SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT FALKIRK

[2025] SC FAL 4

FAL-A103-24

JUDGMENT OF SHERIFF S G COLLINS KC

in the cause

FRASER ALLISON residing at 6 Hillcrest Square, Falkirk FK2 0GR

First Pursuer

and

VIVIAN ALLISON residing at 6 Hillcrest Square, Falkirk FK2 0GR

Second Pursuer

against

RUSSEL + AITKEN (FALKIRK + ALLOA) LTD, a company incorporated under the Companies Acts with registered number SC616224 and having its registered office at Unit 5 The Courtyard, Callendar Business Park, Falkirk FK1 1XR

Defenders

Pursuers: Blane; Urquharts, Solicitors
Defenders: Steel, Advocate; Kennedys, Solicitors

Falkirk, 5 February 2025

The sheriff, having resumed consideration of the cause, refuses the defenders' motion for dismissal of the action, which failing deletion of some or all of the pursuers' averments of loss in condescendence 11; appoints the case to a proof before answer, all pleas in law standing, on a date to be afterwards fixed; reserves all questions of expenses meantime.

Introduction

[1] In this action the pursuers seek damages against their former solicitors for breach of contract and/or professional negligence.

[2] The pursuers instructed the defenders to act for them in the purchase of the house at 6 Hillcrest Square, Falkirk FK2 0GR, a property then located next to an undeveloped greenfield site. Missives were concluded with a date of settlement of 21 December 2021. The missives incorporated clause 21 of the Scottish Standard Clauses, obliging the sellers to exhibit a property enquiry certificate ("PEC") and (read short) entitling the pursuers to resile without penalty if it disclosed "any matter which [was] materially prejudicial to the purchaser or the property."

[3] Shortly before settlement the defenders received a PEC from the seller's solicitors which disclosed that "There is a housing proposal site to the west of the property, H21 of the local development plan refers" ("the housing proposal"). The defenders did not send a copy of the PEC to the pursuers, nor inform them of the housing proposal disclosed in it. The transaction settled and the pursuers moved into the property.

[4] The pursuers aver that they only became aware of the housing proposal in January 2022, when they learned that an appeal had been lodged by the developer against the refusal of planning permission. The housing proposal was for the development of a large number of houses on the greenbelt land adjoining the property. The developer's appeal was successful, and it appears that the houses have now been built. The pursuers aver that had the defenders made them aware of the terms of the PEC and/or the housing proposal they would not have proceeded with the transaction, as the greenfield location of the property was material to their decision to purchase it.

[5] The pursuers further aver that they intend to sell the property and move elsewhere, and that when they do so they will incur loss. First, they will have what they describe as "wasted expenditure". They aver that they will once again have to pay the costs of sale, purchase (including tax) and removal, estimated at around £26,000 in total. Second, they

aver that they incurred capital expenditure on the property prior to learning of the housing proposal, namely in relation to installing new windows, carpets, decking, blinds, and a bookshelf, and in carrying out electrical works. The total cost of these works is said to amount to around £16,500. Third, the pursuers claim damages for inconvenience and stress. This is said arise from the disruption caused by the noise, dust and traffic occasioned by the building of the housing development, and also the inconvenience and stress which will be associated with their moving house again. No specific sum is sought under this head.

[6] The defenders tabled a preliminary plea to the relevance and specification of the pursuers' averments, and I heard a debate on this plea on 3 February 2025. Thereafter I reserved judgment.

Submissions

[7] Counsel for the defenders produced, adopted and elaborated on a written note of argument. He moved the court to dismiss the action as irrelevant and lacking in specification.

