



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 26

CA4/22

OPINION OF LORD BRAID

In the cause

LEANDER CB CONSULTANTS LIMITED T/A LEANDOR ADVISORS

Pursuer

against

(FIRST) BOGSIDE INVESTMENTS LIMITED AND (SECOND) ALAN CARSON McLEISH

Defenders

**Pursuer: Ower; DAC Beachcroft Scotland LLP**

**Defender: Dean of Faculty KC; Paterson; Gilson Gray LLP**

25 April 2023

**Introduction**

*The Engagement Letter*

[1] The pursuer sues in this action for £150,000 which it maintains is the sum due to it by the defenders for services rendered pursuant to an Engagement Letter signed by the second defender (as a director of the first defender) on 8 March 2021. The defenders deny that any such services were rendered. Further, they have lodged a counterclaim seeking

(a) reduction of the Engagement Letter on the basis that it was part of a series of transactions induced by fraudulent (which failing, innocent) misrepresentations made by Philip Shute as

the purported executive chairman/managing partner of the pursuer and (b) payment to the first defender of the sum of £175,000 already paid to the pursuer.

### *The Bogside action*

[2] Separately, the first defender has raised an action against Mr Shute, and one Graeme Paterson (the Bogside action), seeking damages of just under £5m, said to be the loss sustained by it as a result of the allegedly fraudulent misrepresentations. It is important to acknowledge at this stage that although all parties accept that the defenders have been the victims of a fraud, Mr Shute strenuously denies that he, or the pursuer, were party to that fraud, his position being that he, as much as the defenders, was duped by the fraudster(s).

### *The fraud*

[3] The fraud surrounded the formation of a company called Obree Global which was supposedly to receive the sum of \$2.4 billion being held by a New York law firm, and to which the defenders were prevailed upon to lend the sum of \$7.5 million, which (it was said) was required to secure the release of the \$2.4 billion which had been earned from the supply of personal protective equipment (PPE). In exchange, the second defender was to receive a stake in Obree. The loan was advanced in January and February 2021. In May 2021, it was discovered that the New York law firm knew nothing of the transaction and did not hold, and had never held, the \$2.4 billion in question.

### *The Shareholders Agreement (SHA) including the arbitration clause*

[4] In August 2021 (after the commission of the fraud had come to light) a Shareholders Agreement (SHA) was entered into among the shareholders of Obree (being Mr Shute, one

Ryan Underwood and the second defender), and Obree. That replaced a previous SHA, the purpose of the second SHA being to increase the second defender's shareholding in Obree. The SHA included a dispute resolution clause (clause 25), referring any dispute "arising out of or in connection with" the SHA to arbitration.

*The debate – the issues*

[5] The action called before me for a debate on the commercial roll on the following issues:

- (i) Whether, standing clause 25 of the SHA, this court lacks jurisdiction such that the counterclaim should be dismissed;
- (ii) Whether the defenders' averments of fraud on the part of Mr Shute are sufficiently relevant and specific;
- (iii) Whether in any event the defenders have averred a substantive defence, such as to entitle them to put the pursuer to proof of its averments;
- (iv) Whether the second defender has title to sue for the sum sought in the counterclaim.

[6] The Bogside action also called before me, on the motion of the first defender in that action (Mr Shute) that it should be sisted in terms of section 10(1) of the Arbitration (Scotland) Act 2010 in order that arbitration under clause 25 might run its course.

[7] As to whether the counterclaim and the Bogside action should respectively be dismissed and sisted, the defenders' position is that clause 25 has no application. For its part, the pursuer says that the Obree fraud has no relevance to the Letter of Engagement.

[8] I will return to these arguments, and to the issues, below. First it is necessary to say something of the pleadings in this action, since ultimately I require to decide whether or not to allow parties a proof of their averments, and if so, to what extent.

