of the conclusions of the action", in substance no different from the settlement agreement here. The defenders in the action against P&W/BP had responsibility for the loss caused to the pursuer by having entered into the transaction to sell his shares and that damage was the sole basis of the claim that was settled.

[42] I therefore conclude that the pursuer's claim is incompetent and falls to be dismissed. It is, however, appropriate that I also deal with the other issues.

Issue 2: Relevancy and specification

Submissions for the first to fifth defenders

[43] Intention to injure is an essential ingredient of a claim based on unlawful means conspiracy: *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch* 1942 SC (HL) 1; *Lonrho plc* v *Al-Fayed* (No. 1) [1992] 1 AC 488. It is enough that the defender ought to have known that injury to the pursuer would ensue. But incidental harm is not enough: *JSC BTA Bank* v *Khrapunov* [2018] 2 WLR 1125 (at paras [13] and [14]). The pursuer made no relevant averment of intention to injure on the part of the first to fifth defenders. A distinction required to be made between the "harm" which the pursuer avers he suffered, namely depriving him of the knowledge required to realise that he could not place his trust in P&W, and the allegedly deleterious effect of the transaction on the value of the pursuer's shares. What made the transaction bad for the pursuer, according to his averments, was that he did not get what he wanted out of the deal. But nowhere did the pursuer aver any proper basis for the notion that the defenders knew or ought to have known that the terms of the deal were something other than what the pursuer wanted them to be or that they were not in accordance with his instructions to P&W. The essence of the pursuer's allegation was that the defenders created a false impression of an arm's length transaction. The pursuer avers that he was not advised by P&W that it was disadvantageous, but that is not claimed to be part of the conspiracy. There was no suggestion that the activities of any of the defenders were intended to prevent communications between P&W and the pursuer, including the taking and giving of instructions on the terms of the transaction and advice in relation

thereto. In short, the conspiracy alleged in the pleadings did not result in loss where the conspiracy did not involve preventing the pursuer from obtaining the legal advice from P&W. The pursuer's case of conspiracy was therefore irrelevant and should be dismissed.

Submissions for the sixth to eighth defenders

[44] The fraudulent conduct averred was a conspiracy to deceive the pursuer. Fair notice is required of the basis for that allegation: *Marine & Offshore (Scotland) Ltd* v *Hill* 2018 SLT 239 (at para [16]). Accordingly, the pursuer's averments ought to clearly and specifically identify: (i) the act(s) or representation(s) founded upon; (ii) the occasion(s) on which the act(s) was/were committed or the representation(s) made; and (iii) the circumstances relied upon as yielding the inference that that act(s) or representation(s) was/were fraudulent: *Royal Bank of Scotland* v *Holmes* 1999 SLT 563 (*per* Lord Macfadyen at 569K-L). The pursuer's averments did not do so and were irrelevant and lacking in material specification.

[45] The requirements of a claim based on conspiracy were made clear in the case law referred to on behalf of the first to fifth defenders. The pursuer does not offer to prove that the defenders intended to or objectively knew that they would cause harm to the pursuer. It was clear that the case about conspiracy was predicated on the suggestion that where solicitor A acts in a transaction knowing that his opposite number therein, solicitor B, is in a position of conflict, that means that A and B are involved in a conspiracy. That proposition was outlandish and unvouched by authority. These defenders owed no duty of care to the pursuer to point out any shortcomings on the part of his representatives: *Gran Gelato Ltd* v *Richcliff (Group) Ltd* [1992] Ch 560; *Steel* v *NRAM Ltd* 2018 SC (UKSC) 141. That being so, it would be strange to find that a failure to advise the pursuer of the conflict experienced by Mr Gordon and P&W, not actionable in the law of negligence, nevertheless thereby rendered

liable these defenders on the basis of conspiracy. The reference to knowledge of a breach of a professional obligation was irrelevant and added nothing. *Frank Houlgate Investment Co Ltd* v *Biggart Baillie LLP* 2015 SC 187 was readily distinguishable. In that case the solicitor was held liable as an accessory to the fraud perpetrated by his client. He was not sued as a co-conspirator with the fraudster. The pursuer did not explain how these defenders became aware of the fraud. Absent such an averment, his case fell foul of the rule requiring proper particularisation of the serious accusation of fraudulent conduct (here on the part of a solicitor).