[8] Counsel accepted that in relation to his motion as regards relevancy the onus was on the defenders, on familiar authority, to show that the action must necessarily fail even if the pursuers proved all their averments: *Jamieson* v *Jamison* [1952] SC (HL) 44 at 50. As regards specification, he accepted that he required to show that the pursuers had not given fair notice of what they hoped to establish (Macphail *Sheriff Court Practice* (4th Edition), paragraph 9.28), and that on the pursuers' averments the defenders would be taken by surprise at proof (*MacDonald* v *Glasgow Western Hospitals* 1954 SC 453 at 465) because they did not properly explain – to the defenders or the court – what the case was truly about: *D* v *Lothian Health Board* 2018 SCLR 1 at paragraph 32.

[9] Counsel accepted that the pursuers' averment that they would not have proceeded with the purchase had they known of the content of the PEC was a matter for proof. However he submitted that the pursuers offered only to prove that the defenders were required to "inform" them that the PEC disclosed information which "may" have been material to them. The presupposition was that the defenders could somehow know what may or may not have been material to the pursuers, but the pursuers accepted that they did not communicate to the defenders that the housing proposal was material. Absent such communication, the claim was irrelevant and should be dismissed. No authority was cited in support of this proposition.

[10] In the event that the action was not irrelevant for this reason, counsel submitted that the pursuers' averments of loss were variously irrelevant and/or lacking in specification. The pursuers averred that they "intend" to sell the property and move house, but did not say when, nor that any steps have yet been taken in this regard. That was so, even though three years have passed since they became aware of the housing proposal. They have made no averments about the current value of the property, and there was therefore no basis to prove that they had suffered any loss at all – for example if the property had increased in value by an amount in excess of the claimed losses. It was for the pursuers to aver and prove that it had not. Matters had to be considered holistically. Even if there was loss, it had not crystallized, and this was fatal. Again, no authority was cited for these propositions.

[11] In any event, the claim for costs incurred in the purchase of the property were mis-characterised as being wasted expenditure. They were not wasted, but achieved their purpose, that is, the purchase of the property and the acquisition of an asset. Moreover the estimated sum of £11,000 claimed in connection with the intended sale of the property was not further specified; there was no explanation of how this estimate was arrived at or on

what it was based. In relation to the claims for capital expenditure on the property, the pursuers had failed to answer the call as to exactly when in January 2022 they first became aware of the housing proposal, and exactly when the various items of expenditure were incurred relative to this. Material recovered under specification suggested that in at least some cases the latter post-dated the former. As regards the claims for stress and inconvenience, there was no explanation as to why the pursuers should be entitled to a further award beyond that made by the SLCC. In any event this head of loss was not, as it should have been, the subject of a separate crave. Again, no authority was cited for these propositions.

[12] In reply, the pursuers' solicitor moved the court to appoint the case to a proof before answer, all pleas standing.

[13] As to the relevancy of the claim, the pursuers did not aver that the defenders were under a duty to send the PEC to the pursuers. They accepted that not every reasonably competent solicitor would do this. But whether what the PEC disclosed was materially prejudicial to the pursuers was a matter for them. They were under no obligation to anticipate in advance everything which it might contain and tell the defenders of anything which might be materially prejudicial to them. Their position was that a reasonably competent solicitor was under a duty to inform the pursuers if the PEC contained something that might reasonably be materially prejudicial to them. That was what the pursuers offered to prove on the facts of the present case. It could not be said at this stage that it was a claim that was bound to fail, and so should go to proof.

[14] As to the pursuers' averments of loss, their position was that they did not get the house with the open greenfield outlook which they had contracted for. At proof they would give evidence that had they known of the housing proposal they would not have bought the

property, and that they intended to sell it and move. If they could satisfy the court that this intention was genuine, then their claim for the costs of selling and moving amounted to a claim for future contingent losses reasonably anticipated as a result of the defenders' wrongdoing, being costs which they would have had to pay twice: *McGregor on Damages* (21st Edition), paragraph 11.024.

[15] As to the pursuers' claim in relation to capital expenditure on the property after the purchase, it was not unreasonable for them to have incurred such expenditure prior to becoming aware of the housing proposal. But even after that point in time the expenditure might still be reasonable if it was necessary to maintain the house pending or in preparation for further sale. The defenders had obtained the invoices for the various works by way of specification. It may be that in the light of this not all of the expenditure claimed would fall to be recoverable. But it was all a matter for proof.