## **The pleadings**

### *The summons*

[9] The pursuer avers that on 8 March 2021 it entered into an agreement with the defenders, set out in an Engagement Letter of that date, whereby it would provide services to the second defender in connection with his personal affairs and the so-called “redomiciling” of his assets in relation to ongoing divorce proceedings. At considerable and arguably unnecessary length, the summons sets out work said to have been undertaken by Mr Shute. In terms of the Engagement Letter, the parties agreed that the fee payable by the defenders would be £50,000 monthly paid in advance for an initial commitment period of 6 months (ie an initial commitment fee of £300,000 split between two payments of £150,000 each, 3 months in advance). It is averred that Obree paid the first tranche but that the second tranche of £150,000 remains outstanding.

### *The defences*

[10] The defenders aver, in answer 2, that they were induced to enter the agreement contained in the Engagement Letter as a result of Mr Shute’s fraudulent misrepresentations. As to what those misrepresentations were, reference is made to the counterclaim. They also aver that no work was done by the pursuer in connection with any “redomiciling” of the second defender’s assets and that the focus of the work done by Mr Shute related to the investment purportedly required to secure the release of the \$2.4 billion commission.

*The counterclaim*

[11] In statement 2 of the counterclaim, the defenders aver that the second defender was introduced to Mr Paterson, Mr Underwood and Mr Shute in January 2021. He was advised that they had a significant investment opportunity relative to a PPE transaction that a contact of Mr Paterson's, Brent Fernandez, had entered into with the US Department of Defense. Mr Paterson told the second defender that he had agreed with Mr Fernandez that Mr Paterson would receive 50% commission of any proceeds of the deal, said to be worth \$2.4 billion. The total commission of \$4.8 billion was said to be held by a named US law firm. The second defender was told that funding was required to overcome US regulatory issues so that the money could be released and transferred to a new company being incorporated in Dubai (Obree). To that end, the second defender was asked to provide a \$7.5 million loan in return for which he would receive a 15% stake in Obree. Obree was also to be engaged in other lucrative new contracts.

[12] In statement 3, the defenders aver that Messrs Shute and Paterson repeatedly advised the second defender that the money was held by the US law firm and constituted a legitimate source of income. In particular, on a video call on 26 January 2021, attended by, among others, the second defender, Shute and Paterson, Mr Paterson's lawyer confirmed that Mr Paterson had advised him that the full proceeds of the PPE transactions were currently held by the client account of that firm but were frozen, pending investigative clearances. Once the funds were released, they would be transferred to Obree. Mr Shute took an active role on that call and said that he and Mr Paterson's lawyer would liaise with the law firm to obtain a letter of comfort confirming that they held the funds, which would be released once certain steps had been taken. Thereafter the second defender was sent a

video by Mr Paterson, purporting to show a computer screen with an online statement for a bank account with a frozen balance of \$250 million. Mr Paterson said that this statement showed the PPE commission held by the law firm. On 2 February 2021 at about 0700 hours Mr Shute sent a WhatsApp message to the second defender stating that he and another would be coordinating with the law firm throughout that day to deliver the remaining documents to enable the transfer/transaction to be proceeded with on the following day. He said he had been working through this overnight. On 2 February Mr Paterson sent a message stating that he had received confirmation that the US law firm now held the funds. On 4 February the second defender spoke with Mr Shute. Mr Shute told him that the firm had received the funds. He then emailed the second defender's solicitors purportedly to confirm that Mr Shute had been corresponding directly with the US law firm. The email stated that the law firm had:

“...informed us that funds have been received from the US-based financial institutions that were previously holding funds that were subject to regular way AML review procedures. We anticipate that we will receive documentation in support of these funds being received shortly and just as importantly we expect those funds to be remitted out to the UAE to be received initially by Aldahabashi Gray and then ultimately transferred into the new corporate entity (Obree Global)”.

