



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 67

CA55/23

OPINION OF LORD BRAID

In the cause

JOHN GLARE

Pursuer

against

CLYDESDALE BANK PLC

Defender

**Pursuer: Tariq; BTO Solicitors LLP**

**Defender: Dean of Faculty, Horn; DLA Piper Scotland LLP**

6 October 2023

**Introduction and background**

[1] In this commercial action against Clydesdale Bank PLC, the pursuer seeks production and reduction of a decree of absolvitor pronounced by Lord Doherty on 26 January 2016 (together with subsequent interlocutors dated 22 April 2016 and 15 July 2016, described more fully below) in a prior action at the instance of the pursuer against the bank.

[2] That action, raised in 2013, was also a commercial action in this court, in which the pursuer sought damages from the bank on the ground that in February 2008, it mis-sold him a Tailored Business Loan (TBL) in the sum of £3.95 million. The TBL was a fixed interest loan in which interest was charged at 7.8% per annum for a term of 25 years. As security for

the loan, the bank took a first legal charge over the pursuer's property, Chantmarle Manor, Dorchester, Dorset, which he operated as a conference centre and a wedding venue. On 21 September 2009, the bank terminated the TBL on the basis that the pursuer had failed to fulfil various financial covenants, including a failure to make repayments. In terms of clause 8 of the TBL, break costs were debited to the pursuer's account in the sum of £712,931. Those costs arose out of the acknowledged need for the bank to enter into an arrangement with a third party to hedge its risk to fluctuations in interest rates, and to reimburse the bank for any cost or liability which it incurred or suffered in connection with the cancellation of such an arrangement. Receivers were appointed over Chantmarle on 26 April 2010. In February 2011 a bankruptcy order was made against the pursuer on the application of a third party. Chantmarle was sold in 2013, leaving a debt outstanding from the pursuer to the bank of £2,490,752.

[3] In the 2013 action, the bank accepted that the TBL had been mis-sold to the pursuer, and that it had liability to make reparation to the pursuer for the loss and damage (if any) which he had suffered as a result of entering into the TBL. The pursuer's counterfactual scenario – in other words, what he averred would have happened had he not been mis-sold the TBL – was that, instead of the TBL, he would have been advanced a loan with a variable interest rate; he would not have suffered the failure of his business, or his resultant bankruptcy; and he would have retained Chantmarle.

[4] That action called before Lord Doherty for a diet of proof in 2015. The only issues for decision were causation and quantum. Lord Doherty found in favour of the bank and granted decree of absolvitor: 2015 CSOH 184. Specifically, he held: first, that he was not satisfied that the pursuer would have sought and obtained a variable rate loan, described by Lord Doherty as the “keystone of the pursuer's case”: paragraph [40] of the opinion;

second, that the bank would have offered the pursuer a loan over twenty five years with the first five years fixed, and the pursuer would have accepted that offer: paragraphs [43] and [45]; third, that the pursuer therefore failed to establish the starting point of his case: paragraph [46]; and fourth, that in any event, even had a variable rate loan been advanced, he was not satisfied that the pursuer's business would have survived: paragraph [48]. Thus, the pursuer failed to establish the counterfactual scenario on which he had founded his case. It is important to note that in the approach to quantification of the pursuer's loss, the break costs were left out of account, since the bank acknowledged that these should not have been applied to the account. It was therefore of no moment how those break costs had been calculated.

[5] Following that decision, the pursuer sought review of the interlocutor of 26 January 2016. This was refused by interlocutor dated 22 April 2016. He subsequently sought leave to appeal to the Supreme Court of the United Kingdom, refused by interlocutor dated 15 July 2016. He next raised a further action against the bank at the High Court in Manchester. That action was dismissed as *res judicata* and an abuse of process.

