



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 75

CA12/23

OPINION OF LORD BRAID

In the cause

RONNIE O'NEILL FREIGHT SOLUTIONS LIMITED

Pursuer

against

MACROBERTS LLP

Defender

Pursuer: Watt; MBM Commercial LLP

Defender: A McKinlay; Clyde & Co (Scotland) LLP

2 November 2023

[1] To what extent must a solicitor, when advising a client involved in a contentious situation, give advice about all arguments which might be deployed? Is it negligent not to give advice about arguments which the solicitor thinks could be advanced, but are likely to fail? These are the questions which lie at the heart of this case.

Background

[2] The pursuer, Ronnie O'Neill Freight Solutions Limited, was involved in the parcels, pallets and freight business. For customers who had freight requirements, it would subcontract a haulier to uplift pallets and transport them to a central hub for onward

delivery to locations throughout the United Kingdom. In the course of that business, it entered into an agreement with one haulier, UP Logistics Ltd (UPL), whereby the pursuer's customers would place orders directly with UPL for the uplift, transport and delivery of their pallets. The terms of the agreement are set out more fully below but for present purposes it is sufficient to record that UPL agreed to pay commission to the pursuer "for all pallet business passed to [UPL] for the duration of which the customer shall trade based on the schedules below"; that all customer pallet business passed to UPL via the pursuer was agreed to remain under the ownership of the pursuer; and that the agreement contained no express provision for termination.

[3] The pursuer and UPL traded under the terms of the agreement for some three and a half years until, without warning, UPL emailed the pursuer on 9 April 2020 purporting to terminate the agreement with immediate effect and stating that it intended to continue to trade with customers introduced to it by the pursuer. Immediately upon emailing the pursuer, UPL emailed the pursuer's two largest customers informing them of the termination and inviting them to continue trading with UPL (which they did).

[4] The pursuer's eponymous Ronnie O'Neill was naturally concerned by the termination, since the contract with UPL accounted for the lion's share of the pursuer's business. He sought immediate advice from the defender as to what he should do. In brief, that advice, which Mr O'Neill followed, was that the agreement was terminable subject to reasonable notice being given; and that rather than litigate immediately, the pursuer should pursue a commercial settlement, while at the same time trying to persuade its customers to switch to another contractor in place of UPL. After several months of negotiating with UPL's solicitors (Brodies), and the eventual raising of court proceedings, settlement was reached with UPL in the sum of £40,000, of which about £10,000 represented unpaid invoices

and the balance damages. However, the pursuer was unsuccessful in persuading many of its customers to switch hauliers and it ceased trading in 2021.

[5] Mr O'Neill is now unhappy with the advice he was given by the defender. He thinks that £30,000 was a poor return for the loss of his business. He contends that the defender ought to have given advice (i) to seek interim remedies from the outset and (ii) that the agreement was arguably non-terminable; and that its failure to tender such advice was negligent, in other words (applying the appropriate legal test, of which more later) that it was advice which no ordinarily skilled solicitor exercising ordinary care would have failed to give. Had non-negligent advice been given, it is argued, the pursuer would have achieved a better outcome than it did; and the pursuer values its loss at some £232,500. The primary issues for decision are, first, liability - was the advice negligent; second, causation - what would have happened had the desiderated advice been given (which involves considering the so-called counterfactual scenario); and, third, *quantum* - what loss, if any has the pursuer suffered?

The proof

[6] The action called before me for proof. Evidence was given by Mr O'Neill for the pursuer; and by Euan Duncan and Leon Breakey of the defender, being the principal solicitors who tendered the allegedly negligent advice. There is no suggestion that any of them was lying. For the most part, there was no dispute on the facts, nor was the reliability of Mr Breakey's evidence challenged. The reliability of certain aspects of Mr O'Neill's and Mr Duncan's evidence was challenged, and I will deal with this, insofar as material, as and when it arises. The contemporaneous correspondence (including emails) was lodged, and

this provides a reliable guide to what advice was given, and when; and what communications passed between the defender and Brodies.

[7] Each party also led expert opinion evidence from a litigation solicitor: for the pursuer, Douglas Blyth; and for the defender, Sheila Webster. I accept that they both have the requisite skill and experience to entitle them to give such evidence.

