SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 58

A585/17

JUDGMENT OF SHERIFF R D M FIFE

In the cause

STANLEY FRANCIS MAZUR

Pursuer

against

MITCHELLS ROBERTON

Defender

Pursuer: Party
Defender: Borland

Edinburgh, 10 May 2018

Introduction

[1] A debate in this action proceeded on 6 and 20 March 2018, thereafter on 23 April 2018 following a Minute of Amendment for the pursuer and Answers for the defenders, on preliminary pleas in law 1-6 for the defenders and in terms of a Rule 22 Note, number 10 of process. The amendment procedure was completed on 23 April 2018. The debate on 23 April 2018 was treated as a continued debate with supplementary submissions from both parties.

[2] Mr Mazur appeared as party litigant. Ms Borland, solicitor, represented the defenders.

[3] At the hearing on 23 April 2018 Ms Borland confirmed the defenders were not insisting on their first plea-in-law, no jurisdiction. The court had been so advised when the

record was closed on 5 December 2017 but that had not been recorded in the interlocutor. Accordingly, I repelled the first plea-in-law for the defenders as no longer insisted upon.

[4] While Mr Mazur had not incorporated documents into the pleadings in the course of the amendment procedure, it was accepted by Ms Borland that for the purpose of the debate I could have regard to all or any of the pursuer's reduced bundle of documents lodged with the Minute of Amendment following the debate on 20 March 2018. That bundle consists of 36 productions ("the pursuer's bundle of productions").

[5] Ms Borland tendered written submissions at the start of the hearing on 6 March 2018, supplementary written submissions at the start of the hearing on 20 March 2018 and further supplementary submissions on 23 April 2018. Ms Borland also tendered a number of lists of authorities. Mr Mazur tendered written submissions for the hearing on 20 March 2018. I do not intend to repeat the written submissions in detail. I refer to the written submissions for their terms. I will refer to the written submissions where appropriate. I am grateful to parties for written submissions which significantly reduced the length of the debate.

[6] At section 2 of the written submissions for the defenders there is a summary of the factual background to this action. That factual background was agreed by Mr Mazur.

[7] The present action is action number 4 in a series of actions. In the present action Mr Mazur ("the pursuer") claims damages of £100,000 against the defenders for material breach of contract and separately negligence and aiding and abetting the actions of Matthew Pumphry of Primrose & Gordon, solicitor of Dumfries.

[8] Given the history of proceedings involving the parties, that this is action number 4 and that the pursuer is a party litigant I have set out at some length the reasoning for the decisions following the debate.

Authorities

[9] The following authorities were placed before the court although the court was not referred to all the authorities:

1. The Prescription and Limitation (Scotland) Act 1973, Section 6 and Schedule 1(d);
2. Section 10 of the Prescription and Limitation (Scotland) Act 1973;
3. *Campbell* v *Campbell* (1865) 3 M501;
4. *Jamieson* v *Jamieson* 1952 SC (HL) 44;
5. *Jamieson* v *Allan McNeil & Son* 1974 SLT (Notes) 9;
6. *Macdonald* v *Glasgow Western Hospitals* 1954 SC 453;
7. *Shedden* v *Patrick* (1852) 14 D 721;
8. *C* v *W 1950 SLT* (Notes) 8;
9. *Macphail, Sheriff Court Practice,* 3rd Edition, paragraphs 2.104-2.110, 2.112, 9.10, 9.29, 9.30, 10.60.
10. Sections 16 and 17 of the Bankruptcy (Scotland) Act 1985, as applicable to sequestration petitions presented prior to 1 April 2008;
11. Sections 31 and 54 of the Bankruptcy (Scotland) Act 1985, as applicable to sequestrations at November 2005;
12. *Liebenman* v *GW Tait & Sons* SSC 1981 SLT 585;
13. *Richardson* v *Quercus Limited* 1999 SC 278;
14. *David Johnston, Prescription and Limitation of Actions,* Second Edition, paragraphs 5.65-5.80, 622-6.29;
15. *David T Morrison & Co Ltd (t/a Gael Home Interiors)* v *ICL Plastics Ltd* 2014 UKSC 222;
16. *Gordon and others, as the Trustees of the Inter Vivos Trust of the late William Strathdee Gordon* v *Campbell Riddell Breeze Paterson LLP* 2017 UKSC 75;

17. *Dunlop* v *McGowans* 1980 SC(HL)73;

18. *Durkin* v *HSBC Bank Plc* [2016] CSIH 93;

19. *Rankin* v *Jack* [2010] CSIH 48;

20. *Phosphate Sewage Co* v *Molleson* 1879 SC (HL) 113;

21. *The Glasgow and South Western Railway Company* v *Boyd & Forrest* 1918 SC (HL) 14;

22. *McBryde, Bankruptcy, Second Edition*, Chapter 6.

23. I also considered *Tor Corporate A.S.* v *Sinopec Group Petroleum Company Limited* [2012] CSOH 112 in relation to the fifth plea-in-law for the defenders, competent and omitted.

***Res judicata*: 4th plea-in-law for defenders**

[10] At section 4 of the written submissions the defenders and at sections 3 and 4 of the submissions in response to the pursuer's answers, the defenders set out the basis upon which the defenders submitted that the issues raised by the pursuer in the present action had been determined in previous actions between the parties and that there was no basis for a plea of *res noviter veniens ad notitiam* (*"res noviter"*).

[11] The submission for the pursuer was that the present action "was greatly different" from the previous actions. I refer to the response for the pursuer at section 4 of the written submissions for the pursuer.

The law on *res judicata*

[12] The case of *Durkin* v *HSBC Bank Plc* [2016] CSIH 93 is a recent decision of the Inner House (Extra Division) regarding *res judicata*.

[13] The court stated:

> "[9] The applicable law (for *res judicata*) is well settled, and can be summarised as follows. The plea, which is found in most developed legal systems, is rooted in the public policy against repeated litigation between the same parties 'on substantially the same basis' – Lord President Cooper in *Grahame* v *Secretary of State for Scotland* 1951 SC368 at 387. In the same passage it is stressed that the court should not concentrate on the specific terms of the conclusions or the pleas in law, but look to 'the essence and reality of the matter' and simply inquire – What was litigated and what was decided? 'The court is not concerned with whether the first decision was right or wrong….'
>
> [10] In *Short's Trustee* v *Chung* 1999 SC 471 … (the court) derived little assistance from concepts such as a comparison of the *medium concludendi* of each action, but preferred the 'more useful' test adumbrated in *Grahame* - see at 477H. The 'nature of the (second) action' was different from the first. A 'new matter' was being litigated.
>
> [11] In *Primary Health Care Centres (Broadford) Ltd* v *Ravangave* 2009 SLT 673 Lord Hodge observed that a plea of res judicata depends upon a prior determination by a court of competent jurisdiction pronounced *in foro contentioso*; that the subject matter and *media concludendi* are the same; and that (other than in respect of decrees *in rem*) the parties are the same, or representative of the same parties, or with the same interest. The modern tendency is to focus on the essence of the matter rather than technical form ... Absent *res noviter ad notitiam*, a different factual basis will not stop a plea of *res judicata* if the legal claim has not changed."