[6] In this, his latest attempt to seek redress for the wrong which he perceives he has suffered at the hands of the bank, the basis on which the pursuer seeks to have Lord Doherty's decree reduced is his assertion that one of the bank's witnesses at proof, Mr Douglas Campbell, gave untruthful evidence in relation to the way in which the break costs in terms of the TBL were calculated, and that he was suborned to do so by the bank. The pursuer contends that Mr Campbell deliberately concealed the true position as to how the break costs were calculated, and, further, that had he known the true position, he would have quantified his loss differently in the 2013 action: his counterfactual scenario would have been different. (For the avoidance of doubt, any subsequent references in this opinion

to perjured evidence, or to subornation of perjury, must be read subject to the qualification that at this stage, these are mere allegations which have not been proved and which are denied by the bank; but for present purposes, they must be assumed to be true.) One effect of decree being granted in the pursuer's favour in this action would be not that he would obtain an award of damages against the bank, but that he would be free to raise yet another action against it, in which he would (presumably) seek damages on the basis of a different counterfactual than he advanced in the 2013 action.

[7] The action called before me for debate on the bank's plea to the relevancy of the action. The Dean of Faculty, for the bank, moved for dismissal of the action as being fundamentally irrelevant and one which the pursuer was bound to lose even if he succeeded in proving all of his averments. Mr Tariq for the pursuer moved for a proof before answer, his submission being that the case had a number of "moving parts" on which the court should hear evidence before reaching a concluded view. It will be necessary to consider the pursuer's averments in more detail than I have summarised them above, but before doing so, and to enable the averments to be read in the context of the applicable legal principles, it is convenient to begin by setting out the law.

### **The law**

[8] The starting point is the acknowledged importance of the finality of litigation in the interests of legal certainty. To express it in colloquial terms, an unsuccessful litigant does not readily get a second bite at the cherry. In *Rankin v Jack* 2010 SC 642 Lord Reed, paragraph [25], described the importance of finality, albeit in the context of a plea of *res noviter* in an application to allow fresh evidence in the course of an appeal, thus:

"The principal reason, which applies to *res noviter* generally, is the importance of finality in litigation. This has long been recognised by the court as a compelling

consideration, 'it being the interest of mankind that pleas be not immortal, and that one be not the seed to propagate another, like Cadmus's teeth' (*Campbell v Farquhar*). The importance of finality, in the interests of legal certainty, is obvious."

While that was said in relation to *res noviter*, the principle is of general application to all litigation. It is not, however, an absolute principle, and it must sometimes give way to other considerations in the interests of justice. Thus, a decree *in foro* (as the decree in the 2013 action was, being pronounced after proof) is capable of being reduced by action in the Court of Session, albeit on limited grounds. The principles were succinctly summarised by Lord Woolman in *Campbell v Glasgow Housing Association* 2011 Hous LR 7 at paragraph [48]:

- (a) reduction is a question of judicial discretion;
- (b) each case turns on its own individual facts and circumstances;
- (c) the remedy is only applied in exceptional circumstances: in this regard, see also *Frost and Another v Alexander Stone & Co* 2003 SCLR 472;
- (d) the test is higher for decrees *in foro* than for decrees in absence;
- (e) reduction should only be granted where it is necessary to ensure that substantial justice is done: *Bain v Hugh LS McConnell Ltd* 1991 SLT 691 and *Johnstone & Clark (Engineers) Ltd v Lockhart* 1995 SLT 440 are example of such cases;
- (f) the existence of, or failure to use, an alternative remedy is not an absolute bar to reduction.

[9] There is a well-established general rule that a decree *in foro* cannot be set aside by a fresh action merely on the ground that perjury was committed in the first: *Stewart v Stewart's Trustees* (1906) 8F 467, Lord Kinnear at 472, where he cited the judgment to that effect of Lord Cairns in *Lockyer v Ferryman* (1877) 4R (HL) 32 which, in an oblique reference to the finality principle, included the wry observation that:

"there would be no end to litigation if that were held to be a sufficient and relevant ground for the reduction of a former decree".