The agreement

[8] The agreement, which Mr O'Neill drew up himself, was in the following terms (replacing the parties' full names, where they occur in the agreement, with their initials):

“Agreement between ROFS and UPL.

- UPL agree to pay ROFS for all pallet business passed to UPL for the duration of which the customer shall trade based on the schedules below.
- £3.00 per pallet/pallet space payment based on 'Standard' tariff sold for the duration of the account.
- £2.00 per pallet/pallet space payment based on 'Adhoc or Volume discounted' tariff sold for the duration of the account.
- All customer pallet business passed to UPL via ROFS shall remain under the ownership of ROFS.
- ROFS will account manage the customer database with the understanding that the customer has the right to cease trading with UPL for any reason and ROFS has the right to transfer the business to an alternative service provider.
- The above decision would only be taken after all avenues were exhausted to try and retain the customer for UPL.
- UPL agree that they will not trade directly with any customer that ROFS has introduced them to.
- ROFS will not trade directly with any customer that UPL are currently trading with.
- ROFS would request a weekly pallet volume summary from all trading customers passed to UPL from ROFS for billing purposes.
- ROFS would invoice, as per the weekly summary, on a weekly/fortnightly basis.”

I discuss how this falls to be construed below, but at this stage will make some general observations. The agreement does not contain any express provision as to duration, nor as to termination. The reference in the first bullet point to “the duration of which the customer

shall trade” suggests a link between the payment of commission, and duration of trading by the customers. The reference in the second and third bullet points to the “duration of the account” would appear to carry a recognition that the relationship between the parties was not intended to be in perpetuity. The apparently indefinite and unrestricted prohibitions on trading are arguably contrary to public policy as being in restraint of trade. Finally, Mr O’Neill explained in his evidence that the reference in the first bullet point to “the schedules below” was not to the following two bullet points, but to schedules of rates which had been agreed between ROFS and UPL, which were contained within separate documents.

[9] After the agreement had been entered into, Mr O’Neill told the pursuer’s customers that UPL was its preferred provider. Where a customer wanted to proceed, they would be given a username to access UPL’s online portal to place orders directly with UPL. To that extent, the contract operated (and was intended to operate) in a manner inconsistent with the seventh bullet point, that UPL would not trade directly with any customer. The pursuer was paid commission by UPL based upon the total volume of business placed.

Chronology of material events

[10] The following chronology is based partly upon the evidence of Mr O’Neill, Mr Duncan and Mr Breakey, most of which was non-contentious, and partly on the contemporaneous correspondence. This is a convenient moment to mention the absence of file notes. Mr Duncan accepted that no file notes of any telephone conversations had been made. However, the material points arising out of telephone conversations were recorded in emails following thereon. Mr O’Neill was also sent copies, in draft, of proposed correspondence to UPL and its solicitors. Accordingly, while counsel for the pursuer sought

to make much of the absence of file notes, I do not consider that anything turns on that, since an email written shortly after a conversation is as legitimate a means of recording what was discussed as a file note: indeed, in some ways, it is a more reliable record, since the client, in this case Mr O'Neill, has the opportunity, which they do not have with a file note, to correct any discrepancy between what is said in an email and what was discussed on the telephone. Accordingly, where an email refers to a matter having been discussed, or advice having been given, I have proceeded on the basis that that was indeed what had been said.---

[11] Mr O'Neill got wind of a change in UPL's attitude in early 2020, and first made contact with Mr Duncan in February of that year, but no advice was given at that time.

On 9 April 2020, Alan Booth of UPL sent Mr O'Neill an email in which, among other things, he complained that the pursuer had not performed obligations which were incumbent upon it. The email went on:

"We did explore alternatives, including a revisit of commission fees to account for the lack in business growth but this was flatly rejected leading me to have no choice but to bring the relationship between our organisations to a close with immediate effect as this is now no longer commercially viable for UPL.

UPL will continue to trade with the customers that have an account with us for as long as they chose (*sic*) to do so as we have established sound working relationships and continue to see our customers satisfied with the service provided by UPL/UPN.

...

I have no doubt that it will be your intention to migrate the account to whichever organisation you become affiliated and as I have stated it is my intention to continue to trade with and retain those accounts for UPL...