[16] As to the claim for stress and inconvenience, the pursuers submitted that the sum awarded by the SLCC was insufficient to fully compensate them, albeit that it fell to be deducted from any award that the court might make. They had set out the factual basis on which the stress and inconvenience arose – the disruption of the building works and the need to move house again – and they did not require to quantify the claim further. It would be a matter for the court at proof.

[17] The defenders' submission that the pursuers' claim for loss was irrelevant because they had not averred the present value of the property was misconceived. The losses which were claimed arose from the defenders' breach of contract and/or professional negligence. They had been (or would be) sustained regardless of whether or not the property had risen in value since the purchase, and there was no basis for the "holistic" approach submitted by the defenders. If the defenders wanted to try to show that there had been an increase in the

value of the property since the purchase, and that as a result of this there was somehow no loss, then it was incumbent on them to aver and prove it, not for the pursuers to aver and prove the contrary.

Analysis and decision

[18] The pursuers aver that the defenders were in breach of contract and/or professionally negligent because they failed to inform them of the housing proposal disclosed by the PEC. It was common ground that the familiar test in *Hunter* v *Hanley* 1955 SC 200 was applicable. In other words the pursuers say that no solicitor of ordinary reasonable competence would have failed to make them aware of the housing proposal prior to settlement, thereby giving them the right to resile. That is not a claim which is irrelevant and necessarily bound to fail, and it does not become so just because the pursuers did not previously tell the defenders that such a housing proposal would be materially prejudicial to them.

[19] Whether a claim of this kind succeeds is ultimately a matter of facts and circumstances as established by evidence. There may be cases where something disclosed by the PEC is on the face of it so minor that a reasonably competent solicitor would not be under an actionable duty to inform their client of it (for example, an application for permission to replace the windows on a nearby listed building). On the other hand there may be cases where there could be no sensible dispute that the solicitor would be obliged to inform the client (for example, that permission had been granted for developing an open cast mine next door to the subjects of sale). Whether or not in any case the client has previously told their solicitor of matters which the PEC might disclose which they would or would not regard as materially prejudicial, is simply part of the factual matrix for the court to consider. In other words it is relevant, but not determinative.

[20] On which side of the line the present case falls is a matter for proof. For what it is worth, however, I would suggest that to fail to inform a purchaser of a house on a greenfield site that there was a proposal for a large housing development adjacent to the house on that site would likely fall on the side of the line indicative of breach of contract and/or professional negligence on the solicitor's part. That is likely to be so whether or not the purchasers had previously indicated that they would regard this as materially prejudicial to them. It might be thought that this is precisely the sort of information of which the purchaser of a property on a greenfield site would wish to know, and of which their solicitor should inform them. However I do not have to decide this in order to reject the defenders' motion to dismiss the action as irrelevant. It is enough to say that the claim is not bound to fail on the ground advanced by the defenders, and that they have therefore not satisfied me that the test for dismissal in *Jamieson* v *Jamieson* has been made out.

[21] As to the pursuers' averments of loss, it should be remembered that the courts are entitled to take a broad approach to assessment of damages, which is sometimes described as a jury question. This does not so much reflect a lack of intellectual rigour, as a recognition that assessment of damages is often not capable of calculation with mathematical precision. An exercise of judgment is required, albeit one rooted in the facts found. Where matters are reasonably straightforward, therefore, it may not be necessary to break down precisely how a headline sum sued for has been arrived. If the defenders take issue with the approach to quantification proposed, it is open to them to propose an alternative approach. If the case is bound to go to proof anyway, matters of expediency and practicality may also come into play when considering averments of loss at the stage of debate: see *Peebles* v *Rembrand Builders Merchants Ltd*. [2016] DUN 31 at paragraphs 33 to 37, citing in particular *McBryde on*

Contract (3rd Edition) at paragraph 22.93, and *Locke* v *Murray* (unreported) Dunoon Sheriff Court, 15 October 2015.