See also *McCarroll v McKinstery* 1926 SC (HL) 1, Lord Sumner at 6, to similar effect:

something more than mere perjury is required as a ground of reduction. One of the circumstances which might lead to reduction of a decree *in foro* is where the decree has been obtained by fraud, of which subornation of perjury is one example: *Begg v Begg* (1889)

16 R 550, Lord Young at 555. The difference between perjury and subornation of perjury as a ground of reduction was explained by Lord Kinnear in *Stewart's Trustees* as follows, at page 473:

"I have no doubt that a sufficiently specific averment of subornation might be relevant to support a reduction; but the distinction between a case of that kind and a case founded only on the allegations of the falsity of the evidence given at a former trial is not that there is fraud in the one case and not in the other. There is fraud in both. But the true distinction is that in the one case the question of fraud has been already tried and decided, and in the other an entirely new issue is raised on which no decision has yet been given. The principle is that of *res judicata*. A judgment may be set aside on the ground of fraud, if the facts alleged to constitute fraud were not in issue when the judgment was given; but the successful party cannot be put a second time to proof or disproof of the same issues as were raised in the original action. This is clearly brought out in the opinion of Lord Justice James in *Flower v Lloyd* LR 10 Ch 327:—

'When a judgment has been obtained by fraud, there is power in the Courts of this country to give adequate relief. But that must be done by a proceeding putting in issue that fraud, and that fraud only. There cannot be a rehearing of the whole case until the fraud is established. The thing must be tried as a distinct and positive issue; you the defendant or you the plaintiff obtained that judgment by fraud. You bribed the witnesses, you bribed my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I wish to have the judgment set aside on the ground of fraud. That would be tried like anything else on evidence properly taken directed to that issue, and wholly free from and unembarrassed by any of the matters originally tried.'

In other words, for there to be a relevant case for reduction of a decree *in foro*, a pursuer must aver some fact or circumstance extraneous to the first case, which was not before the court in that case and which amounted to a fraud on the court. Such a fraud might consist of subornation of perjury by one of the parties; or it might be a fraud of another sort such as a pursuer deliberately concealing evidence which might constitute a defence: for an example

of a case where that was averred (but not established), see *Walker v Walker* 1911 SC 163, where decree of divorce on the ground of adultery had been granted, and the issue was whether the parties had colluded to prevent a defence of condonation of the wife's adultery by the husband being presented to the court.

[10] Central to the above, and similar, *dicta*, and consistent with the idea that there must have been a fraud on the court, is the requirement that the judgement which it is sought to reduce must have been brought about by the fraud; in other words, where the fraud is alleged to have been committed by subornation of perjury, that there was a causal link between the perjured evidence and the ensuing judgment. That this must be so is illustrated by the following passage from Lord Kinnear's opinion in *Stewart's Trustees*:

“The only averment which has any semblance of novelty is that the pursuer is now in a position to disprove a certain statement which was made by the late defender incidentally in the course of his cross-examination. He appears to have said that he heard of the sales in question by a telegram which he received from a person named; and the pursuer says he can now prove by the evidence of this person that this statement was false. I cannot see that by itself this would do much to help the pursuer's case. **It would not prove that the judgment was obtained by fraud, because it appears from Lord Moncreiff's opinion that he did not give credence to that particular statement**” (emphasis added).

In *Walker*, above, Lord Kinnear (again) stated that it would be a good ground for setting aside a judgment in the husband's favour if it were proved that in order to obtain it he committed a fraud on the court, which underlines the need for a causal link.

[11] For completeness, and because counsel for the pursuer at one point submitted that the present proceedings were tainted by the perjured evidence, obviating the need for the pursuer to show that the bank had succeeded because of that evidence, I acknowledge that there may be cases where the fraud is such that the entire proceedings are irredeemably tainted, even though it might not be possible to show that the outcome would have been any different had

there been no fraud: the example posited by Lord Justice James of bribery of the other party's counsel or solicitor might be one such example. However, the present is not such a case.

[12] Finally, although the pursuer does not expressly advance a case based on *res noviter*, I need to say something about it given that in substance the pursuer's complaint is that at the time of the proof in the 2013 action he was unaware of information which has subsequently come to his attention, which might be thought to be the sort of situation where a plea of *res noviter* might be advanced. For such a plea to succeed, a party must aver (and prove) not merely that something material has newly come to his knowledge, but that he could not by the exercise of reasonable diligence have known of it in time to have made use of it in the original action: *McCarroll v McKinstery*, above. This is relevant to the present case, since one of the issues between the parties is whether or not the pursuer could reasonably have ascertained the true position regarding calculation of break costs at the time of the 2013 action.