[14] In support of the fourth plea-in-law the defenders set out at section 5 of the written submissions and at sections 3 and 4 of the written submission in response to the pursuer's answers in what way the pursuer's pleadings in the present action referred to matters already determined in the second and/or third actions. The defenders specify the relevant passages from the pleadings in the actions. The defenders rely upon the decision in *Durkin* as being directly in point.

Discussion and Decision on 4th plea-in-law for defenders

[15] As stated at paragraph 4.3 of the written submissions for the defenders *Macphail Sheriff Court Practice* 3rd Edition at paras 2.105-1.109 sets out the five conditions which must be met in order for a cause to be held as *res judicata*.

[16] Are the five conditions for a plea of *res judicata* met in the present action?

1. It was accepted by the parties in the course of the debate that the previous actions between the parties were determined in Edinburgh Sheriff Court and Perth Sheriff Court respectively at competent tribunals.

2. It was accepted by the parties in the course of the debate that the previous actions were litigated in contested actions, that the second action was concluded in May 2015 by Minute of Tender and Minute of Acceptance of Tender for £10,000 with judicial expenses, and that the third action proceeded to judicial determination. Sheriff Tait issued a judgment on 23 August 2016. The pursuer appealed that decision. The appeal was refused by Appeal Sheriff Arthurson on 20 December 2016.

3. The subject matter of each of the actions is the same, namely, professional negligence and breach of contract on the part of Mr Grant in relation to Primrose & Gordon and in each action there is a crave for damages and expenses. It is not material that the sum craved in damages in each of the actions is different.

4. Are the points in controversy between the parties in the present action the same as in the second action and the third action; and *Durkin* adopting *Macphail Sheriff Court Practice*, 3rd Edition at paragraph 9.10: "what was litigated and what was decided?"

    a. The pursuer in the present action relies upon a letter dated 11 May 2016 from the defenders (tab 24 of the pursuer's bundle of productions) which the pursuer avers was produced at the proof in the third action at Perth Sheriff Court on 19 May 2016 and which the pursuer avers gave him new information of which he was not previously aware. The pursuer also relies on the evidence of Mr Grant at the proof in that third action on 19 May 2016 and 20 June 2016 as giving him new information of which he was not previously aware.

b. It is upon that basis the pursuer submitted to the court on 20 March 2018 that the present proceedings were raised, see condescendence 3.

c. The letter of 11 May 2016 is a letter from Mitchells Roberton (the defenders) dated 11 May 2016 ("letter of 11 May 2016"). According to the terms of that letter the purpose of the letter was to try and limit the hearing of evidence at proof in the third action by agreeing some of the evidence in a Joint Minute of Admissions.

d. The letter was written on a without prejudice basis to the relevance of the points which the pursuer wished to agree. The fact that the letter of 11 May 2016 was written on a without prejudice basis is of no significance as to the intention of parties to agree matters not in dispute.

e. The undernote to the letter lists 11 items which, according to the letter, were points which the pursuer wished to agree. On an ordinary reading of the letter the defenders were responding to points which the pursuer had put to the defenders that the pursuer wished to agree.

f. For the purpose of the present action and in providing the pursuer with new factual information, at the hearing of the debate on 20 March 2018 the pursuer submitted to the court that he sought only to rely on items 3, 4, 6, 8 and 9 of the undernote. It was the submission of the pursuer at the hearing on 20 March 2018 that all these items provided new factual information of which the pursuer had previously been unaware.

g. Items 6, 8 and 9 do not provide any new factual information. For each of items 6, 8 and 9 the undernote from the defenders expressly states: "no admission is made". As no admission is made the pursuer cannot found

upon any of these items. These items 6, 8 and 9 contain no new factual information upon which the pursuer can rely in any proceedings. The pursuer expressly accepted during the debate on 20 March 2018 that was correct.

h. Items 3 and 4 of the undernote are interlinked.

i. Item 3 states:

> "Hugh Grant of Grant Brown Hughes, Solicitors, did not send to Graeme Smith, CA, the letter from Primrose & Gordon WS, a copy of which is produced by the Defender as 6/15 in this present action (third action)."

j. Item 4 states:

> "The terms of said letter, produced at 6/15 was not considered by Graeme Smith, CA, at the time of his Adjudication of the claim of Primrose & Gordon, WS, in the sequestration of the Defender."

k. As Mr Grant did not send the letter 6/15 to the trustee Mr Smith, it follows Mr Smith did not consider the letter 6/15.

l. The letter 6/15 of process is a copy of a letter dated 17 February 2006 from Primrose & Gordon to the pursuer, see tabs 20 and 25 of the pursuer's bundle.

m. The highlighted section of the letter reads as follows.

> "I got your two emails. All the money has completely run out – largely on outlays. There has been no fee charged and no fee put through nor do I intend to charge any. I think I made this clear."

n. The pursuer informed the court on 20 March 2018 that Primrose & Gordon had submitted a claim in the sequestration for fees of £12,000. That was why the pursuer stated to the court that he had instructed Mr Grant to "deal with that matter". That instruction, according to the pursuer, was for Mr Grant to send

the letter 6/15 to the trustee Mr Smith and which, according to the pursuer, the pursuer believed Mr Grant had done.

o. The pursuer submitted that some 10 years later, when the pursuer had sight of the letter of 11 May 2016 from the defenders in the third action and heard the evidence of Mr Grant during the course of cross examination there was evidence that Mr Grant had not done so. The pursuer was not aware of this until May 2016.

p. The pursuer was sequestrated on 28 November 2005. The pursuer was discharged from his sequestration on 14 November 2008 by automatic discharge. Mr Grant was first instructed by the pursuer in around March 2009. That was after the pursuer had been discharged from his sequestration. There is a factual dispute between the parties whether Mr Grant was instructed by the pursuer to undertake any work in relation to the sequestration. Mr Grant denies being instructed to carry out any work in relation to the sequestration.