With this notice of termination of arrangement, I respectfully request that you have no further contact with any other staff at UPL"

[12] Mr O'Neill immediately sought advice from Mr Duncan, sending him an email, with a copy of Mr Booth's email, at 18.49 on 9 April 2020. In his email, Mr O'Neill told Mr Duncan that the value of the business which UPL wanted to retain was almost £1m per annum; he pointed out that UPL had given no notice period; and he described the

suggestion that the pursuer was in breach of the agreement as “complete nonsense”.

He concluded by saying “I would like to start legal proceedings immediately if you could advise the best way forward.” It is perhaps a small point, but one worth noting nonetheless, that by referring to the absence of any notice period (which he said left him in a very difficult position with his customers), Mr O’Neill appeared to implicitly accept that the agreement was terminable upon reasonable notice being given.

[13] The first telephone conversation between Mr O’Neill and the defender was on the morning of 10 April 2020 (Good Friday). An assistant solicitor, Rebecca Henderson, was also on the call. It is not unfair to suggest that Mr Duncan did not subject the meaning of the agreement to rigorous scrutiny but he had considered it, and formed the view that it was terminable on reasonable notice being given. In reaching this view, he had consulted McBryde, *The Law of Contract in Scotland (2nd Edition)*, which he had at home (this being the early stages of lockdown: nothing turns on the fact that he did not have the most up-to-date edition), paragraphs 9-14 to 9-17. Mr Duncan candidly accepted that he did not advise Mr O’Neill that there was an argument that the agreement was not terminable at all; that was because he had discounted such an argument as being inconsistent with what was said in McBryde. He explained in his evidence that he did not consider the agreement to be perpetual, and in his view the first bullet point, and the words “so long as the customer shall trade”, applied only during the course of the agreement. Mr Duncan told Mr O’Neill of the view he had reached regarding notice of termination, and advised him to pursue a commercial settlement, in preference to raising proceedings for interdict. The strategy was to take the line that the termination letter had not effectively terminated the agreement, because no notice had been given, and that the agreement continued in force meantime, the aim being to buy the pursuer time to transfer its customers to a different haulier.

Mr Duncan discussed with Mr O'Neill the possibility of seeking an interim interdict, either to stop UPL dealing with the pursuer's customers, or telling them that the agreement had been terminated, but only in the most general of terms. He did not think that Mr O'Neill would wish an interdict preventing trading, as it would cause his customers massive inconvenience (and would in any event have been inconsistent with the strategy that the argument was to be that the agreement continued in force absent a valid notice of termination). He advised Mr O'Neill that his priority should be to find an alternative logistics carrier so that he could move his customers over to that carrier while the agreement with UPL remained in place. At that stage, he was under the impression that the contract between the parties involved the sale of goods, not simply the supply of services, and he advised Mr O'Neill that the Commercial Agents (Council Directive) Regulations 1993 possibly applied. This is one matter where there was some controversy on the evidence: Mr O'Neill's recollection was that Mr Duncan had advised him that the Regulations *did* apply and that the pursuer would be entitled to substantial compensation, which Mr Duncan flatly denied. I will come back to the issue of the Regulations later. At all events, Mr Duncan told Mr O'Neill that he would draft a holding response for the pursuer to send to UPL and he subsequently emailed suggested draft wording to Mr O'Neill, which stated, among other things that the pursuer did not accept the notice of termination; that there was no automatic right of termination for convenience; that the pursuer did not accept that it had been in material breach of the agreement; and that the agreement remained in place and was enforceable until the pursuer and UPL were able to agree (1) termination and a reasonable notice period for termination and (2) compensation payable to the pursuer. This all reflected the advice given, and focussed on the terminability of the agreement at common law rather than upon any putative remedy under the 1993 Regulations. Mr O'Neill

responded to this email professing himself happy with its terms. Mr Duncan hoped that the result of the letter to UPL was that UPL would serve another notice of termination, this time with a reasonable period of notice. At the back of his mind was the possibility that UPL would maintain the position that the pursuer was in breach of the agreement, entitling them to terminate it forthwith.

[14] On 14 April 2020 Ms Henderson emailed Mr O'Neill, reinforcing the advice that the holding email clearly stated that the notice of termination was rejected and that until both parties agreed a suitable termination date (which would be subject to getting undertakings about customers) the agreement was still valid and both parties should be acting in accordance with it.