[13] In statement 4, the defenders aver that Messrs Shute and Paterson either knew that the representations were untrue or that the representations were made recklessly, there being no proper basis for belief in their truth. The representations caused the defenders to enter into a series of transactions and lend sums to Obree. In particular, in terms of a loan agreement dated 29 January 2021 the first defender agreed to lend \$7.5 million to Mr Underwood for use by Obree, which had not by then been incorporated. The funds were advanced in two tranches, £400,000 on 29 January 2021 and £5,074,000 on 10 February 2021. Those funds were placed into an escrow account, pursuant to an escrow agreement about

which the defenders make detailed averments, including Mr Shute's involvement therein. There then follows an averment that after the calls on 26 and 27 January Messrs Shute and Paterson were applying pressure to the second defender to release the loan funds, representing that another investor was interested, that the second defender might lose out on the deal and that he would double his money in a matter of weeks if he transferred the loan funds.

[14] In statement 5, the defenders aver that an English solicitor was instructed by the second defender to verify the PPE transaction and to compile a transaction bible. As that work was going on, the second defender entered a series of agreements with entities associated with Mr Shute, and Obree's other shareholders, including the Engagement Letter. Mr Shute's role, as the second defender understood it, was to act as an investment advisor to Obree and its shareholders. The Engagement Letter was "part and parcel" of the arrangements regarding the anticipated PPE transaction. But for that transaction, the Engagement Letter would not have been agreed to by either defender, there being no purpose thereto.

[15] In statement 6, the defenders aver that the second defender discovered the fraud in May 2021, when it became known that the US law firm did not hold the funds and knew nothing about the alleged funds. At that time it was represented that Mr Fernandez had duped everyone, including Mr Paterson. Thereafter, in an attempt to recoup losses, the second defender agreed to accept an increase in his Obree shareholding.

[16] In statement 7, the defenders aver that the first tranche of £150,000 paid to the pursuer was instructed by Mr Shute, out of the Escrow Account, on 25 April 2021 (that is, out of funds advanced by the first defender).

[17] In statement 8 the defenders aver that the representations of Messrs Shute and Paterson were fraudulent, and if they were not fraudulent because Mr Shute was honestly unaware of the true position, they remained material and operative, though innocent misrepresentations which induced the entering into of the Engagement Letter. On either basis, the Letter of Engagement falls to be reduced and the first defender is entitled to repetition of the sum already paid to the pursuer of £175,00, being the first tranche of £150,000 plus purported expenses incurred by Mr Shute of £25,000.

#### *Answers to the counterclaim*

[18] In its answers to the counterclaim, the pursuer refers to the arbitration clause in the SHA. It avers that that clause excludes the jurisdiction of this or any other court. The answers contain copious averments designed to show that Mr Shute was unaware of the fraud. In particular, the averments made by the defenders about the allegedly fraudulent misrepresentations are answered in detail. There is an averment in answer 2 that any representations made by Mr Shute in relation to Obree were made on the basis of information provided to him by Mr Paterson and that Mr Shute repeated what he understood from Mr Paterson, believing what he had been told by Mr Paterson to be true. The answers seek dismissal of the counterclaim.

#### **The SHA**

[19] As already mentioned, the parties to the SHA were the second defender, Mr Underwood, Mr Shute and Obree. Preamble D states:

“This Agreement regulates the relationship between the Parties in respect of the operation, management and development of the proposed business of the Company, and the governance of its corporate affairs...”



[20] Clause 25.1 provides that the Agreement is governed by and shall be construed in accordance with the laws of England and Wales (there are no averments as to English law, which is therefore assumed to be the same as Scots law; since the approach to interpretation was not in dispute, nothing turns on this). Clause 25.2, to which reference has already been made, provides:

“In the event of a dispute arising out of or relating to this Agreement, including any question regarding its existence, validity or termination (a **Dispute**), any party to the dispute (each a **Disputing Party**) may serve a Notice of Dispute...on all the other Disputing Parties...”

[21] There then follows a series of “waterfall” provisions, regulating how the Disputing Parties are to attempt to resolve the dispute, culminating in clause 25.9:

“If the Dispute is not settled by mediation...the Dispute may be exclusively referred to and finally resolved by *ad hoc* arbitration under the Arbitration Law of the DIFC...”