[46] The pursuer avers that the harm suffered by him was to deprive him of the knowledge required to realise that he could not place his trust in P&W. But the pursuer's loss is said to have resulted from the terms of the transaction which, the pursuer avers rendered his shareholding worthless or substantially worthless. The pursuer did not aver that the defenders were aware, or should have been aware, of the harmful nature of the transaction. Absent any such averment, the pursuer's pleadings were irrelevant. It is the inveigling of the pursuer in the entering into of the contract that completes the delict of fraud, not the hiding from him that Mr Gordon was acting in conflict. For the same reason, the pursuer's averments did not satisfy the requirements for a case in fraud as explained in *Bradford Third Equitable Benefit Building Society* v *Borders* [1941] 2 All ER 205 (at 211). In particular, the pursuer's averments did not disclose an intention on the part of these defenders that the false representation should be acted upon by the pursuer in the manner which resulted in loss to him. Absent such an averment, the pursuer's case on fraud was irrelevant: *Kidd* v *Paull & Williamson LLP* 2018 SC 221 (*per* Lord Tyre at para [33]). In that case the fraud claim was about hiding or failing to reveal Mr Gordon's transgressions. Here the fraud claim is said to be assisting in that deception. It would be very odd that if these

defenders were deemed to be joining Mr Gordon in his conduct they are deemed fraudsters when Mr Gordon is not.

[47] The pursuer also avers that these defenders took no steps to ensure that he became aware of the wrongdoing committed by the first to fifth defenders. However, the pursuer did not explain what wrongdoing ought to have been disclosed to him by the sixth to eighth defenders. Moreover, he did not explain the legal basis upon which such a duty arises. The basis for his averment that these defenders "failed to take proper professional care for the pursuer's interests" was not explained. These defenders had no professional or other relationship with the pursuer. These averments were plainly irrelevant.

Submissions for the pursuer

[48] In the pleadings, the pursuer had made abundantly clear what he offered to prove on fraud. A realistic assessment of what is required to plead a case of fraud had to be taken, when by its very nature the fraud alleged was concealed from the pursuer. Reference was made to *Marine & Offshore (Scotland) Ltd* v *Hill*. A fraud case was sufficiently stated if it alleges a "machination or contrivance to deceive", as put in *Erskine* III.i.16. Here, the transaction was stripped of all its commercial value as a consequence of the concealment by the sixth to eighth defenders that Mr Gordon was providing information to them and the fact that the first to fifth defenders partook in that and instructed the sixth to eighth defenders in the knowledge that Mr Gordon was doing so. The deception was that the pursuer's solicitors were in essence working along with Lime Rock. If the pursuer had known that he would have been "off like a shot". The suggestion that the pursuer required to aver that he was induced to enter into the transaction on bad terms because of the representation was incorrect. The fact that he was induced to enter into any contract

because of the machination or contrivance to deceive was sufficient. The harm caused to the pursuer and known by the defenders was that the pursuer was not receiving independent advice from solicitors who were honest and obeying their professional obligations. The liability of the defenders arose, *inter alia*, from their conduct not only as actors, but as accessories to the wrongs committed by the pursuer's solicitors. Reference was made to the Opinions in *Frank Houlgate Investment Co Ltd* v *Biggart Baillie LLP* [2010] SLT 527 (Lord Drummond Young); [2013] SLT 993 (Lord Hodge); 2015 SC 187 (Lord Menzies) and *Cairns & Others* v *Harry Walker Limited and anor* 1914 SC 51. It was not necessary that to be party to the fraud the solicitor had to act dishonestly. His knowledge of the fraud sufficed, even without any intention to cause harm or to act in a dishonest manner.

[49] The defenders' submission, that the absence of averments that they intended that the fraud be acted upon makes the pursuer's case irrelevant, was ill-conceived and based upon a misunderstanding of the operation of such a rule. The rule applied where the issue is whether a party was fraudulently induced to enter into a contract and either seeks damages or an order nullifying the contract. But where the fraud is committed as is averred in this case, to facilitate a wrong on the pursuer, the rule was of no application. The use of the phrase "dishonest assistance" (and for that matter, the language of "conspiracy") in the pleadings was not intended to present a separate delict. These averments merely described the role of the parties in the fraudulent scheme. The pursuer's further case against the sixth to eighth defenders was that a solicitor who is aware of a breach of professional obligations and fraud by the counterparty's solicitor on his own client has a duty not to partake in that scheme (in which event he becomes party to the fraud). Indeed as a matter of law he has a duty to draw that wrongdoing to the attention of the counterparty: *Frank Houlgate Investment Co Ltd* v *Biggart Baillie LLP*. A solicitor may not owe a duty of care to the other party but

does owe that party a duty not to participate in any fraud. If the fraud is being perpetrated *inter alios* by the counterparty's solicitor, it was plain that the duty arising upon a solicitor is to advise the counterparty directly. The obligation arises from the assumption that any person is entitled to make: that a solicitor is acting honestly in his work. Otherwise a solicitor could act dishonestly, to assist the commission of a fraud, and to do so without any obligation of disclosure of that fraud to the party who is to be defrauded.