[15] On that same day, 14 April 2020, Mr O'Neill was in contact with a potential alternative supplier, Mr McLellan of Keedwell Scotland. He proposed entering into an arrangement with Keedwell similar to that with UPL. However, there was no discussion of rates, and matters did not progress beyond Mr McLellan saying that if he saw the existing tariffs, he would try to price match as best he could, and suggesting an in-depth chat.

This information was not passed on to Mr Duncan. Mr O'Neill said in evidence that the arrangement he discussed with Mr McLellan was that Keedwell could charge the same rates as were charged by UPL. He acknowledged that he would have required to charge his customers a mark-up on those rates which would result in their having to pay more, but was adamant that customers would still have been prepared to transfer their business from UPL.

[16] On 15 April 2020, as had been requested, Mr O'Neill forwarded Ms Henderson a list of customers, volume of pallets and commissions received over the preceding three years.

The defender also sent its Terms of Engagement Letter to the pursuer on that day, in terms

of which, among other things, it agreed to use reasonable skill and care in the provision of advice and assistance in relation to the dispute with UPL.

[17] The next communication to Mr O'Neill from the defender was an email sent by Ms Henderson on 16 April 2020, enclosing a draft letter to be sent by the defender to UPL. Ms Henderson confirmed that the advice was to pursue a commercial settlement. The email included the following:

“In this letter we have dealt with termination and breach of contract however have not went (*sic*) into detail regarding the rights to compensation in the event of an agreed termination under the Commercial Agents Regulations. In the short term, as we discussed previously, you wish to continue the Agreement however realistically this will terminate and through this letter we are trying to control this termination and agree upon a compensation payment due to you for this and prevent UPL from using your customer details... We can give further information on potential compensation as we continue.”

The draft letter to UPL repeated the points made in the holding response that the contract provided no right to UPL to terminate for convenience or otherwise; and that there was no basis upon which UPL could terminate on the ground of the pursuer's material breach. It went on to say that the contract remained in place and was enforceable unless the parties were able to agree termination based on a reasonable period for termination and compensation payable as a result of the termination of the contract. The letter concluded by stating that if proceedings became necessary, the remedies available to the pursuer included interdict, damages or an account of profits. Mr O'Neill responded, again indicating that he was content with the terms of the draft letter. It can be seen that interdict was on the table if settlement could not be achieved, but that the focus, in line with Mr Duncan's advice, was on trying to achieve a commercial settlement; and at that stage, no detailed advice was given to Mr O'Neill about the respective advantages and disadvantages of litigation, including interim interdict, or what the terms of any interim interdict might be.

[18] On 17 April 2020, Mr O'Neill became aware that UPL had written to some of the pursuer's customers telling them that the agreement had been terminated, although not all customers had been written to in the same terms and it seemed that UPL was trying to cherry pick the best customers. At 10.09 hours he received an email from one customer, Metpro, stating that it had received an email from UPL informing them of the termination, and stating that they were the pursuer's customers, not UPL's, and that UPL should not be collecting any future pallets. Mr O'Neill forwarded the email to Ms Henderson, asking what he should do. The draft letter to UPL was amended, to put UPL on notice that it should stop contacting customers. Ms Henderson, having discussed the matter with Mr Duncan, emailed Mr O'Neill recommending that he phone all of his customers to let them know that the agreement with UPL had not terminated but remained in force; that he was looking at alternative service providers; and that he would be in touch again as soon as possible. Later that morning, Mr O'Neill learned that UPL had contacted one of his major customers, Opalion Plastics, within minutes of sending the termination email on 9 April, telling Opalion that the agreement had terminated and that it wished to continue trading with Opalion directly. Mr O'Neill passed this information on to Ms Henderson immediately, stating "Alan Booth has emailed my customer Opalion (*perhaps all of my customers*) prior to sending me the initial email dated Thursday 9th April". Mr O'Neill sent a further email to Ms Henderson a short time later saying

"I have been speaking to my *key customers* and by the look of things Alan Booth has been in touch with some of them last week via email...it looks like Alan Booth is 'cherry picking' the customers that he/UPL wants to retain as some customers have received the note below and others haven't".