### **Submissions**

[22] Counsel for the pursuer submitted that the defenders’ pleadings lacked the necessary high level of specificity where fraud was alleged. The alleged false statement must have been relied on and formed the reason for the party complaining of fraud entering into the transaction complained of: *McLellan v Gibson* (1843) 5 D. 1032, per the Lord Justice Clerk at 1034. The representation complained of must have been made knowing that it was false, and must also have been the cause of the contract: *A. W. Gamage Limited v Charlesworth’s Trustee* 1910 S.C. 257, Lord Kinnear at 264. Specific averments, setting out the acts or representations complained of, the occasions on which such acts or representations were made, and how they were causative of the relevant party entering into the agreement were required: *The Royal Bank of Scotland plc v Holmes* 1999 S.L.T. 563 per Lord Macfadyen at

569-570. The level of specificity required was high: *Gillespie v Russet* (1856) 18 D 677, per Lord President (Colonsay) at 684. That an action is on the commercial roll does not mean that the foregoing requirements may be departed from: *Marine & Offshore (Scotland) Ltd v Hill* 2018 S.L.T. 239 per Lord President (Carloway) delivering the opinion of the First Division, at paragraph 16. Finally, under reference to *Howe v City of Glasgow Bank* (1879) 6 R. 1194, per Lord President (Robertson) at 1203, the purported fraud must have been committed in respect of the act complained of, not be a fraud on a different occasion nor for a different purpose. When measured against these requirements, the pursuer and the court were left entirely in the dark as to what the alleged fraudulent misrepresentation was, how it induced the Letter of Engagement agreement, how it was relied upon and how it caused the defenders to enter that agreement. There were no sufficiently specific averments as to what, precisely, was the inducement made by the pursuer which caused the defenders to enter into the contract, nor what materially influenced the defenders in that decision (*cf Kidd v Paull Williamsons LLP* 2018 SC 193 per Lord Tyre at [33] to [34]). Further, there was no substantive defence: the defenders had failed to engage with the pursuer's detailed averments. Further, the first defender had no title to sue for sums paid by Obree. Finally, the arbitration clause in the SHA was wide enough to cover the dispute raised, and the action should therefore be dismissed.

[23] In reply for the defenders, the Dean of Faculty did not take issue with the degree of specification required when averring fraud, but submitted that the averments in the counterclaim gave ample notice of the matters complained of by the pursuer. The answers to counterclaim demonstrated that Mr Shute well understood what representations he was said to have made, and when he was said to have made them. The defenders had pled a relevant substantive defence and in the circumstances were entitled to put the pursuer to

proof of its averments. The title to sue point was misconceived. The defenders did not accept that the first tranche had been paid by Obree but averred that it had been paid out of money held on the first defender's behalf. The arbitration clause did not and could not apply.

## **Decision**

### *Title to sue*

[24] It was not clear whether counsel for the pursuer ultimately insisted in the no title to sue point - certainly, not strenuously - but in any event, it can be swiftly disposed of. The defenders plainly aver that the sum of £175,000 was paid by the first defender, not by Obree. Whether that was so or not remains to be established at proof, but the defenders have relevantly averred title to sue on the part of the first defender for payment of the sum of £175,000.

### *Arbitration*

[25] This point, too, may be swiftly disposed of. Neither the pursuer nor the first defender was party to the SHA. Neither is bound by the terms of clause 25. The pursuer, not being party to the arbitration agreement, cannot avail itself of that clause. Further, for the reasons given in my refusal of the motion to sist the Bogside action, the clause does not comprehend the dispute which is the subject matter of the counterclaim. Further, even had clause 25 applied, it would not have ousted the jurisdiction of the court such that the action would fall to be dismissed: *Fraserburgh Harbour Commissioners v McLaughlin & Harvey Ltd* 2022 SC 84. Finally, as pointed out by the Dean, it is difficult to see how the pursuer could circumvent the terms of section 10(1)(d)(i) of the 2010 Act, which provides that the

mandatory sist does not apply if the applicant has taken any step in the legal proceedings to answer any substantive claim against it. The pursuer has substantively engaged with the counterclaim and it is now too late for it to invoke the arbitration clause. Counsel for the pursuer sought to circumvent this difficulty by saying that she did not rely on section 10 since she was not seeking a sist, but dismissal. That is correct insofar as it goes, but since, as she acknowledged, dismissal is a greater remedy than sist, and is precluded by *Fraserburgh Harbour*, that argument takes the pursuer nowhere. There is no basis for dismissing the counterclaim on the strength of the arbitration clause.