q. Items 3 and 4 do not provide any new factual information which would form the basis for the present action as new factual information. All items 3 and 4 state are:

    1. Mr Grant did not send the letter 6/15 to Mr Smith; and

    2. Mr Smith did not consider the letter 6/15 at the time of his adjudication of the claim of Primrose & Gordon in the sequestration.

r. There is no admission by Mr Grant that he was instructed to send the letter 6/15 by the pursuer. There is no admission by the defenders that they were

under any obligation to provide the letter 6/15 to the trustee. All that is stated in item 3 is that Mr Grant did not send the letter 6/15 to Mr Smith.

s. No other factual information can be inferred from the words of item 3.

t. No further factual information can be inferred from the words in item 4.

u. In any event item 4 is factually incorrect. Mr Smith did not adjudicate the claim of Primrose & Gordon in the sequestration.

v. I refer to the evidence of Mr Smith in the third action at tab 32 of the pursuer's bundle which bears to be evidence given by Mr Smith at the proof at Perth Sheriff Court on 21 June 2016. The extract from the transcript covers all of Mr Smith's evidence, being pages 18-23.

w. At page 22 Mr Smith states:

> "I mean I was not directly involved in the sequestration process through the Court and the sequestration other than the last two months …"(lines 9 – 11)

and later

> "… my role at the end of the sequestration was simply to pay out the dividends based on the previous adjustments and the final sequestration, I was only in the office because Mr Johnstone retired and gave up."(lines 28 – 31)

x. I have reviewed the various extracts contained in the pursuer's bundle of documents covering extracts of the notes of evidence of Mr Grant in the course of cross examination on 19 May 2016 and 20 June 2016, tabs 1, 12, 13, 21A, 26 and 36.

y. There is in my view no new factual information within the transcript which would form the basis for the present action as new information. No further factual information can be inferred from the extract transcripts of the evidence of Mr Grant.

z. I also refer to the extract transcript of the notes of evidence from the third action during the cross examination of Mr Grant at page 81. The pursuer states to Sheriff Tait at page 81 D-F:

MR MAZUR:

" … Again it goes back to the initial reason for pursuing Mathew Pumphrey was, were I successful I could then pursue him for my sequestration, so that was the whole reason for pursuing Mathew Pumphrey because of what he had done to me."

aa. The present action is a further claim by the pursuer for professional negligence and breach of contract by Mr Grant in relation to Primrose & Gordon. If the previous action had been successful as averred by the pursuer in the present action the pursuer "could then pursue him (Mathew Pumphrey) for my sequestration".

What was previously litigated and what was decided ?

bb. I refer to the written submissions for the defenders at section 4.4. The process is summarised by *Macphail Sheriff Court Practice,* 3rd Edition at paragraph 9.10:

"Where a plea of *res judicata* is stated, its validity as regards identity of *media concludendi* normally depends upon a consideration of the pleadings and the decision in the previous action: the question is always, what was litigated and what was decided. The court must read the whole of the pleadings in each case and grasp the substance of each, and then compare the two. The pleadings accordingly constitute a permanent record of the issues litigated in the action, and together with the decree will show whether the court's decision will ground a successful plea of *res judicata* in subsequent proceedings."

cc. The sequestration of the pursuer has previously been raised in the second action and in the third action both of which cases have been judicially determined. The pursuer averred he had been deprived of the opportunity to

seek recall of his sequestration and the restoration of his reputation as a result of Mr Grant's actings. The pleadings in the present action cannot be looked at in isolation. The relevant passages from the pleadings are as follows:

Second action condescendence 5:

"More importantly the Pursuer has been deprived of the opportunity of seeking recall of his sequestration and the restoration of his reputation. Neither of these remedies are now available to him as a result of Mr Grant's actings. The Pursuer all along made clear to Mr Grant that he wished a judicial determination on the merits in respect of professional negligence on the part of P&G. Compensation for the damage to his reputation and loss of creditworthiness caused by sequestration is accordingly sought from the Defenders. The Pursuer has subsequently incurred substantial additional costs trying to have the acceptance of tender by Mr Grant declared invalid." (lines 17 – 25)

Third action: Answer 4:

"The Pursuer has been deprived of his chance of recovering £40,000 in damages against P&G as a result of Mr Grant's actings without his instructions or authority. More importantly the Defender has been deprived of the opportunity of seeking recall of his sequestration and the restoration of his reputation. Neither of these remedies are now available to him as a result of Mr Grant's actings. The Defender all along made clear to Mr Grant that he wished a judicial determination on the merits in respect of professional negligence on the part of P&G. Compensation for the damage to his reputation and loss of credit worthiness caused by sequestration is accordingly being sought from the Pursuers in his action against them at Edinburgh Sheriff Court." (lines 62 – 73)

dd. The pursuer has previously raised proceedings against the defenders, namely the second action, for professional negligence and breach of contract in relation to Primrose & Gordon. The pursuer defended the third action at the instance of the defenders on the grounds of professional negligence and breach of contract on the part of the defenders.

ee. In the written submissions for the defenders in response to the pursuer's answers to the submissions for the defenders, the defenders rely on the case

of *Durkin* which, it was submitted, was directly in point to the present case.

As a summary from the written submissions there were similarities between *Durkin* and the present action:

- motivated by perceived unjust result in previous proceedings;
- same losses claimed in previous actions;
- essential issue in dispute and nature of action the same;
- serious allegations without relevant and specific averments;
- any truly new ground of action unenforceable due to prescription.

ff. There are similarities between the present case and *Durkin*. The decision in *Durkin* is helpful in setting out the current views of the court on *res judicata*. I am not persuaded *Durkin* is directly in point. For the purpose of determining the plea of res judicata in this action I focus on the following factor highlighted in *Durkin*:

Is the essential issue in dispute and nature of action the same?

gg. I have extracted the following passages from the written submissions for the defenders in response to the pursuer's answers to the submissions, at section 3.8.3:

In the Inner House decision [*Durkin*], the Court stated that:

> "It is true that the underlying nature of the wrongful act (or delict) has been re-categorised ..., but this does not change the essential issue in dispute, nor the nature of the action." (paragraph 16).