Mr O'Neill said in his evidence that he had in fact first become aware of UPL contacting his customers on the evening of 9 April 2020, when he spoke to Paul Flanagan of Flanagan (or

Discount) Flooring, also a major customer, who had already been contacted by that time, although Mr O'Neill conceded that he had not imparted that information to the defender. However, the email correspondence on 17 April does not give the impression that Mr O'Neill already knew that his customers were being contacted directly, or that he considered it unimportant to pass such information on to the defender; but the important point is that by the time the defender was instructed, UPL had already contacted both Opalion and Flanagan Flooring to tell them that the contract had been terminated, and soliciting their business, and to that extent the damage had already been done, as Mr O'Neill conceded in response to a question from me. He also accepted, in cross-examination, that an interdict stopping UPL from communicating with customers would have had little practical utility by that stage.

[19] On 14 May 2020 Ms Henderson emailed Mr O'Neill suggesting that Mr Breakey, described as a Dispute Resolution colleague, be brought in, stating that he had recommended that an application for an interim order at the Court of Session be considered. That was possibly a slight over-egging of Mr Breakey's advice: Mr Breakey said that he did not think that he would have given anything other than the most general advice at that stage. He was passed the papers to consider, and he formed the same view as had Mr Duncan, namely, that the agreement was terminable on reasonable notice being given. He did not think that it would have been tenable to argue to Brodies that the agreement was not terminable at all, which he thought would have been seen as no more than a "try on". He approved the terms of the defender's letter to Brodies dated 14 May 2020, which among other things rejected any suggestion that the pursuer was in material breach of the agreement, advanced the position that the agreement was still in force and sought payment of damages for breach of contract and compensation in terms of the 1993 Regulations.

[20] Mr O'Neill and Mr Breakey first spoke on 27 May 2020, in a telephone conversation to which Mr Duncan was also party. Mr Breakey repeated the advice given previously by Mr Duncan that the agreement was terminable. Interdict was not discussed during this conversation.

[21] On 28 May 2020, the defender received a response from Brodies to the letter of 14 May 2020, continuing to take the position that the pursuer had been in material breach of contract for failing to maintain the customer base to ensure an increase in rates and for failing to introduce new custom since 2017. Brodies' letter also stated that: "It is not reasonable or credible on any view to suggest that the agreement between the parties was perpetual and could not be terminated absent parties' agreement". Finally, Brodies asserted - correctly - that the 1993 Regulations did not apply, because the agreement was for the provision of services only. It was evident by this stage, if it had not been before, that UPL had no intention of issuing another notice of termination, this time with a period of notice, but were adhering to the position that the agreement could be terminated without notice.

[22] By 1 June 2020, the strategy was still to pursue an out-of-court settlement, and Mr O'Neill was still content with that approach. In his email of that date to Mr Duncan and Mr Breakey, he put forward an amount for which he would be willing to settle, adding that if it was not acceptable he wanted to proceed with an interim interdict for UPL to cease trading with customers introduced by the pursuer.

[23] A period of further negotiation ensued. The pursuer (on the defender's advice) sought damages based on a nine month notice period (based on research carried out by Mr Breakey), and a total figure of £69,076 was proposed (inclusive of the outstanding invoices of about £10,000). Mr Breakey, at the same time, advised the pursuer, on 8 June

2020, that a three-six month notice period was more reasonable. By response of 25 June 2020, Brodies offered £10,000 plus payment of the outstanding invoices. After further negotiations, which did not result in settlement, a court action was eventually raised seeking payment of unpaid commission and damages.