### **The pursuer's pleadings**

[13] I now turn to consider the pursuer's pleadings. After averments about the background (which is not in dispute and is summarised in paragraphs [2] to [5] above), the pursuer goes on, in article 6 of condescendence, to refer to his averments in the 2013 action about the break costs; in particular that his pleadings in that action had called upon the bank to explain how the break costs were incurred and how they had been quantified, drawing attention to the bank's failure to disclose these matters on a voluntary basis. He then goes on to make averments about the alleged perjury by Mr Campbell, who was at that time the bank's Head of Corporate Support and former special adviser to the Chief Operating Officer, and who was the most senior witness from within the bank. In the course



of his evidence he is averred to have explained that the break costs arose from portfolio hedging, which evidence is said to have been accepted by Lord Doherty as credible and reliable in all material respects. The pursuer then (in article 8) avers that Mr Campbell's evidence was consistent with the bank's publicly available statements about break costs in TBLs. In article 9, it is averred that in a Group Action currently proceeding against the bank in England, the bank's position is now that "mirror swaps" were entered into, which is said to be inconsistent and irreconcilable with Mr Campbell's evidence that the break costs arose from portfolio hedging. Reference is then made to a detailed explanation given by the bank in the course of the present action that there had been a specific and corresponding hedging transaction with National Australia Bank. The significance of this, according to the pursuer, is that the true break costs which ought to have been charged on the actual TBL were £416,643, not the £783,383 (subsequently reduced to £712,931) actually charged; and, moreover, that the break costs on a 25 year TBL with the interest rate fixed for five, as opposed to twenty five, years would have been approximately £315,000; and, says the pursuer, the difference between £315,000 and £783,383/£712,931 was critical to what he would and could have done in that situation. He then avers a different counterfactual scenario which he would have advanced had he known the true position, namely, that he would have sold Chantmarle, restarted a new business and settled his total indebtedness to the bank (the Sale and Restart Scenario).

[14] In article 11 of condescendence, the pursuer avers, in some detail, what he says were the consequences of Mr Campbell giving false evidence, and what would have happened had he given evidence of the true position:

"Mr Campbell was asked in cross-examination about the basis upon which the break costs had been calculated. He explained that the break costs arise from portfolio hedging. Had Mr Campbell's explanation been that that there was a specific and legally binding corresponding hedge on the same terms and fixed rate in respect of

each Tailored Business Loan, the pursuer would immediately have known that the evidence did not align with the defender's position to date. He would have understood the implications of such evidence – namely, that the break costs levied should not have been £783,383 (or £712,931). He would have known that, as a result of this evidence, the true break costs that ought to have been levied would be significantly lower. This would have made the Sale and Restart Scenario viable as the proper counterfactual position. In other words, the business could be sold as a means of settling the total indebtedness to the defender. He would have alerted his agents to the significance of this evidence immediately. He would have sought to amend his case. The significance of this matter (at least to the pursuer) would have been brought to the court's attention in the course of the proof. The court would have been made aware that the pursuer had sought to ascertain the defender's position about the calculation of the break costs in advance of the proof in correspondence between agents and in specific calls placed in the pleadings (which were unanswered); and that the evidence now contradicted the defender's public position on how these break costs were calculated. In these circumstances, the basis upon which the break costs had been calculated, or ought to have been calculated, was central to the [2013] action. It was central to the question of whether the Sale and Restart Scenario was a viable counterfactual position for the pursuer to advance in that case. Had the pursuer been able to advance the Sale and Restart Scenario as his counterfactual position, he would have succeeded in the action. He would have been able to settle his total indebtedness to the defender on the basis of [that] Scenario. In these circumstances, the Lord Ordinary could have accepted the pursuer's evidence that he would have embarked on the Sale and Restart Scenario rather than attempting to maintain his existing business (which the Lord Ordinary held would not have survived). The pursuer did not seek to recover evidence on this matter prior to the proof on the basis that he had made other efforts to ascertain the position without success and the defender's position about the calculation of the break costs was a matter which was in the public domain. As such, the pursuer did not consider it to be the best use of his financial resources to seek commission and diligence where he had no reason to believe that the defender's publicly stated position was false."