Reply for the first to fifth defenders

[50] Senior counsel for the pursuer had failed to answer the question of how a relevant case on fraud can be made when in *Kidd* v *Paull & Williamson LLP* Lord Tyre found that a case of fraud in essentially the same terms was irrelevant. That case was the same as pled here. No answer was given as to why it would be relevant now when it was irrelevant before.

Reply for the sixth to eighth defenders

[51] The submissions for the pursuer ignored the decision of Lord Tyre in the previous case. The pursuer merely avers that there was a deception. As was explained in the other cases discussed by Lord Tyre, the fact that there was deception does not make good the claim. Just as the pursuer could not make good that allegation in his averments in that earlier case against the primary wrongdoer, he cannot make it good against a person who is said to have failed to reveal that wrongdoing.

Issue 2: Decision and reasons

The pursuer's averments

[52] It is clear from the pursuer's averments that the primary wrong said to have been committed by P&W and Mr Gordon was a breach of fiduciary duty; there are repeated references to this in the pleadings. It is not expressly averred in this case that the conduct of Mr Gordon was fraudulent, although that appears to be implicit. In the case against P&W/BP, there were averments made to allege fraudulent misrepresentation, but these were held to be irrelevant.

[53] In the present case, the conspiracy to defraud and the intention behind it is expressed thus (in Article 18):

> "All of the Defenders were aware that Mr Gordon was acting in breach of his fiduciary duty to the Pursuer (and indeed to ITS). They conspired to facilitate that breach, in order to procure the completion of the transaction, and so caused the Pursuer to suffer the loss and damage hereinafter condescended upon."

Other averments indicate that this conspiracy comprised two main elements, namely creating a false impression or representation and concealing certain key matters (Article 20):

> "The Defenders conspired to induce the Pursuer to enter into the transaction on a false basis, in that they created a false impression of an arm's length transaction between counterparties each with independent legal advisers, whilst concealing from him that he was not being independently advised and that the transactional counter-party was receiving confidential information and guidance from Mr. Gordon."

In relation to the false impression, it is averred (Article 13) that:

> "The engagement of the Sixth Defender firm by Lime Rock Group was indeed a "front" designed to obscure the truth, that truth being that P&W were acting in breach of their duty to the Pursuer. The Sixth Defender firm accepted instructions from ITS and the Pursuer, as did the Seventh and Eighth Defenders in the knowledge that Mr Gordon was in breach of his duty of undivided loyalty to the Pursuer (and indeed to ITS). They thereby conspired with the First to Fifth Defenders to deceive the Pursuer by that false representation and procure, by such fraudulent means, the completion of the transaction. They did so to cause harm to the Pursuer by depriving him of the opportunity of discovering the breach of fiduciary duty by Mr Gordon, of allowing him to have the knowledge to terminate the relationship with P&W and

> indeed the Lime Rock Group, and then obtain separate and truly independent advice".

It appears that the reference to accepting instructions from ITS and the pursuer is an erroneous expression of the facts, given that the sixth to eighth defenders accepted instructions from Lime Rock. However, it is clear that the alleged intention was to deceive the pursuer and procure the completion of the transaction.

[54] Further allegations are made elsewhere in the pleadings. The first to fifth defenders are alleged to have "allowed and joined with Mr. Gordon to put his plan into execution" (Article 9). Mr Gordon is then said to have acted far beyond his remit and the sixth to eighth defenders:

> "in breach of their own duty to act with honesty and integrity, allowed that to occur and became accessories to the wrongs being committed by the [first to fifth] defenders".

It is further averred in Article 9 that the sixth to eighth defenders took no steps to ensure that "the pursuer would become aware of that wrongdoing, as they ought to have done as honest solicitors" and "failed to take proper professional care for the pursuer's interests". Their actions "were contrary to normally acceptable standards of honest conduct" (Article 19) which goes on to include that they:

> "knowingly and dishonestly assisted Mr Gordon by accepting those instructions to represent the Lime Rock Group, knowing that Mr Gordon was acting in breach of his obligations owed to the Pursuer".