### *Averments of fraud*

[26] As the authorities relied upon by the pursuer make clear, for a case of fraudulent representation to be relevant, the party making the case, here the defenders, must aver: that the alleged false statement was relied on in entering the transaction in question (*McLellan v Gibson*); and that the representation was made knowing that it was false (*A. W. Gamage Limited v Charlesworth's Trustee*). As regards specification, the defenders must make specific averments setting out the acts or representations complained of, the occasions on which such acts or representations were made, and how they caused the defenders to enter into the transaction: *The Royal Bank of Scotland plc v Holmes*. The defenders meet all of these requirements. The defenders adequately and amply aver when, and by whom, the misrepresentations about the \$2.4 billion were made; that Mr Shute was aware that the representations were false; that the defenders relied upon those representations in advancing the loan and entering a series of transactions; and that the Engagement Letter was one of those transactions. That is all that is required.

[27] It is necessary to say something about two of the authorities mentioned by counsel for the pursuer. First, *Howe v City of Glasgow Bank*, which was the basis for her submission that the purported fraud must have been committed in respect of the act complained of, not be a fraud on a different occasion nor for a different purpose. That is correct insofar as it goes, but the question being addressed in the passage referred to was whether a company could be held responsible for a fraud previously committed by a person acting as agent, at a time when he was not acting as agent, and the *dictum* must be understood in that context. In any event, the defenders have adequate averments linking the Engagement Letter with the PPE fraud, and the latter cannot be said, on those averments, to be a different fraud committed on a different occasion for a different purpose.

[28] Insofar as *Kidd v Paull Williamsons LLP* is concerned, the facts there were materially different from those here. The pursuer in that case had not averred, and therefore did not offer to prove, that the representation claimed to be fraudulent was made with the intention of inducing him to enter a particular transaction, nor had he averred that the representation materially influenced his decision to enter the transaction. Here the defenders do make such averments, insofar as they aver that the misrepresentation induced not only the loan, but also a series of transactions of which the Engagement Letter was one.

[29] Whether or not the defenders will be able to prove their averments is a question for another day but I consider that they have pled a relevant case of fraud, with a sufficient degree of specification, as to entitle them to a proof before answer.

### ***Substantive Defence***

[30] It cannot be maintained that the defenders have not pled a substantive defence, such that decree should be granted without any further procedure. The defenders have

relevantly and fully pled a case that the Engagement Letter was induced by a fraudulent, failing which an innocent, misrepresentation, such that it ought to be reduced. That is a defence to the action. It is true that the defenders' response to the work which the pursuer claims to have done is not as full as it might be, although as the Dean pointed out, the pursuer has no alternative unjust enrichment claim, and if the defence is successful, as the pursuer's case is currently pled, the extent of the work done will be of no consequence. Whether the pursuer should be put to the expense of proving what work was done (as opposed to why it was done) is a matter which can be dealt with by the court's case management powers when a proof is fixed. It may be that consideration will also require to be given to whether there would be merit in fixing a proof on the discrete issues of whether Mr Shute was party to any fraud, and whether any misrepresentation, be it fraudulent or innocent, induced the defenders to enter into the Engagement Letter, as they aver. Those are questions for another day. In the meantime, defenders' averments are sufficient to entitle it to a proof before answer.

### **Disposal**

As counsel agreed was appropriate, I shall put the case out by order, to discuss what orders should be made in light of this opinion and to fix further procedure.