[24] The first time that the defender wrote to Mr O'Neill with clear and detailed advice regarding interim interdict was on 15 July 2020, when Mr Breakey sent a comprehensive email, stating that he would now raise proceedings in the sheriff court, seeking damages based upon a notice period of nine months, and pointing out the advantages, and disadvantages, of litigating. Insofar as interdict was concerned, Mr Breakey's view now was that interdict would not be granted, for three reasons: (a) the appropriate notice period was no longer than three months, which had elapsed since the termination letter (which he considered to be a more realistic notice period); (b) damages would be an adequate remedy; and (c) it would be unfair on customers to prevent UPL from continuing to service their needs. Mr O'Neill accepted that advice in relation to seeking interim interdict, and instructed Mr Breakey to continue with negotiations by offering to settle for the sum of £40,000 rather than raising a court action immediately. That proposal was not acceptable to UPL at that time, but shortly thereafter the dispute settled for that figure, inclusive of outstanding invoices and VAT, which equated to lost commissions for a period of about three or four months. The negotiations centred not only on the applicable notice period, but the average commission which would have been earned during that period (at a time when the pursuer would have been trying to persuade its customers to switch to another haulier). When UPL eventually offered to settle at the £40,000 previously rejected by it, Mr O'Neill wished to respond with a higher figure, but accepted Mr Breakey's advice not to do so. This is relevant because it informs the approach that Mr O'Neill would likely

have taken to settlement in any hypothetical counterfactual scenario in which proceedings had been raised seeking damages on the basis that the agreement was not terminable at all (and in which UPL would still have been arguing that it was terminable without notice).

Issues arising from the foregoing evidence

Did the defender comply with Mr O'Neill's instructions?

[25] Mr O'Neill tried to maintain at one point in his evidence that he had made it clear to Mr Duncan that he wished interdict proceedings to be raised as soon as possible and that the defender did not comply with this instruction. However, as the correspondence makes clear - and as he was eventually constrained to accept in cross-examination - Mr O'Neill was content to follow the advice given to the effect that interim interdict should not be pursued, and that the strategy should be to seek a commercial settlement based upon whatever reasonable period of notice could be agreed. As the summer went on, he gave instructions to the defender as to what sums he would, and would not, be prepared to accept. There is no basis for any finding that the defender did not implement the pursuer's instructions, but the gravamen of the pursuer's complaint is in any event that the advice led him down the wrong path; that he should have been advised about the possibility of arguing that the agreement was not terminable; and, much sooner than happened, about the pros and cons of seeking interim interdict. On that latter point, at least one of the reasons given by Mr Breakey for not seeking interim interdict - that three months had passed - would not have been applicable had the matter been considered, and advice tendered, three months sooner.

What advice was given on the 1993 Regulations? And did it make any difference?

[26] Whatever the reason for Mr Duncan's doing so, whether due to a misunderstanding of the basis upon which the pursuer and UPL traded, as he contended, or of the Regulations themselves, as counsel for the pursuer argued, Mr Duncan formed the mistaken view that the 1993 Regulations might apply, and said as much to Mr O'Neill. At most, this may have given rise to an unjustified expectation on Mr O'Neill's part as to the strength of his position, but the law does not entitle the pursuer to damages for disappointment. As to what the advice was, I accept Mr Duncan's evidence that he said no more than that the Regulations might apply; had he told Mr O'Neill that they did apply, and had the entire strategy been predicated on that basis, I would expect the email advice to Mr O'Neill, in particular that of 16 April 2020, and the initial letter to UPL, to have been couched in different terms, rather than stating, as it did, that the draft to UPL had not gone into detail regarding the Regulations. Counsel for the pursuer submitted that the use of the term "compensation" in that initial letter was taken directly from the Regulations, and that had the claim been based on the common law, one would have expected the correct term "damages" to have been used. However, "compensation" is synonymous with "damages" and I do not think that there is any significance in using the one word in preference to the other, particularly when writing to a lay person. Read as a whole, the correspondence referring to "compensation" does make clear that the pursuer's primary position was that the contract between the parties had not been validly terminated at common law.

[27] It was unfortunate that Mr Duncan's view that the Regulations might apply persisted for some two months until Brodies pointed out the error. Whether or not Mr Duncan apologised to Mr O'Neill for his mistake by saying "My bad!" as Mr O'Neill claimed is not an issue of fact I need to resolve: the fact is that Mr Duncan accepted, and told Mr O'Neill,

that the Regulations did not after all apply. However, the mistake did not cause the pursuer any loss. I do not accept the submission of counsel for the pursuer that it got the defender off on the wrong foot from the outset, and informed the entire strategy recommended by the defender. That argument is not supported by the contemporaneous correspondence.

[28] That being so, the 1993 Regulations have no bearing on the live issues for resolution and it is unnecessary to refer to them again.