[55] In relation to harm, additional averments are made (in Article 20), in similar terms to those quoted above:

> "The harm suffered by the Pursuer was to deprive him of the knowledge required to realise that he could not place his trust in P&W, and that he required (but would not receive from P&W) independent legal advice…The transaction concluded without P&W providing to the Pursuer proper advice, whilst being misled by the Defenders into him thinking that they were acting honestly in his dealings with them."

As to the consequences of the alleged wrongs, it is averred (in Article 22):

> "Those actions throughout led the Pursuer to believe that legal advice was being provided to him regarding the transaction at an arm's length basis, untainted by breaches of duties by any of the solicitors…"

and (in Article 24):

> "The Pursuer was induced by the wrongful conduct of the Defenders outlined above to complete the transaction. Had they not acted in the wrongful manner condescended upon, he would not have completed the transaction."

[56] The first plea-in-law refers to the pursuer having suffered loss and damage through the fraudulent conduct of the defenders and being entitled to equitable compensation from them therefor and the second plea-in-law is in the same terms, except that reparation is sought rather than equitable compensation. Submissions were made on whether the pursuer's averments provided a basis for equitable compensation, but in the context of the third issue, prescription, dealt with below.

Conspiracy

[57] In making the allegations of conspiracy, I am of the view that the pursuer identifies with sufficient precision the acts and representations of the defenders that are founded upon. The occasions or timing can readily be inferred from the pleadings, as continuing over the period when the relevant information was known to the defenders to the point in time when Inventory Z was recovered. As to the circumstances relied upon as yielding the inference that those acts and representations were fraudulent, these include the alleged creation of the false impression of an arm's length transaction between the counterparties and allegedly concealing from the pursuer that in fact he was not being independently advised and, further, that the transactional counterparty was receiving confidential information and guidance from Mr Gordon. The allegation of conspiracy is therefore not based simply on knowledge of the conflict of interest, but rather on knowledge of active

steps being taken to cause the counterparty to be given an unfair advantage. The requirements of a claim based on conspiracy include an intention to harm the pursuer and that the pursuer suffered loss as a result: *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch*; *Lonrho Plc* v *Al-Fayed* (at 465-468). As regards the second criterion, the defenders should know that injury to the pursuer will ensue: *JSC BTA Bank* v *Khrapunov* [2018] 2 WLR 1125 (para [13]), citing with approval the judgment of the Supreme Court of Canada in *Canada Cement LaFarge Ltd* v *British Columbia Lightweight Aggregate Ltd* [1983] 1 SCR 452. In the averments set out above, the pursuer avers the nature of the allegedly fraudulent conduct and that the defenders intended to, or objectively knew that they would, cause harm to the pursuer. I accordingly conclude that the requirement for an averment of a "machination or contrivance to deceive" (*Erskine* III.i.16) or false pretence and the tests for relevancy identified in the case law, including *Marine & Offshore (Scotland) Limited* v *Hill & another* and the authorities on conspiracy, are met.

Fraudulent misrepresentation

[58] The key proposition for the pursuer in the present case is that the defenders conspired to make a false representation that this was an arm's length transaction with each side having independent professional advice. The approach taken by Lord Tyre in *Kidd* v *Paull & Williamson LLP* was based upon the absence of averments on certain key matters. Lord Tyre held that there was no averment that the representation that the first defender (P&W) in that case would not act in conflict of interests was made with the intention of inducing the pursuer to enter into the transaction to sell part of his interest in ITS to Lime Rock. Nor was there any averment (and in Lord Tyre's view it was not easy to see how there could be) of direct connection between the representation regarding absence of conflict

of interest and the pursuer's decision to enter into the sale agreement. The pursuer's assertion that, if he had been made aware of the conflict of interest, he would have withdrawn his instructions from the first defender and ended the negotiations with Lime Rock was not the same as an averment that the representation, whether express or implied, that the first defender was not acting in conflict of interest, materially influenced the pursuer in his decision to enter into the contract. Lord Tyre concluded that it could not therefore be presumed that the representation was material.