In other words, the pursuer's position is not that the perjured evidence caused him to lose his action on the basis on which it was presented to the court; rather, that if he had heard true evidence (in the course of Mr Campbell's cross-examination by the pursuer's counsel), he would have alerted his advisers, sought leave to amend and (in due course) would have given further evidence about a different counterfactual scenario which "could" have been accepted (although how that is to be reconciled with his averment that he "would" have succeeded is unclear). He also explains his failure to seek recovery of documentation from the bank during the course of the 2013 action, which would have shown the basis on which

the break costs had been calculated, by averring that he had made other efforts to ascertain the position without success (although normally that would be a reason for seeking recovery, rather than choosing not to) and because of statements made by the bank which were in the public domain (in other words, for reasons entirely unrelated to the evidence which Mr Campbell gave at the proof).

[15] The pursuer's position is elaborated upon in article 12 of condescence, where he attempts to explain the significance of the break costs to the 2013 action. In the interests of brevity I do not propose to narrate these averments at length. In summary, the pursuer makes clear that he does not challenge specific findings in fact which were made in relation to the counterfactual scenario he advanced, but repeats that he would not have advanced such a scenario had he known the true position, and had the bank not concealed the true position from him. There is some mild implied criticism of the Lord Ordinary for having excluded break costs from the bank's counterfactual (of a twenty five year loan, with interest fixed for five years), at paragraph 80 of his opinion, without having given reasons for doing so, which he ascribes in part to the true position regarding break costs having been concealed. He goes on to aver that had Mr Campbell's evidence under oath reflected the bank's position now, the issue of the break costs would have been an important part of the proceedings before the Lord Ordinary, and that the correct amount of the break costs would have been central to the question of whether the Sale and Restart Scenario was a viable counterfactual position (although, since that scenario was not in fact before the court, it is difficult to see why that would have been so).

[16] Finally, the pursuer makes detailed averments in article 14 of condescence about the exceptional circumstances prayed in aid to support reduction of the decree. Again in the interests of brevity I do not propose to narrate these in full. The evidence given by

Mr Campbell is said to have related to matters within the knowledge of the bank and some of its employees. It is averred that Mr Campbell either knew or ought to have known the true position. The pursuer believes and avers that the bank sought to deliberately conceal the true position about the break costs in the 2013 action; and further, that the bank, through its senior executives, suborned Mr Campbell into giving false and misleading evidence in the commercial action. It is not entirely clear from article 14 itself whether the pursuer's position is that the combination of Mr Campbell's false evidence and the concealment of the true position during the course of the action (prior to proof) would in and of itself amount to exceptional circumstances justifying reduction, or whether the subornation is an essential component of the case. The introduction of the averments about subornation by the word "Further" would suggest the former. However, the pursuer's plea in law – "the decree having been pronounced in circumstances where false or misleading evidence was given by Mr Campbell that had been suborned by the [bank], there are exceptional circumstances to justify its reduction ..." – suggests the latter.

### **Submissions**

[17] The Dean of Faculty, for the bank, submitted that the action was bound to fail even if the pursuer proved all of his averments, because he was not offering to prove that the perjured evidence led to the failure of his case. On the authorities such as *Begg and Stewart's Trustees*, above, that precluded subornation of perjury as a ground of challenge. The pursuer's case was that if he had known certain things he would have framed his case differently, but there were various problems with that approach, not least that he was not offering to prove that any motion to amend would have been granted. Further, the pursuer had still not explained why break costs were relevant at all, when the bank had conceded in

the 2013 action that no break costs ought to have been debited to the pursuer's account. The pursuer's case was in reality an attempt to introduce by the back door an argument based on *res noviter* which he expressly declined to advance, advisedly so, since such a case would be doomed to fail given that the pursuer could have ascertained the information of which he now complained much earlier. He had raised the issue of how the break costs were calculated in his summons in the 2013 action, and placed calls on the bank, yet had not sought recovery of documents pertaining thereto. That may have been because the issue was irrelevant, but even if that was wrong, there could be no question of the pursuer's calls in the summons amounting to reasonable diligence. A plea of *res noviter* would, for that reason have been bound to fail, and the back-door attempt to introduce it could be no more successful.