The expert evidence

[29] Having looked at what advice was given by the defender, I now turn to the evidence of the two expert witnesses, Mr Blyth and Mrs Webster, as to what advice ought to have been given. Each provided a written opinion; Mr Blyth also provided a supplementary opinion in response to Mrs Webster's opinion; and they produced a joint note recording a discussion which they had shortly before the proof in an attempt to narrow the issues.

[30] The experts were in agreement as to the approach, and the test the court required to apply in considering professional negligence, as set out in *Hunter v Hanley* 1955 SC 200, namely: whether there is a usual and normal practice; whether that practice had been adopted in the instant case; and whether the course adopted was one which no ordinarily skilled solicitor exercising ordinary care would have taken. In the present context, that translated into duties to (i) consider the options open to a client in a contentious matter; (ii) provide advice on those options having regard to the client's objectives and consideration of the costs against possible benefit of those options and (iii) review the options and advice given as matters progress and assess any change required in that advice in light of changing circumstances. They further agreed that in the absence of any agreement restricting the scope of the advice, the client should be advised (as part of the

advice on available options) as to at least all arguments with reasonable prospects of success and associated remedies. As to the timeframe within which advice should be given, they agreed that what is reasonable will vary according to the circumstances of any particular case (including client expectations and the likely consequences of inaction).

[31] The experts' opinions differed as to whether the client should also be advised of arguments which did not have a reasonable chance of success. They arrived at their final views on this matter via a somewhat unusual route. In his initial opinion, Mr Blyth was of the view that the usual and normal practice of a solicitor advising a client on a contentious matter pertaining to a potential breach of contract was to provide the client with an assessment of the key arguments and remedies most likely to be available to the client and the likely relative advantages and disadvantages of pursuing each option (Opinion, paragraph 4.25). Mrs Webster by contrast appeared to suggest that the defender should have advised the pursuer of all arguable arguments (the third full paragraph on page 7 of her Opinion:

"I do not dispute that it was arguable that the Agreement was not terminable but in my opinion, the advice [the defender] ought to have given was that it was not a strong argument").

Following their meeting, however, their views had shifted somewhat: Mr Blyth was now of the view that a client should be advised of all arguments that are likely to be stateable and associated remedies; with which Mrs Webster disagreed, and to that extent she appeared to back-track from her original view, (at least on the assumption that "arguable" and "stateable" mean the same thing: whether they do or not, no-one in this case sought to draw a distinction). She no longer thought that a client had to be advised of an argument which was merely stateable, and that remained her position at proof.

[32] The experts also disagreed on the key underlying issue in the case: the strength of the argument that the agreement was not terminable even on notice. Mr Blyth's view, as expressed in his written opinion, was that it was readily arguable that the agreement was not terminable by unilateral notice. He saw the agreement as clear and unambiguous. The key obligation on the part of UPL was to make payment to the pursuer for all pallet business passed to UPL. Both the obligation to make payment and the applicable prices were expressed as being for a specified duration. While UPL was under no obligation to trade with any particular customer for any particular period of time, for so long as it did trade it was obliged to pay commission. It followed that, in Mr Blyth's view, there was no room for the implication of any implied term to the effect that the agreement was terminable by unilateral notice, of whatever duration. Such a term would have been inconsistent with an express term of the agreement. Mr Blyth concluded that the possibility of the argument was obvious and should have been readily apparent to a solicitor of ordinary skill and care practising commercial litigation. In his supplementary opinion, Mr Blyth went further, and stated that to his mind, seeking enforcement of the literal terms of the agreement ought to have been the starting point (by way of an action either of declarator or payment).

[33] In his oral evidence, Mr Blyth adhered to the position that a client should be advised of all stateable arguments, which he accepted was a low threshold. The only qualification to this that he was prepared to concede was that it was subject to an instruction, express or implied, from the client not to be told about arguments unlikely to succeed. He conceded that it was difficult for him to comment on what other members of the profession did. He did not criticise the strategy of attempting to achieve a commercial settlement. He accepted that a solicitor in deciding what to advise a client was exercising judgment. He struggled to understand how an ordinarily competent solicitor could reach the view (as Mrs Webster

had) that the argument that the agreement was not terminable did not have reasonable prospects of success. An important factor in his reasoning was that the pursuer had performed its obligation under the contract, entitling it to payment, as soon as it had introduced the customer to UPL and did not have any ongoing obligations. When asked about the obligation on the pursuer to manage the database, he said that he could only reach a view on the significance of that after having had a conversation with Mr O'Neill. He acknowledged that any suggestion that the pursuer was in breach would have had an impact on what advice he might have given to the pursuer. He said that he had assumed the "schedules below" had referred to the £2 and £3 referred to in the two bullet points underneath that reference and had not appreciated that they were separate documents, but he said this did not affect the argument that the agreement was not terminable.