The same can be said in the present case. In the second action, the Pursuer sought damages for losses he alleged he had suffered as a result of the negligence by the Defender. At Article 5 of Condescendence of the Record in

the second action and at Answer 5 (page 14) in the Record in the third action the Pursuer states:

> "… the Pursuer has been deprived of the opportunity of seeking recall of his sequestration and the restoration of his reputation. Neither of these remedies are now available to him as a result of Mr Grant's actings … Compensation for the damage to his reputation and loss of credit worthiness caused by sequestration is accordingly sought from the Defenders."

The Defenders responded in Answer 5 of the pleadings in the second action that:

> "No alleged act or omission on the part of the defenders has resulted in the pursuer being deprived of the opportunity of seeking recall of his sequestration or the restoration of his reputation."

The Pursuer has already sought damages for losses he alleges arise as a result of him being prevented him from recalling his sequestration by the Defenders' actions. In the second action he received £10,000 plus judicial expenses by way of Minute of Tender and Acceptance in full and final settlement of all claims contained within that action and decree of absolvitor was pronounced.

The Pursuer also makes further allegations in the current action. At pages 4 and 5 at paragraph 5.2.1 he claims that Mr Grant failed to properly cite witnesses for the proof in the first action. It is understood that he suggests that in the course of the proof in the third action, in 2016, he discovered Mr Grant had not cited other witnesses, beyond those he mentioned in the second action for negligence relating to Mr Grant's conduct of the first action. The Pursuer makes averments in this regard at Article 6 of Condescendence, referring variously to five and seven witnesses. It is submitted however that

this is in essence the same issue covered in the second action and does not add any new complexion to the action.

The Pursuer also submits at page 5, paragraphs 5.2.2 and 5.2.3 that Sheriff Tait erred in her decision in the third action in relation to the issue of modification of expenses associated with a discharged diet of debate and his claim that the choice of Court in the second action resulted in an unnecessary cost to him for rail fare. Both of these points were determined by Sheriff Tait and Appeal Sheriff Arthurson did not find any error in that determination (per paragraph 6 of Appeal Sheriff Arthurson's Note).

The Pursuer also makes various allegations of fraud and dishonesty on the part of Mr Grant and/or the Firm, as detailed in Part 9 of the Defenders' principal written submission and Part 8 of this submission below. The Pursuer's amended Article 32 of Condescendence, at paragraph 10 states:

> "The Pursuer avers that in all the records prior to the proof of 2016 there is no reference to this fraudulent action of Hugh Grant whatsoever."

However, the Pursuer has previously alleged fraud and deceit on the part of Mr Grant in previous actions. In particular, in the Record in the second action at Article 3 of Condescendence, lines 5 – 12, and Article 5 of Condescendence, lines 11 – 15 and in the Record in the third action, the Pursuer makes similar allegations at Answer 3, lines 30 – 35 and 86 – 88 and Answer 4 at lines 59 – 62, 73 – 76 and 76 – 81, as follows:

"Rule B1.2 states:

> "You must be trustworthy and act honestly at all times so that your personal integrity is beyond question. In particular, you must not

> behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful."

Rule B1.13.1 states: "You must never knowingly give false or misleading information to the court."

Mr Grant of the Defenders acted in breach of all these rules after 1 October 2012 and breached the duties incumbent upon him in terms of said Practice rules as hereinafter condescended upon." (Second Action, Article 3, lines 5 – 12 and Third Action, Answer 3, lines 30 – 35)

"The Pursuer produces and refers to the aforesaid judgment of Sheriff Crowe, decision of Sheriff Principal Stephen and reports of the Scottish Legal Complaints Commission as expert opinions on the question of the Defenders' alleged negligence and flagrant disregard and fraudulent misrepresentation of his instructions upon which he intends to rely." (Second Action, Article 4, lines 11 – 15 and Third Action, Answer 4, lines 59 – 62).

"He not only acted negligently falling below the standards of a reasonably competent solicitor but also deliberately misrepresented the Defender's instructions to D&W in a fraudulent manner." (Third Action, Answer 3, lines 86 – 88).

"He is seeking aggravated damages for the continued refusal of Mr Grant to accept he was at best negligent and at worst fraudulently culpable thereby giving the Defender no option but to raise these further proceedings." (Third Action, Answer 4, lines 73 – 76)

"Sheriff Crowe, Sheriff Principal Stephen and the Scottish Legal Complaints Commission have already given their opinions as to how far Mr Grant's conduct and behaviour fell short of the standards expected of a reasonably competent and honourable member of the solicitor profession and shall be founded upon. Sheriff Principal Stephen in particular at paragraph 19 of her decision stated: 'I should add that any questions of fraud or bad faith are matters which are more properly arguable in any proceedings that may ensue between the appellant Mr Mazur and his former solicitor Mr Grant.' (Third Action, Answer 4, lines 76 – 81)."

hh. The defenders have submitted that the nature of the dispute and the allegations of fraud and deceit made by the pursuer in the present action are

therefore essentially the same as in previous actions. As stated by the court in *Durkin* at paras [14] and [16]:

"[14] If one turns to the issues raised in the present case, plainly there are differences from the pleadings in the first action, but the basic cause of action remains the same, namely, damages for loss caused by the adverse credit references, which in turn were caused by the wrongful communication of the notices to the credit reference agencies. The differences relate to the categorisation of the delictual act, namely negligent misstatement in the original proceedings, and in the present proceedings, variously malicious and deliberate falsehood (sometimes referred to as defamation); intentional harm; and fraud/fraudulent misrepresentation…

[16] It is clear that the new action is an attempt to re-litigate matters decided adversely to the pursuer…."

ii. As already noted in paragraph [9] of *Durkin* the court is not concerned with whether the first decision is right or wrong. To put it another way the court is not concerned whether the pursuer was successful or unsuccessful in any previous proceedings, rather, what was litigated and what was decided.

jj. The question for this court to determine is whether the essential issues in dispute and the nature of action are the same.

kk. In considering the written pleadings a broad approach not a narrow approach should be taken whether the essential issues in dispute and the nature of action are the same.

ll. As stated in *Macphail* at para 9.10:

"The court must read the whole of the pleadings in each case and **grasp the substance of each**, and then compare the two." (my emphasis)

mm The underlying nature of the delict may have been re-categorised in the present action but that has not changed the essential issue in dispute or the nature of the action.

nn I adopt what is stated in *Durkin* at paragraph [18]:

> "… In the language of *Phosphate Sewage Co Ltd*, whatever different facts or legal arguments are now presented, the nature of the relief claimed remains the same. To borrow the words of *Short's Trustee*, the new action is an "unacceptable repetition of litigation" on a matter previously determined in contested proceedings. The above is consistent with the rule that when damages are sought for a delictual act, successive actions based upon different legal grounds or more recent damages are not allowed. All damages past, present and future must be claimed in the original action."

oo In the present action the pursuer is seeking damages for a delictual act by re-categorising a previous claim for professional negligence and breach of contract on the part of the defenders. For the reasons already stated, see [16] 4 q, r, s, t, x, y and aa above there is no new factual information from the pursuer in the present action. The letter of 11 May 2016 was known to the pursuer in advance of the start of the proof in the third action at Perth Sheriff Court commencing 19 May 2016 and yet no motion was made by the pursuer either to amend or discharge the proof, see [20] below. As in *Short's Trustee*: "All damages past, present and future must be claimed in the original action."

pp I have concluded the points in controversy between the parties in the present action are essentially the same as in the second action and the third action.