[22] In the present case, the foundations of the pursuers' position are their averments (i) that had they been aware of the housing proposal they would not have purchased the property, and (ii) that having done so they now intend to sell it and move to an alternative property – presumably one with the greenfield location which they say was material to them. These are matters of fact, and therefore for proof. Obvious evidential issues are likely to arise as to why the pursuers have not moved since January 2022, nor apparently taken any steps preparatory to doing so. These issues will no doubt be put to them, but if the pursuers' evidence on the foundational facts were to be accepted, it may then also be accepted that they will incur costs in buying, selling and removing from the property which, but for the defenders' claimed breach of contract and/or negligence, they would not have incurred. In the absence of any submission or citation of authority to the contrary, I accept the pursuers' submission by reference to *Mcgregor on Damages* that these costs would then in principle be recoverable as future contingent losses.

[23] I therefore reject the defenders' submissions that the costs claimed in relation to purchase, sale and removal are not recoverable. If the pursuers can prove that but for the defenders' claimed breach of contract and/or negligence they would have resiled from the purchase of the property, then it would follow that they would not have sustained the costs of buying and moving to it. They would have incurred such costs in moving to an alternative property instead. If it is accepted that they are now going to move to such an alternative property, then they are entitled to claim that they will incur these costs twice, whereas but for the defenders' breach of contract and/or negligence they would have only incurred them once. If that is established, then the pursuer will sustain a loss for which they

are entitled to be compensated by reference to familiar principles. As to specification, it is inevitable that the costs of sale and removal can only be estimated at this stage but it is nonsense to suggest that the defenders do not have fair notice in this regard. It is their business to buy and sell houses and they will know the reasonable cost of doing so. If they consider the pursuers' estimates to be excessive, they can lead evidence to that effect but in any event greater specification in the pursuers' pleadings on this matter is not necessary.

[24] The pursuers also claim that they have incurred capital expenditure on the property "prior to learning of the [housing proposal]" (condescendence 11). They aver that they "only became aware of the housing proposal in January 2022" (condescendence 7). They have not responded to a call by the defenders to specify precisely when within this month they became aware of it. However the defenders lodged a specification of documents seeking recovery of, in particular, all documents showing or tending to show the pursuers' said capital expenditure. In response to this the pursuers produced (i) an undated text message bearing to be from a joiner in relation to window replacement, (ii) an invoice in relation to the purchase of carpets dated 15 January 2022, (iii) an invoice from a joiner in relation to installing a bookshelf dated 24 January 2022, (iv) an exchange of text messages including a quote for electrical work dated 24 January 2022 (with a request to carry out this work in March 2022); and (v) an invoice from a joiner in relation to installation of decking dated 29 May 2022.

[25] In the light of this the pursuers' solicitor candidly accepted that they might have difficulty establishing their claims in relation to at least some the items of capital expenditure listed. That does indeed seem likely. There are obvious questions as to whether some of all of the claimed expenditure was incurred after the pursuers became aware of the housing proposal. They have failed to answer the call to specify more precisely

the date in January 2022 when they became aware of it, and this may be material given the dates on some of the documents recovered under the specification. This may be put to the pursuers and commented upon as bearing adversely on their evidence in relation to this matter. Indeed, if they were willing to spend – as is claimed - £6,500 on decking in May 2022, four months after they were aware of the housing proposal, it might be suggested that this also casts doubt on the both of the foundational facts of their claim mentioned above. If they really would not have bought the property had they known of the housing proposal, and really intended to move thereafter, why were they spending so much on this particular home improvement, apparently well after the time when they knew about the proposal? But this is all a matter for proof.