[18] In his reply, counsel for the pursuer accepted that the test for reduction of a decree *in foro* was a high one but submitted that each case must turn on its own facts, the ultimate test being whether reduction was necessary to achieve substantial justice, which could be decided only after hearing evidence, when the court would be better placed to exercise its discretion as to whether or not reduction should be granted. As the authorities made clear, it was impossible to define all the situations in which reduction of decree *in foro* was competent. The pursuer's case was not bound to fail. In *Begg*, above, a proof had been allowed. The break costs were relevant on the bank's counterfactual scenario in the 2013 action, which was that the pursuer would have been advanced a twenty five year loan with interest fixed for five years, which would also have attracted break costs. The amount of the break costs had been crucial to the counterfactual scenario which the pursuer would have advanced, had he known that the break costs would be of the order of £315,000. The position advanced by Mr Campbell in cross-examination, and by the bank publicly – that the

bank did not enter individual contracts in respect of each business loan it made – was now seen to be plainly untrue. The information in the public domain at the time of the 2013 action served to explain why the pursuer had not pursued the issue further in the course of that action, and why he had not sought the recovery of any documents. He could not have known in advance that Mr Campbell would give perjured evidence. As regards the bank's submission that the break costs were irrelevant, it could not be said that the 2013 action was conducted on the basis that break costs would not be relevant in any counterfactual scenario that might be advanced. That could not be inferred from the passing reference Lord Doherty made to the break costs at paragraph [80] of his opinion, as contended by the bank. The proceedings had been tainted by the perjured evidence, and the bank's subornation of it. The pursuer was not seeking to retry the same issue as had been tried before Lord Doherty, because the issue of subornation had not been before Lord Doherty. It was setting the bar too high to require the pursuer to aver and prove that the perjury led to his losing a case he ought to have won. It was sufficient to show that the proceedings were tainted and that the evidence was material. An analogy could be drawn with an application to introduce new evidence in the course of an appeal, as had been the case in *Rankin v Jack*, above.

## **Decision**

### ***Introduction***

[19] At the heart of this dispute is the pursuer's complaint that information which he called upon the bank to produce in the 2013 action, pertaining to how break costs were calculated, was never provided in the course of that action; that documents were never produced; and that to compound these failures, one of the bank's witnesses gave evidence

which was untrue. While candour is not simply desirable, but *de rigueur*, in the commercial court, the court has a panoply of tools at its disposal to deal with recalcitrant litigants, including the power in RCS 47.11(1)(b)(v) to order the lodging of documents; and the very wide power in RCS 47.12(2)(o) to make such order as he thinks fit. It is a pre-requisite of any such order, of course, that the documents to which it relates are relevant to the issues before the court. Had the information which the pursuer now claims he ought to have had in the 2013 action been relevant to that action, he could have invited the court to exercise one or more of its powers during the case management of that action, but he did not do so. It is no real answer to that to say, as the pursuer does, that his decision was driven by reasons of economy. The argument that he has suffered a miscarriage of justice therefore gets off to a somewhat shaky start.

[20] As regards the requirement for candour it would be a matter of extreme concern if a party in a commercial, indeed any, action conducted its defence on a basis which it knew to be false; deliberately withheld information relevant to the issues in dispute; and gave (or suborned) evidence which it knew to be false. Given the importance attached to witness statements, if it transpired that such statements had been prepared on a knowingly false basis, there might well be cases where a relevant case for reduction might be made out, notwithstanding that there had been no subornation of perjury in a strict sense.

[21] However, it is important to appreciate at the outset that this case, even on the pursuer's averments, does not fall into that category. It is not averred that Mr Campbell's witness statement was false: the evidence complained of was adduced in cross-examination. One might well ask what relevance that line of questioning had. Further, and critically, the bank is correct when it argues that the manner of calculation of the break costs was simply not an issue which was relevant in the 2013 action. That is because (a) the bank conceded

that no break costs ought to have been applied to the account, and (b) as was conceded by the pursuer's counsel at the debate, no break costs would have been chargeable on the variable loan which the pursuer averred he would have advanced had he not been mis-sold the TBL. Having made these general observations, I now turn to the case advanced by the pursuer in his pleadings.