5. It is accepted by the parties that the parties in the second action and the third action are the same parties in the present action.

Plea of *res noviter veniens ad notitiam* ("res noviter")

[17] The pursuer has no plea of *res noviter* but given the basis upon which the pursuer has raised the present action it is appropriate for the court to consider a plea of *res noviter*. This is addressed by the defenders in the written submissions for the defenders at section 4 and in particular sections 4.5 to 4.7 and in the written submissions for the defenders in response to the answers for the pursuer at section 4.

[18] I would endorse what is stated by the defenders at section 4.2:

> "The Pursuer makes no specific plea of res noviter but alludes to the possibility of the principle applying, as he states he was unaware of the Defenders not having previously sent P&G's letter of 17 February 2006 (Pursuer's production 20) to his Trustee until he received their letter of 11 May 2016 (Pursuer's production 24). He makes submissions in this regard in his 'Answers to the submissions of the defender' at page 2 at paragraphs 3.1.2 and 3.1.3, page 3 at paragraphs 4.6 and 4.7, page 7 at paragraph 6.7 and page 17 at paragraph 10.1. He does however admit that much of the evidence he relies on is the same as in previous actions, stating at page 7, paragraph 6.2: 'The evidence produced by the pursuer is not new except for certain items. However Hugh Grant denies that many of the once accepted evidence from previous proofs. These are now if he is to believed new evidence as he denied them. All extracts carry the truth.' "

[19] The solicitor for the defenders relies on a decision of an Extra Division of the Inner House in *Rankin* v *Jack* 2010 CSIH 48 which in turn refers to comments of Lord Cullen in *Miller* v *MacFisheries* 1922 SC 157 at page 164:

> "Accordingly, I think the power should not be exercised save in very exceptional cases, and where the new evidence not formerly available is in its nature such as materially to change the complexion of the case, and to lead to a reasonable presumption that there has been a miscarriage of justice and that the new evidence, had it been available at the trial, would have led to a different verdict."

[20] The pursuer relies on the letter of 11 May 2016 in raising the current proceedings as new information. I have already addressed the terms of that letter and concluded the letter of 11 May 2016 did not provide any new factual information which would form the basis for the present action as new factual information, see [16]4 above. Further and in any event the letter of 11 May 2016 was known to the pursuer in advance of the start of the proof in the third action at Perth Sheriff Court commencing 19 May 2016. At the continued debate on 23 April 2018 the pursuer accepted he made no motion either to discharge the proof for investigation and amendment or to amend the pleadings prior to the start of the proof on 19 May 2016.

[21] On that analysis and for the reasons stated there is no new information in the present action which was not formerly available to the pursuer and which was of such materiality "to change the complexion of the case, and to lead to a reasonable presumption that there has been a miscarriage of justice and that the new evidence, had it been available at the trial, would have led to a different verdict". There is no basis for a plea of *res noviter* to be made by the pursuer in the present action.

[22] I shall sustain the fourth plea-in-law for the defenders that the issues raised in the present action are *res judicata*.

Prescription: 6th plea-in-law for defenders

[23] At section 7 of the written submissions the defenders, in the supplementary written submissions for the defenders and at section 5 of the written submissions in response to the pursuer's answers to the submissions for the defenders, set out the basis upon which the defenders submit that any obligation on the part of the defenders to make reparation has expired.

[24] The submissions for the pursuer are set out at section 7 of his written submissions. In summary it was submitted by the pursuer that the action was not prescribed as the date from which the prescriptive period began was from May 2016, for the reasons stated below.

[25] The relevant statutory provisions are found in the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").

Section 6 provides:

(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years-

(a) without any relevant claim having been made in relation to the obligation, and

(b) without the subsistence of the obligation having been relevantly acknowledged,

then as from the expiration of that period the obligation shall be extinguished:

Provided that in its application to an obligation under a bill of exchange or a promissory note this subsection shall have effect as if paragraph (b) thereof were omitted.

(2) Schedule 1 to this Act shall have effect for defining the obligations to which this section applies.

(3) In subsection (1) above the reference to the appropriate date, in relation to an obligation of any kind specified in Schedule 2 to this Act is a reference to the date specified in that Schedule in relation to obligations of that kind, and in relation to an obligation of any other kind is a reference to the date when the obligation became enforceable.

(4) … see [49] below.

(5) Any period such as is mentioned in paragraph (a) or (b) of subsection (4) of this section shall not be regarded as separating the time immediately before it from the time immediately after it.

Schedule 1

Obligations affected by prescriptive periods of five years under section 6:

(1) Subject to paragraph 2 below, section 6 of this Act applies—

…

(d) to any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation;…

section 10(1) defines a "relevant acknowledgement" as follows:

(1) The subsistence of an obligation shall be regarded for the purposes of sections 6, 7 and 8A of this Act as having been relevantly acknowledged if, and only if, either of the following conditions is satisfied, namely —

(a) that there has been such performance by or on behalf of the debtor towards implement of the obligation as clearly indicates that the obligation still subsists;

(b) that there has been made by or on behalf of the debtor to the creditor or his agent an unequivocal written admission clearly acknowledging that the obligation still subsists.

Section 11 of the 1973 Act sets out when an obligation to reparation will become enforceable for the purposes of prescription.

Section 11 provides:

(1) Subject to subsections (2) and (3) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred….

(3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware…

Discussion and Decision on 6th plea-in-law for defenders

[26] The pursuer in the present action seeks damages for breach of contract and professional negligence. That is an obligation to which section 6 and Schedule 1(d) of the 1973 Act applies. The prescriptive period is accordingly five years.