[59] In the present case, the pursuer's averments, as noted above, include a reference to the defenders conspiring to facilitate the breach of fiduciary duty "in order to procure the completion of the transaction". This averment does therefore identify the alleged intention. In relation to the connection between the implied representation and the pursuer's decision to enter into the transaction, it is averred that he was "induced by the wrongful conduct of the Defenders outlined above to complete the transaction" and that if they had not so acted he would not have completed the transaction. In light of the express reference to being induced and to what he would have done had he not been so induced, I am of the view that the pursuer's averments here can be taken as asserting that the representation materially influenced him in his decision to enter into the transaction (however difficult that may be to actually establish in evidence). In short, the pursuer has in this case made sufficient averments of the kind that Lord Tyre in the earlier case properly identified as necessary for a relevant case based upon fraudulent misrepresentation. The defenders' conduct did not prevent P&W or Mr Gordon giving the advice the pursuer claims should have been given, but they are all said, in effect, to have acted in concert to reach that result. I therefore conclude that the argument for the defenders that the pursuer's case here is irrelevant for the same reasons as in the earlier case falls to be rejected.

Further alleged duties of the sixth to eighth defenders

[60] In *Frank Houlgate Investment Co Ltd* v *Biggart Baillie LLP* the claim against the defenders was that a solicitor had acted in furtherance of a fraud by his client. Dealing firstly with the issue of implied representation, Lord Menzies concluded that in the circumstances of that case the solicitor gave a continuing implied representation to the solicitor for the other party that he was not aware of any fundamental dishonesty or fraud which might make the transaction worthless. Lord Menzies also concluded that the solicitor was under an obligation to tell the pursuer's solicitors immediately after he became aware of the fraud. Dealing next with the other principal issue in the reclaiming motion (whether the solicitor had acted as an accessory to the fraud by the client), Lord Menzies observed that there is no Scottish authority for the proposition that it is necessary for an accessory to have the same intent as the fraudulent principal. The absence of any subjective dishonest intent on the part of the solicitor was irrelevant. Lord Menzies held that the Lord Ordinary was correct to draw an analogy with an accessory to a crime. In accepting and acting on the client's instructions not to tell the pursuers of the fraud when he himself knew of it, the solicitor became accessory to the fraud. He was privy to and assisted in carrying out the fraud. The fact that the solicitor was actively involved in the transaction was a relevant factor. Lord McEwan agreed with Lord Menzies on these two issues, for similar reasons. Lord Malcolm reached the same conclusion on the first point, albeit based on slightly different reasoning, but on the second point did not consider that the solicitor was an accessory to the fraud without having, to some degree, the mental element necessary for commission of the wrong itself.

[61] In the present case, plainly the first to fifth defenders are not solicitors and it is difficult to see how this authority assists in identifying any liability on their part for an

implied representation or acting as an accessory to a fraud. As noted above, they are however alleged to be direct conspirators, acting in combination with Mr Gordon. But in respect of the sixth to eighth defenders, I conclude that this decision of the Inner House supports the relevancy of the pursuer's averments against them about the implied false representation and their actions as an accessory to the unlawful conduct on the part of Mr Gordon. As I understand the pursuer's averments, the sixth to eighth defenders are sued as alleged accessories to the unlawful conduct perpetrated by Mr Gordon and also as co-conspirators with him. While in *Frank Houlgate Investment Co Ltd* v *Biggart Baillie LLP* the solicitor was liable in respect of knowledge of, and being accessory to, the unlawful actings of his client, the present case against the sixth to eighth defenders is based upon their knowledge of, and actings as accessory to, the conduct of the counterparty's solicitors. However, I do not consider that the facts are so plainly distinguishable as to render this aspect of the case bound to fail. Here the sixth to eighth defenders were, it is averred, actively involved in the transaction. Their alleged awareness of, and actings as accessory to, the unlawful conduct of the pursuer's solicitors, in circumstances where their own clients are also alleged, to their knowledge, to be parties to the conspiracy, arguably gives rise to similar legal obligations as those held to exist in *Frank Houlgate Investment Co Ltd* v *Biggart Baillie LLP*.

[62] It was submitted on behalf of the sixth to eighth defenders that the pursuer does not explain how they became aware of the fraud. But the pursuer makes averments about the provision of legal advice by Mr Gordon to these defenders, intending that it be passed on to Lime Rock, and the sending to them of sensitive and commercially confidential information relating to both the pursuer and ITS, which again was then communicated to Lime Rock. It is also averred that they accepted the instructions to represent Lime Rock, knowing that

Mr Gordon was acting in breach of his obligations owed to the pursuer. Sufficient averments of awareness are therefore made. It was also submitted for the sixth to eighth defenders that the pursuer does not explain what wrongdoing ought to have been disclosed to him by them and does not explain the legal basis upon which such a duty arises. It is, in my view, tolerably clear from the averments that the undisclosed wrongdoing was that of Mr Gordon and the first to fifth defenders. The legal basis for the duty to disclose could arguably arise from *Frank Houlgate Investment Co Ltd* v *Biggart Baillie LLP*, as discussed above. The pursuer's averment that these defenders "failed to take proper professional care for the pursuer's interests" also relies upon that decision.