*The subornation of perjury case*

[22] At its most basic level, the pursuer's action is irrelevant because (a) it is founded upon an allegation of subornation of perjury but (b) the pursuer does not offer to prove that the perjured evidence had any bearing whatsoever on Lord Doherty's decision on the evidence led before him, let alone that it caused the pursuer to lose a litigation he would otherwise have won or that the bank achieved decree of absolvitor by having committed a fraud on the court. While it is correct, as counsel for the pursuer argued, that the issue of subornation was not before Lord Doherty, that is a necessary, but not a sufficient, condition for reduction of the decree obtained in the 2013 action. Further, it is not sufficient for the pursuer to show merely that perjured evidence was given in the course of the proof, whether it was suborned or not. He must also show, as is clear from the authorities referred to in paragraphs [10] and [11] above, that the perjured evidence had at least some causative effect on the outcome of the action. It is not surprising that there are no averments to this effect, since it is plain from Lord Doherty's opinion that Mr Campbell's evidence about the manner in which break costs were calculated (which features nowhere in Lord Doherty's opinion) was not material to the issues before him, and it therefore could have had no bearing on the outcome of the case. Putting that another way, the pursuer lost not because of Mr Campbell's evidence, but because Lord Doherty did not accept the pursuer's evidence



as to what he would have done had he not been offered a TBL; specifically, he did not accept that the pursuer would have sought and been granted a variable interest loan. To the extent that the pursuer's case is predicated upon the line of authority which shows that subornation of perjury which leads to a judgment in a party's favour is or may be a ground for reduction of a decree *in foro*, it is bound to fail. *Begg*, relied upon by the pursuer in support of his argument that inquiry should be allowed in this case, can be distinguished because there the alleged perjured evidence related to an issue which went to the heart of the earlier action, namely, whether the defender in that action had committed adultery.

### *The substantial justice argument*

[23] On one view that is sufficient to dispose of the action. However, the pursuer invites the court to take a broader view of his pleadings, relying on the principles that each case must be decided on its own facts and that reduction, even of a decree *in foro*, may be granted where it is necessary to do so in order to achieve substantial justice between the parties. Distilling his case down to its essentials, it is that he has suffered a miscarriage of justice because he was misled, both by the bank's public pronouncements (made before the proof) and by Mr Campbell's evidence into a belief that the bank calculated break costs by reference to portfolio hedging rather than by entering into mirror transactions, which mistaken belief both informed his adoption of a counterfactual scenario in which he would have obtained a variable interest loan, and led to his not instructing his solicitors to move to amend his case at the eleventh hour (a more apt metaphor, given that he had closed his proof by the time Mr Campbell was being cross-examined, is perhaps that it was a few minutes to midnight). Had he known the true position, so the argument goes, he would have adopted a different counterfactual scenario, namely, one in which he would have

received a loan with the interest rate fixed for only five years, which would have had much lower break costs, which would have allowed him to present the Sale and Restart scenario.

[24] The first problem with this argument is its reliance not only on the perjured evidence given by Mr Campbell, but on the earlier public pronouncements made by the bank. Only those pronouncements, not the perjured evidence, could have influenced the manner in which the pursuer pled his case and adduced evidence at the proof, but they do not themselves amount to perjury, and indeed have nothing to do with the manner in which the court action was conducted. They could not in themselves found an action of reduction. The pursuer's reliance on the public pronouncements, as I understand it, is not that they justify reduction, but that they influenced his decision not to invite the court to invoke its case management powers, to which I have already made reference. However, this leads on to the second problem, already adverted to, which is that the perjured evidence was given after the pursuer had closed his case and at a stage in the proceedings when (as his pleadings acknowledge) he would have required to seek leave to amend and (in effect) to re-start his proof in order to have had any prospect of succeeding in his action. While the question of whether such a motion would have been acceded to by Lord Doherty might be seen as a matter for proof, counsel for the pursuer acknowledged that Lord Doherty would not be a competent witness and it is difficult to see what a proof would achieve when, as the Dean of Faculty observed, the chances of such a motion being granted in a commercial action after the pursuer had closed his case must be vanishingly small, particularly having regard to the court's extensive case management powers in the lead-up to a proof. The view that Lord Doherty formed of the pursuer was that his evidence had been "influenced greatly by hindsight" (Opinion, para [31]) and an application to amend at such a late stage in the proof might have been seen as a further example of that.