[27] As regards the pursuer's allegations of fraud (which are denied by the defenders) it was submitted by the defenders that any obligation to make reparation for a delict such as fraud was also subject to a five year prescriptive period. The solicitor for the defenders relied on *Johnston, Prescription and Limitation of Actions*, Second Edition, at paragraphs 6.27

and 6.28. I agree with that submission. The prescriptive period for the purpose of the present action is five years.

[28] For the purpose of the sixth plea-in-law for the defenders in relation to prescription I have to determine in terms of the 1973 Act:

(a) the date when the obligation to make reparation for loss, injury or damage caused by an act, neglect or default became enforceable (section 11);

(b) the date of any relevant acknowledgement, if any (section 10(1)).

(a) The date when the obligation to make reparation for loss, injury or damage caused by an act, neglect or default became enforceable (section 11).

- The date when the obligation to make reparation became enforceable has been considered by the Supreme Court in several cases in recent years.
- In *David T Morrison & Co Ltd (t/a Gael Home Interiors)* v *ICL Plastics Ltd* 2014 UKSC 222 the Supreme Court confirmed that for the prescriptive period to begin under section 11(3) of the 1973 Act the creditor of the obligation needed to be aware (actually or constructively, if the creditor could with reasonable diligence have been aware) only of the occurrence of the loss or damage and not of its cause.
- In the recent Supreme Court case of *Gordon and others, as the Trustees of the Inter Vivos Trust of the late William Strathdee Gordon* v *Campbell Riddell Breeze Paterson LLP* 2017 UKSC 75 Lord Hodge states in relation to the operation of section 11(3):

  "It follows that section 11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry

> rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss."

[29] In the present action for the prescriptive period of five years to begin under section 11(3) of the 1973 Act I specifically raised with parties what could be possible dates from which the loss occurred. There are a number of possible dates from which the loss occurred. These dates are listed as follows. No other dates were identified or suggested by parties during the course of the debate and there are no other obvious dates:

1. date of sequestration 28 November 2005;
2. date of discharge from sequestration 14 November 2008;
3. date the pursuer withdrew his objection to the trustee's adjudication in or around November 2009;
4. date of discharge of the trustee in sequestration, which I was informed by both parties during the debate happened in or around November 2009;
5. 17 July 2012: email from Mr Grant to the pursuer;
6. letter of 11 May 2016 from Mitchells Roberton;
7. 19 and 20 May and 20 June 2016: dates when Mr Grant gave evidence at Perth Sheriff Court in the third action.

[30] The present action was raised by the pursuer on 22 August 2017. As the prescriptive period for the purpose of the present action is five years then any date prior to 22 August 2012 is prescribed in terms of sections 6 and 11 of the 1973 Act. That covers the dates listed in items 1-5 above. All these 5 items have dates more than five years prior to 22 August 2017.

[31] Accordingly, for the purpose of determining the date when the obligation to make reparation became enforceable in the present action, the only other dates which require to be

considered are 11 May 2016 (item 5) and 19/20 May 2016 and 20 June 2016 (item 6). Indeed, these were the only dates expressly relied upon by the pursuer in his submissions at debate.

[32] I highlight an extract from what was said by Lord Hodge, see [28] above, in *Gordon and others, as the Trustees of the Inter Vivos Trust of the late William Strathdee Gordon* v *Campbell Riddell Breeze Paterson LLP* 2017 UKSC 75:

> "It follows that section 11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. **The creditor does not have to know that he or she has a head of loss.**"(my emphasis)

[33] So, the pursuer did not have to know that he had a head of loss. That is not the date from which the prescriptive period begins. The date from which the prescriptive period begins is the date of the occurrence of the loss not of its cause. This is a single and indivisible obligation, see *Dunlop* v *McGowans* 1980 SC(HL)73 Lord Keith of Kinkel at page 81.

[34] The date from which the prescriptive period began was from the date the loss occurred resulting in the liability to make reparation and **not** from the date when the pursuer was aware he had suffered a loss **nor** from the date the pursuer was aware something had gone awry **nor** from the date the pursuer was aware of the cause of the loss.

[35] What was the date of occurrence of loss resulting in the liability to make reparation in relation to the present action?

[36] The pursuer would have been aware or could with reasonable diligence have been aware of having suffered the alleged financial and reputational losses he claims resulted from his sequestration in or around the period of the sequestration, which began 28 November 2005 and ended with his discharge on 14 November 2008. That would be the

earliest dates from which the prescriptive period of five years began: either 28 November 2005 or 14 November 2008.

[37] Alternatively the prescriptive period of five years began from the date upon which the pursuer dropped his objection to the claim by Primrose & Gordon in the sequestration. That happened in or around November 2009.

[38] Alternatively the prescriptive period of five years began from the date upon which the trustee in sequestration was discharged and the sequestration proceedings were at an end. I was informed by parties during the debate this had happened in or around November 2009.

[39] Alternatively the prescriptive period of five years began from when Mr Grant sent an email to the pursuer on 17 July 2012, see Judgment of Sheriff Tait in case reference A7/15 at Perth Sheriff Court, page 7. The email of 17 July 2012 from Mr Grant to the pursuer included the following:

> "For the avoidance of any doubt, however, the establishing of Matthew Pumphrey's professional negligence will not 'overturn' the bankruptcy as you put it ... I thought I should make it absolutely clear, however, that the legal fact of pronouncing of bankruptcy will not be changed in any way by the outcome of this case."

[40] The letter of 11 May 2016 from Mitchells Roberton to the pursuer is not the date of occurrence of loss resulting in the liability to make reparation.

[41] The evidence of Mr Grant at Perth Sheriff Court on 19 and 20 May and 20 June 2016 is not the date of occurrence of loss resulting in the liability to make reparation.

[42] The present action has been raised more than five years after the latest date from which the prescriptive period of five years began, namely, 17 July 2012.

(b) The date of any relevant acknowledgement, if any (section 10(1))

[43] I have concluded there has been no relevant acknowledgement in the present action in terms of section 10 of the 1973 Act.

> "For there to be a relevant acknowledgement there needs to be an unequivocal written admission or that the admission must clearly acknowledge that the obligation still subsists": Lord Prosser in *Richardson* v *Quercus Limited* 1999 SC 278.