[63] For these reasons, I reject the submissions for the defenders that this part of the pursuer's case, as averred and taken *pro veritate,* would have been bound to fail.

Issue 3: Prescription

Submissions for the first to fifth defenders

[64] The submissions for the sixth to eighth defender on prescription were adopted. The point about equitable compensation being a remedy for breach of trust or breach of fiduciary duty meant that the case against the first to fifth defenders, which was not based on any such breach by them, had prescribed.

Submissions for the sixth to eighth defenders

[65] The pursuer's reliance upon section 6(4) of the 1973 Act was misconceived. He averred that he was induced to refrain from making a claim on account of error induced by the defenders' conduct, namely a pretence that "the transaction was being conducted in a professionally proper, honest and arm's length fashion". Yet, on the pursuer's averments,

his own agents, P&W and also others including Mr Corray and Mr Milne, were aware that was not so. Their knowledge as agents fell to be imputed to the pursuer as principal: *Adams* v *Thorntons WS (No.3)* 2005 1 SC 30 (at para [65]); *Chapelcroft Ltd v Inverdon Egg Producers Ltd* 1973 SLT (Notes) 37; and Johnston, *Prescription and Limitation* (2nd ed., para. 6.89). Moreover, that alleged pretence must have ended, at the very latest, by the time that the pursuer raised proceedings against his former agents, P&W. The summons in that action was signetted and served on 22 September 2014, more than five years prior to the raising of the present proceedings. By the time the present action was raised in December 2019, prescription had operated. The defenders should therefore be assoilzied.

[66] It was accepted that where the agent is fraudulent there is no attribution of knowledge. However, participation in the fraud is required. Fraud is personal. One could not attribute knowledge across the firm of P&W in general. So the fraud exception would exclude only the knowledge of Mr Gordon. The pursuer instructed Mr Corray and Mr Milne and on his authority they instructed P&W. They were all agents of the pursuer. There were averments about knowledge on their part in 2008 and 2009. The involvement of Mr Gordon was therefore within the knowledge of other agents who were not said to be fraudulent. At all material times authorised agents were aware of the actual position. Accordingly, the pursuer failed to put himself in the territory of section 6(4) and the case was out of time.

[67] As there was no relevant claim for equitable compensation, vicennial prescription did not apply, although it was not in any event clear that an obligation to make equitable compensation actually fell within that period, rather than the quinquennium: *Heather Capital* v *Levy & McRae* 2017 SLT 376. But equitable compensation was not a remedy that a party is simply allowed to elect; on the contrary, it only applies in certain constraining

circumstances. It is a remedy for breach of trust and, arguably, for breach of fiduciary duty. While the notion of equitable compensation is not entirely clear, it does require a breach of that nature. In the present case the only cause of action was fraud. The remedy for fraud is simply damages. In the pursuer's case against P&W/BP equitable compensation was sought on the basis of breach of fiduciary duty. However, the present defenders were not involved in a relationship with the pursuer that gave rise to any fiduciary duty. There was simply no place for a claim of equitable compensation.

Submissions for the pursuer

[68] In relation to section 6(4), reference was made to *BP Exploration Operating Co Ltd* v *Chevron Shipping Co* 2002 SC (HL) 19. It was accepted that an agent's knowledge when acting in the course of his agency is to be imputed to his principal, but that is simply the ordinary rule. In *Adams* v *Thorntons WS (No.3)* there was no suggestion of the kind of conduct of which the present pursuer complains, namely that his agents were acting not on his behalf but in the interests of others. It was no part of the agency of Mr Gordon or indeed his firm, that he or it should commit wrongful acts upon the pursuer. Accordingly, to the extent that a principal is "clothed with" the knowledge of his agent, that is only true if the agent is acting within his authority. Moreover, whether the knowledge of an agent should be imputed to the principal depends on the context: *Bilta (UK) Ltd (in liquidation)* v *Nazir (No 2)* [2016] AC 1. Here there were compelling arguments in the factual context and the nature of the present claim why no such imputation is appropriate. Further, recent cases made the policy of s 6(4) clear. It is in essence about the equity (or otherwise) of a defender relying on the passage of time, given what he has said or done, or failed to say or do, in relation to a pursuer's claim. The provision does not require a positive act on the part of the defenders

but is also satisfied by an omission: *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Ltd* [2011] CSIH 26; *Heather Capital* v *Levy & McRae*.