[26] The pursuer's solicitor ventured to suggest in the alternative that the capital expenditure might be recoverable even if it was incurred after the date when the pursuers became aware of the housing proposal, for example, if it was necessary to maintain the property or prepare it for further sale. But that is not the pursuers' position on record. On the present state of the pleadings objection would no doubt be taken to any attempt to lead evidence on this line at proof. The pursuers' case for damages under this head presently rests on the proposition that the expenditure is recoverable because it was incurred in ignorance of the housing proposal, and that is presumably - for the reasons just alluded to -- because it is more consistent with establishment of the foundational facts on which their whole claim rests.

[27] The defenders submitted that it was incumbent on the pursuers to aver and plead the present value of the property. That was said to be because if it had increased in value they may have sustained no net loss, viewed holistically. The proposition seemed to be that if the property had increased in value by more than the total sum claimed by way of damages

then no award could be made. I reject this submission which, as noted, was not supported by any authority. If the above mentioned foundational facts are established, then any losses which flow reasonably and directly from the defenders' breach of contract and/or negligence are in principle recoverable, whether or not the property has increased in value since the date of purchase. On the pursuers' position, they would have bought an alternative property, and of course that property too might have gone up in value. So if the defenders wish to establish that the pursuers in fact *benefited* as a result the claimed breach of contract and/or negligence (that is, relative to the position that they would have been in had it not occurred and they had bought a different house), then it is for the defenders to aver and prove that, not for the pursuers to aver and prove the contrary.

[28] But the question of the value of the property may have some relevance relative to the pursuers' claim for damages in relation to capital expenditure. Even assuming, for the sake of argument, that the pursuers suffered loss by expending money on a capital item before becoming aware of the housing proposal, this does not mean that they would thereby be entitled to recovery of the whole sum expended. The capital item purchased may have increased the value of the property when they come to sell it. On sale, they may thereby recoup some of the capital expenditure incurred. And in any event they have had the use and benefit of the item for more than three years. But even in relation to such matters it is not necessary for the pursuers to aver and prove the overall value of the property with and without the capital expenditure. These are simply matters which the sheriff, after proof, may wish to take into account in taking the broad and robust approach to quantification referred to above.

[29] Finally, as regards the claim for stress and inconvenience, the pursuers aver that they were subjected to noise, dirt, dust and traffic congestion due to the works involved in

building the housing development, and they aver that when they move again that will in itself be inconvenient and stressful for them. They do not dispute that they have received £2,000 in compensation from the SLCC. They accept that this will fall to be deducted from any award made by the court under this head in this action: Legal Profession and Legal Aid (Scotland) Act 2007, section 14(2). It is therefore clear that the pursuers do not regard the sum awarded by the SLCC to be sufficient to compensate them for their loss under this head. The total sum craved is £50,000, and the claims for the purchase, sale and removal costs and for the capital expenditure amount to £42,714. It is therefore implicit that the pursuers estimate their loss by way of stress and inconvenience and stress at around £7,000. Whether any sum in excess of £2,000 is found to be due will be a matter for the sheriff to assess, after proof, in the light of all the evidence, and taking a broad and common sensical view of matters.

[30] As noted, counsel for the defenders also submitted that the pursuers' crave for damages for stress and inconvenience should have been the subject of a separate crave. This submission appears to have been something of an afterthought – it is not a matter raised in the defenders' note of basis of preliminary plea. In any event no authority was offered in support of it relative to the facts and circumstances of the present case. Accordingly I am not at this stage prepared to sustain the defenders' preliminary plea such as to exclude the pursuers' averments of loss in relation to stress and inconvenience. Rather, and as the pursuer submitted, I will appoint the cause to a proof before answer, all pleas standing meantime, and if so advised a more focused argument can be made on the point after the hearing of evidence.

[31] No submissions were made in relation to the expenses. I will reserve these meantime, and if the pursuers seek the expenses of the debate then the appropriate motion

can be enrolled. I note that they offered a proof before answer at the hearing on 11 September 2024. In any event parties should liaise with the sheriff clerk regarding dates for further procedure.