[44] I refer to the supplementary written submissions for the defenders and in particular paragraph 7.2 where it is stated:

> "It is submitted that neither the Defenders' letter of 11 May 2016, … nor any evidence given by Mr Grant at the proof in the third action heard in May and June 2016 or correspondence since then, contain a 'relevant acknowledgement'. In the letter of 11 May 2016, the Defenders stated that a letter from Primrose & Gordon solicitors dated 17 February 2006 was not sent to the Pursuer's Trustee in sequestration. The Defenders have made no admission that they were ever under any such obligation to provide that letter to the Trustee. The Defenders have also made no admission that they were under any obligation to somehow recall or stop the Pursuer's sequestration. They have denied having any such instructions. If the Pursuer is suggesting that the letter of 11 May 2016 or evidence given by Mr Grant at the 2016 proof contains any relevant acknowledgement, that is incorrect."

[45] As I have already stated in this Judgment, see [6]4 above:

> "Items 3 and 4 (of the undernote to the letter of 11 May 2016) do not provide any new factual information which would form the basis for the present action as new factual information. All items 3 and 4 state are:
>
> 1. Mr Grant did not send the letter 6/15 to Mr Smith; and
>
> 2. Mr Graeme did not consider the letter 6/15 at the time of his adjudication of the claim of Primrose & Gordon in the sequestration."
>
> There is no admission by Mr Grant that he was instructed to send the letter 6/15 by the pursuer. There is no admission by the defenders that they were under any obligation to provide the letter 6/15 to the trustee. All that is stated is that Mr Grant did not send the letter 6/15 to Mr Smith. No other factual information can be inferred from the words of item 3. No further factual information can be inferred from the words in item 4".

[46] There is nothing within the terms of the letter of 11 May 2016 from the defenders to the pursuer that could be construed as a relevant acknowledgement for the purpose of section 10(1) of the 1973 Act.

[47] There is nothing within the extracts of the notes of evidence for Mr Grant during the course of the proof at Perth Sheriff Court that could be construed as a relevant acknowledgement for the purpose of section 10(1) of the 1973 Act.

[48] Accordingly, there has been no relevant acknowledgement in the present action.

Period not reckoned as part of the Prescriptive Period: section 6(4) of the 1973 Act

[49] I refer to the supplementary written submissions for the defenders at section 8. The prescriptive period can be interrupted, that is a period will not be reckoned as part of the prescriptive period in certain restricted circumstances in terms of section 6(4) of the 1973 Act which provides:

> "6(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."

[50] As stated in the supplementary submissions for the defenders at section 8.2:

"The definition of fraud is set out in *Derry* v *Peek* (1887) 14 App Cas 337, by Lord Herschell at page 374:

> 'fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.'

If the Pursuer is suggesting there has been fraudulent concealment, it is necessary to establish a duty of disclosure and that there has been a machination or contrivance to deceive (McBryde, The Law of Contract in Scotland, Third Edition, paragraphs 14-16 to 14-18)."

[51] The pursuer makes no factual averments to support an allegation of fraudulent misrepresentation or fraudulent concealment. There has been no interruption of the prescriptive period in terms of section 6(4) of the 1973 Act.

[52] For all these reasons I shall sustain the sixth plea-in-law for the defenders that any obligation incumbent upon the defenders in the present action has prescribed in terms of section 6(1) and Schedule 1(d) of the 1973 Act.

Competent and Omitted: 5th plea-in-law for the defenders

[53] The submissions for the defenders are set out at section 6 of the written submissions. In response the pursuer states the pursuer's pleadings come from the evidence, see pursuer's written submissions at section 6.

[54] It was submitted on behalf of the defenders that in the event the plea of *res judicata* was not sustained the court should sustain the fifth plea-in-law for the defenders, that the pursuer was barred by the exception of competent and omitted from now pleading any failure on the part of the defenders in respect of the pursuer's sequestration.

[55] In support of that submission the solicitor for the defenders relied on *Macphail, Sheriff Court Practice* 3rd Edition at paragraph 2.112 with reference to *Stair*:

> "Where a defender has put forward a defence that is unsuccessful, he cannot in a subsequent process challenge the prior judgment on grounds which it was competent to plead in the prior process, but which he omitted to do."

[56] In the third action Sheriff Tait upheld an objection to a line of cross examination that the then pursuers (Mitchells Roberton) had failed to implement the then defender's (Mr Mazur) instructions to seek recall of the sequestration, as there was no record and no fair notice.

[57] *Macphail* continues at paragraph 2.112:

> "The plea will be sustained only if the party against whom it is stated is seeking to challenge a prior judgment given against him or his representative and if the omitted ground would have been a good defence in the prior process."

That approach was endorsed in the case of *Tor Corporate A.S.* v *Sinopec Group Petroleum Company Limited* [2012] CSOH 112.

I have concluded that cannot be said in the present action, that the omitted ground would have been a good defence in the third action.

[58] At section 6.7 of the defenders' written submissions it was submitted by the defenders that in the second action the pursuer had not averred the defenders had failed to implement the pursuer's instructions to seek recall of his sequestration and that the pursuer was barred from raising that argument in the present action. I have rejected that submission as the plea of competent and omitted "cannot be maintained against a party who was a pursuer in a prior process", see *Macphail* at paragraph 2.113.

[59] I am not persuaded the omitted ground would have been a good defence in the prior process, that is, in the third action. I cover this more fully in addressing the second plea-in-

law for the defenders on relevancy, see [62] – [67] below. Accordingly, I shall repel the fifth plea-in-law for the defenders.

Scandalous and irrelevant averments: 3rd plea-in-law for the defenders

[60] The submissions for the defenders are set out at section 9 of the written submissions and in particular at section 9.4 and in the submissions in response to the pursuer's answers to the submissions for the defenders at section 7 and in particular section 7.1. The pursuer states his position at section 9 of the pursuer's written submissions and in particular:

> "The pursuer stands by every word printed as being factual and all can be substantiated by documents with the exception of section 8.24" which refers to Mr Grant being "an excellent liar, manipulator…."

[61] I have had regard to the Inner House decision of *C* v *W* 1950 SLT (Notes) 8 and generally. I have concluded the following averments are scandalous and irrelevant and are excluded from probation:

- Sentence 1 of condescendence 2 the words:

  "… and aiding and abetting the fraudulent actions of Matthew Pumphry of Primrose & Gordon, solicitor of Dumfries"

- Sentences 3 and 4 of condescendence 3:

  "Along with the shorthand writer's notes and the sheriff's comments there are numerous letters and emails which prove to the court that the denials of Mr Grant are entirely without substance, and are false. This evidence will be produced and will show, beyond question that the defenders, through the acts and omissions of Mr Grant, wilfully withheld information which would have prevented the Pursuer's sequestration and this inaction allowed Matthew Pumphry access to the Pursuer's inheritance."