[69] The basis of the pursuer's claim is fraud and conspiracy. The ground for relying on section 6(4) is that the pursuer knew nothing about that cause of action until 7 October 2016. This was the typical situation of the victim of fraud not knowing that he is a victim. The contention for the sixth to eighth defenders that knowledge of the pretence must have come to an end when proceedings were raised against P&W in 2014 was irrelevant. This case is concerned with the present defenders and their conduct, including causing the pursuer not to claim against them. These defenders committed a fraud and concealed it successfully until October 2106. The pursuer's pleadings were therefore a relevant invocation of section 6(4) for a period sufficiently long that the five-year prescriptive period has not been completed since the cause of action arose in 2009.

[70] Turning to the issue of equitable compensation, such an obligation did not fall under any of the sub-paragraphs of Schedule 1, paragraph 1, to the 1973 Act and was therefore not amenable to the five-year prescription. A claim for equitable compensation is not a claim for damages: *AIB Group (UK) plc* v *Mark Redler & Co* [2015] AC 1503; *Kidd* v *Paull & Williamsons LLP (*at paras [37]-[46]*); Hobday* v *Kirkpatrick's Trustees* 1985 SLT 197 (at 199). It was correct that a pursuer cannot just choose or elect to use equitable compensation. There had to be a fiduciary content. The pursuer's position was that there is no binary choice between fraud or breach of fiduciary duty. Here the facts pled disclosed a breach of fiduciary duty in the context of fraud. Breach of fiduciary duty is a breach of its own kind and is not the same as a claim based on delict or contract. The authorities made it clear that there is no sense in drawing a sharp line between a trust in the strict sense and a fiduciary duty in the other.

There was a valid claim for equitable compensation. It was accepted that the precise boundaries of that remedy are difficult to define. However, the fundamental proposition behind such a claim is that if it is based on a duty of honesty then there can be equitable compensation. The sixth to eighth defenders were under an obligation not to act when they knew there was a breach of fiduciary duty; it was unconscionable to do so. The question that arose was whether there is a duty arising from the professional nature of a party's position to not just distance himself from what is going on but to tell the other party. If a solicitor engages in a fraud, equitable compensation is an available remedy.

Reply for the first to fifth defenders

[71] On equitable compensation, whatever the pursuer has to say regarding the sixth to eighth defenders as solicitors does not arise regarding the first to fifth defenders, who were parties on the other side of a commercial transaction and there could be no breach of fiduciary duty or anything of that sort by them. There could be no claim of equitable compensation and for these defenders the whole issue of prescription had to turn on the question of section 6(4).

Reply for the sixth to eighth defenders

[72] Dealing with section 6(4), in relation to Mr Allan, he was not said to have been implicated in Mr Gordon's wrongdoing and so the pursuer had not pled a means of excusing the knowledge of Mr Allan. As to Mr Corray and Mr Milne, the pursuer made averments about their awareness of actual conflict. On equitable compensation, there was no case about breach of fiduciary duty. A fraudster is not a fiduciary. None of the defenders was in a fiduciary relationship with the pursuer and no such relationship is pled.

If the only case for the pursuer is fraud he cannot ask for equitable compensation.

Accordingly, this case fell within the quinquennium.

Issue 3: Decision and reasons

Section 6(4) of the 1973 Act

[73] Section 6(4) of the 1973 Act provides:

> "(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section-
>
> (a) any period during which by reason of-
>
> (i) fraud on the part of the debtor or any person acting on his behalf, or
> (ii) error induced by words or conduct of the debtor or any person acting on his behalf,
>
> the creditor was induced to refrain from making a relevant claim in relation to the obligation, and
>
> (b) any period during which the original creditor (while he is the creditor) was under legal disability,
>
> shall not be reckoned as, or as part of, the prescriptive period:
>
> Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph."