[25] The third problem with the pursuer's argument that he has been caused substantial injustice is that the issue of how the break costs were calculated, irrespective of whether that was a relevant issue or not, was one which, as the Dean put it, he had in his sights at the time of the 2013 action. He had made calls in the pleadings which went unanswered. I refer again to the point that if the break costs were relevant, and considered to be of importance, the pursuer had the option of seeking an order of the court for the recovery of documentation bearing upon that issue. If they were not relevant, then it cannot conceivably be said that evidence about that issue was of any moment, or that perjured evidence about it led to substantial injustice. The principle of finality of litigation is relevant in this context, since litigants know, or ought to know, that other than in exceptional circumstances, they will have only one opportunity to prove their case. The litigant who chooses not to seek an order for recovery of documents which are potentially relevant and which may undermine the other party's case cannot be heard to complain, after the event, that the documents would have achieved that effect; there can be no miscarriage of justice in refusing to allow such an argument to be advanced after the proof has taken place. The pursuer argues that he could not have known that Mr Campbell would give perjured evidence, and that no amount of reasonable diligence prior to the proof could have forewarned him of that. However, that could be said of any case in which perjured evidence is given and in any event, misses the point: it is not the fact of there having been perjured evidence which is significant, but the content of what truthful evidence would have been; it is that information which the pursuer asserts would have influenced his conduct of the case, but which could have been uncovered before the proof, by recovery of documents.

[26] The fourth problem with the pursuer's argument is that it is predicated on an assertion that it was material that the break costs on the counterfactual scenario which

would have been advanced by the pursuer would only have been of the order of £315,000 (since it was the amount of the break costs, rather than the manner of calculation *per se*, which the pursuer contends was material). I have already commented on the irrelevance of the break costs but two further points may be made. First, it seems that the bank's counterfactual scenario, which Lord Doherty accepted, proceeded on an assumption, rightly or wrongly, that there would have been no break costs at all on a loan with a fixed interest rate for only five years. Any error in that assumption operated to the pursuer's advantage, since the amount which he would have to pay to clear the debt was taken to be £315,000 less than it would have been if break costs had been applied. Second, the pursuer must on any view have known that the break costs on a loan on which interest was fixed for only five years would have been less than those on a twenty five year fixed deal. If the counterfactual scenario of a twenty five year loan, with interest fixed for five years was one which he had under active consideration at the time of the 2013 action, he had it in his power to investigate that further by recovering documents if necessary.

[27] The pursuer further argues that the proceedings in the 2013 action were tainted by the perjured evidence; which might have led to Lord Doherty forming a less favourable view of the pursuer's credibility and reliability than he would otherwise have done. I do not accept that: the rejection of the pursuer's evidence was not based upon an acceptance of Mr Campbell's evidence, nor could it have been, since Mr Campbell was speaking to matters of which the pursuer had no knowledge; see, for example, paragraph [34] of Lord Doherty's opinion, where other reasons are given for his conclusion that he found aspects of the pursuer's evidence to be incredible.

[28] For completeness, I will deal briefly with the argument advanced by counsel for the pursuer that it was sufficient for the pursuer to show that the proposed new evidence was

material. That argument was founded upon in *Rankin v Jack*, above, but in that case the issue was whether additional evidence should be allowed in the course of a reclaiming motion, and I do not accept that it provides a sound basis for determining whether the remedy of reduction is available. However, even if that is wrong, and materiality is all that is required, for the reasons already given, the evidence about the calculation of break costs is of no materiality to the issues which were before the court in the 2013 action.

[29] In conclusion, the pursuer's case amounts to no more than an assertion that if he had known something which he could have found out earlier, he would have conducted his case differently. As the Dean submitted, that could only ever be relevant if a plea of *res noviter* were advanced, but there is no such plea here, nor could there be. In the absence of that, and of any relevant averments supporting reduction of the interlocutors pronounced in the 2013 action, this action is bound to fail. Any further action by the pursuer against the bank would offend against the principle of finality in litigation.

### **Disposal**

[30] For all of the foregoing reasons, I have sustained the bank's first plea-in-law and dismissed the action. I have reserved all questions of expenses.