- Sentences 2 of condescendence 6:

  "By looking at the circumstances leading up to the proof this reason can be exposed as being completely false."

- Condescendence 7:

  "This action is being raised not only to seek financial recompense but to expose Messrs Grant and Pumphrey for their cynical attempts to manipulate the legal system for their own ends regardless of the welfare of their client. Examination of the facts make it abundantly clear that Mr Grant had no intention of taking matters to proof where his conduct would be exposed as seriously questionable. He took the equally questionable route of forcing a cheap settlement against the Pursuer's wishes, but using the legal tool of 'ostensible authority' which he knew could not be challenged, thus closing the case".

- Sentence 3 of condescendence 18:

  "In failing to do so he knowingly colluded in an unlawful and fraudulent act."

- Sentence 4 of condescendence 20:

  "Here was another example of vital evidence being hidden from view."

- Sentence 3 of condescendence 22:

  "For Mr Grant to give the reason for not going to proof after almost 4 years of knowing how the Pursuer felt, was clearly false."

- Sentence 7 of condescendence 26:

  "Averred that Hugh Grant withheld that information from Sheriff Smith, thereby allowing the sequestration to go ahead."

- Sentence 1 of condescendence 28 the words:

  "… in order to hide the fact that he did so."

- Sentence 5 of condescendence 31:

  "That is a lie."

- Paragraph 4, lines 2 and 5 of condescendence 32:

  "… the lies told by Hugh Grant during that Proof created an entirely different story…" and "… knowingly allowed Matthew Pumphry to draw money from the Pursuer's estate."

- Paragraph 6 of condescendence 32:

  "Aver Hugh Grant hid this fact from all eyes when he drew up his fee note. Clearly Hugh Grant had an eye on the future should it come to light that he had colluded with Matthew Pumphry in 2009."

- Paragraph 7, lines 3 and 4 of condescendence 32:

  "… in the Proof hear the lies of Hugh Grant. Had the Trustee been allowed to give more evidence Hugh Grant's lies would have been exposed."

- Paragraph 8, line 1 of condescendence 32:

  "… the withholding of this evidence."

- Sentence 1 of condescendence 37:

  "Aver that the award of £10,000 from Primrose Gordon, and the award of same from Mitchells Roberton, were either settled as compensation or damages for their joint lies and deceit and were not part of the losses incurred by the Pursuer due to their actions."

- Paragraph 6 of condescendence 38:

  "It is imperative that the Pursuer be given the opportunity to counterclaim against these amounts which were raised through lies and deceit."

Relevancy & Specification: 2nd plea-in-law for defenders

[62] The submissions for the defenders are set out at section 8 of the written submissions and in the submissions in response to the pursuer's answers to the submissions for the defenders at section 6. The pursuer states his position at section 9 of the written submissions for the pursuer, that all the pursuer's averments are relevant and that there is sufficient specification.

[63] At sections 6.1 to 6.3 of the submissions in response to the pursuer's answers to the submissions for the defenders the following submissions are made for the defenders:

> "6.1 It is clear from the Pursuer's submissions that his principal case appears to be that, had Mr Grant provided a copy of Primrose & Gordon's ('P&G') letter of 17 February 2006 to his Trustee or the Court in or around September/October 2009, then

his appeal against the Trustee's adjudication of P&G's claim in his sequestration would have been successful and that would somehow have resulted in his sequestration being stopped or otherwise prevented. The Pursuer's position is that the letter of 17 February 2006 shows that P&G's fee was not due as work was done on a speculative or 'no win no fee' basis. The Pursuer makes submissions to this effect in his "Answers to the submissions of the defender" at page 2 at paragraph 3.1.2, page 5 at paragraph 5.2.5, page 11 at paragraph 8.7, page 13 at paragraph 8.14, page 14 at paragraph 8.16 and pages 15 and 16 at paragraphs 8.18 and 8.19.

6.2 The Pursuer claims that he was unaware, until the Defender's letter of 11 May 2016, that the letter from P&G had not been provided to his Trustee. One point to note is that the Trustee was aware of the suggestion that P&G's claim was not due as the fee was speculative, as he was served with a copy of the Note of Appeal against his adjudication of the claim on 30 September 2009 stating that. It was therefore open to the Trustee to make enquiries of Mr Mazur or the creditor if the Trustee thought that relevant.

6.3 In any event, the Pursuer's case in relation to alleged failings of the Defender in relation to his sequestration is fundamentally misconceived and entirely irrelevant. Even if P&G's letter of 17 February 2006 had been sent to the Trustee and/or the Court and if the Pursuer had somehow been successful in his appeal against the Trustee's adjudication of P&G's claim, that would not have had the result the Pursuer claims. At the highest, all that would have happened would be that P&G's claim would not be admitted in his sequestration. That would mean that other creditors would receive a greater share of the sequestrated estate and, if there were sufficient assets to repay all creditors and meet the Trustee's fees, the Pursuer would have been repaid any surplus of assets at the end of his sequestration. His sequestration would not have been 'stopped', 'halted' or otherwise avoided."

[64] The general legal test for relevancy is set out at section 8.3 of the written submissions for the defenders:

"In accordance with the leading case of Jamieson v Jamieson 1952 SC (HL) 44, the well-established test for assessing pleadings at debate is to read the Pursuer's averments as if they are true. On that basis, the Defenders can only succeed if it can be shown that, even if the Pursuer's averments were to be established at Proof, the Pursuer's case would still be bound to fail. The onus is on the Defenders to establish this.

Lord Normand states, at page 50, '… an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved.' "

[65] On a consideration of the pleadings in the present action I am persuaded the pursuer's action is irrelevant for the reasons specified in section 6.3 of the written

submissions for the defenders above, that even if the pursuer's averments were established at proof, the pursuer's case would be bound to fail.

[66] In these circumstances it is not necessary for the court to address the relevancy and lack of specification in the pursuer's pleadings all as set out in section 8 of the written submissions for the defenders and in particular at sections 8.13 – 8.25.

[67] I shall sustain the second plea-in-law for the defenders that the action is irrelevant.

Summary of Decision following Debate

[68] I repel the fifth plea-in-law for the defenders.

[69] I repel the pleas in law for the pursuer.

[70] I sustain the second plea-in-law for the defenders which would result in decree of dismissal. However, separately I sustain the fourth and sixth pleas- in-law for the defenders whereby decree of absolvitor is granted in favour of the defenders. Parties were agreed that expenses should follow success. I find the pursuer liable to the defenders in the expenses of the cause as taxed.