In considering how these provisions operate, I have had regard to what was said in *BP Exploration Operating Co Ltd* v *Chevron Shipping Co.* On this matter the pursuer avers, in Article 24:

> "Furthermore, the Pursuer refrained from making a claim against the Defenders on account of error induced by their conduct. That conduct was such that they pretended that the transaction was being conducted in a professionally proper, honest and arm's length fashion when as is averred above it was not and maintained that pretence after the transaction was completed. Reference is made to the terms of section 6(4) of the Act of 1973."

[74] The defenders seek to refute the existence of this alleged error as unsustainable, on the ground of knowledge of the pursuer's agents being imputed to him. The agents whose knowledge is relied upon by the defenders are Mr Allan (a partner in P&W at the material time), Mr Corray and Mr Milne. As ever in the law of agency, the scope of the agent's authority is a relevant consideration. It is not appropriate to impute to the principal knowledge on the part of the agent that was obtained when acting outwith his authority, or for an ulterior motive against the interests of the principal. On the pursuer's averments, these persons were not acting within their authority or on his behalf when the information alleged was made known to them. I also note that in *Adams* v *Thorntons WS (No.3)* two of the three judges reserved their opinion on the question of whether section 6(4) applied to imputed rather than actual knowledge. Moreover, whether the knowledge of an agent should be imputed to the principal depends on the context. In *Bilta (UK) Ltd (in liquidation)* v *Nazir (No 2)* Lord Neuberger repeatedly emphasised the importance of the nature and factual context of the claim in question. In the context averred here by the pursuer, imputing knowledge is not appropriate. While the pursuer refers to the inducement of the error for the purposes of section 6(4) as resulting from the defenders "pretending" that the transaction was properly conducted, I accept the submission that such a pretence does not require a positive act on the part of the defenders but is also satisfied by an omission to disclose the true position: *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Ltd* (at para [9]); *Heather Capital* v *Levy & McRae (*at paras [63]-[64]). I reject the defenders' position that as knowledge of the pretence was known to the pursuer in 2014 when the P&W/BP action was raised, that means the action has prescribed; the issue here is about the conduct of the present defenders. I conclude, taking the pursuer's pleadings *pro*

veritate, that the defenders have not established that the pursuer's reliance upon section 6(4) is bound to fail.

Equitable compensation

[75] The defenders did not seek to contest the pursuer's position that an obligation to make equitable compensation does not fall under any of the sub-paragraphs of Schedule 1, paragraph 1, of the 1973 Act and is not therefore amenable to the five-year prescription. The issue focused upon was whether a relevant claim is made for equitable compensation. In that regard, I was taken to a number of key authorities in relation to elements that make up such a claim, including the nature of the relationships involved, how the concept compares with the structure of a claim for damages based on negligence and the mode of its application (in particular, *AIB Group (UK) plc v Mark Redler & Co* and *Kidd* v *Paull & Williamsons LLP*). However, I was not referred to any authority on the precise scope or limits of the concept of equitable compensation, particularly in Scots law.

[76] The central point made by the defenders, on the assumption that breach of fiduciary duty can give rise to equitable compensation, is that there are no averments of such a wrong on their part. While it is correct that the pursuer's case proceeds upon the basis of a fraudulent conspiracy on the part of the defenders, it is clearly averred that the conspiracy was aimed at facilitating the breach of fiduciary duty on the part of Mr Gordon. In my view, while the case law focuses on breach of trust and the related concept of breach of fiduciary duty as constituting grounds for equitable compensation, I am not able to conclude that the authorities preclude equitable compensation where the alleged wrong is conspiring to facilitate a breach of fiduciary duty. The additional case made against the sixth to eighth defenders under reference to *Frank Houlgate Investment Co Ltd* v *Biggart Baillie LLP* if

successful could also, at least arguably, permit equitable compensation. The precise structure and scope of the principles in Scots law on equitable compensation in this context are not yet fully developed. In light of the pursuer's averments and given the lack of absolute precision in our jurisprudence on the boundaries of the concept of equitable compensation, I am therefore unable to conclude that the pursuer's case based on that ground is bound to fail. Once again, if the case had not otherwise been dismissed, the appropriate course would be to determine this issue at a proof before answer.

Conclusion

[77] For the reasons given, I accept the argument for the defenders on competency, but I reject the defenders' contentions on relevancy and specification and on prescription.

Disposal

[78] I shall sustain the first plea-in-law (as amended) for the first to fifth defenders, along with the first plea-in-law (as amended) for the sixth to eighth defenders, and dismiss the action. In the meantime, I reserve all questions of expenses.