[34] Finally, as regards interim remedies, Mr Blyth's main criticism of the advice given by the defender was that it was not given sooner (within seven days). He pointed out that a range of remedies, including interdict, would have been available, and the advantages and disadvantages of each remedy, and the associated risks (particularly if interim interdict was to be sought) and the strategy to be pursued were all matters to be explored in discussion with the client. However, in his oral evidence, he confirmed that the strategy of trying to settle a dispute was a reasonable course to adopt. In relation to the possibility of an interdict preventing UPL from taking orders from existing customers, Mr Blyth's view was that that was not a course which he would have recommended, essentially for the same reasons as given by Mr Breakey in his advice of 15 July 2020, and because it might have been counter-productive. He was more ambivalent in relation to an interdict to prevent UPL from telling customers that the agreement had been terminated, in relation to which his view was that such an interdict might be an option but it might add little value.

[35] Mrs Webster disagreed with Mr Blyth as to the strength of the non-terminability argument. In her view, the argument was no more than stateable, and therefore was not one on which advice need be given. She considered that the analysis of the duration of obligations in the agreement relative to any individual customer account was a different issue from that of the duration of the agreement between the pursuer and UPL. The defender was correct to conclude, and advise, that realistically the agreement would terminate. A court action seeking remedies based on the non-terminability argument would have been an uphill battle. The ordinarily competent solicitor exercising ordinary care would not require to give advice on it. As regards the tension between her written opinion and the note of her meeting with Mr Blyth, Mrs Webster sought to explain this by saying that what she had meant in her written opinion was that if advice was given at all about the non-terminability argument, that advice ought to have been that the argument was not strong.

[36] To an extent Mrs Webster exceeded her remit, insofar as, following her scrutiny of the correspondence, she expressed the view that the defender had in fact given advice to the pursuer that there was an argument that the agreement was not terminable. That is essentially a fact finding exercise which it is for the court to conduct; and in any event both Mr Duncan and Mr Breakey conceded that no such advice had been given. Much the same can be said about Mrs Webster's conclusion that the defender had advised the pursuer at an early stage about the advantages and disadvantages of seeking interim remedies. I disregard that evidence; however I do not consider that Mrs Webster's evidence about the standard of care is undermined in any way.

[37] Insofar as interdict was concerned, Mrs Webster agreed that advice ought to have been given about the availability of that remedy and the advantages and disadvantages of

seeking it. She did not see the circumstances as sufficiently urgent to have justified an immediate interdict (over the Easter weekend) but, when pressed, she accepted that advice ought to have been given within seven days. As regards the content of the advice which ought to have been given, in her view a court would be unlikely to restrict a third party's freedom of trade, so that an interdict to prevent UPL from dealing with customers would have been unlikely to be obtained. An interdict against communication would in her view have been equally difficult given the knowledge that the damage had already occurred. She would have found it difficult to argue in court that there was a reasonable apprehension that a future wrong would be committed. In her view, the strategy of not advising the pursuer to press forward with an interdict could not be said to be a course adopted which no ordinarily skilled solicitor exercising ordinary care would have taken.

[38] Finally, in their joint note, Mr Blyth and Mrs Webster agreed that termination of the agreement would bring an end to the obligations of the parties to it (except to the extent that, properly construed, they were to survive termination); and that the implication of a term to the effect that the agreement was terminable by UPL on the expiry of a reasonable period of notice would result in any obligation incumbent upon UPL to make payment to the pursuer coming to an end at the expiry of that period of notice.

Evidence as to the counterfactual scenario

[39] A range of scenarios was put to Mr O'Neill, in which the strength of the advice he might have been given varied. Perhaps unsurprisingly, he said that if he had been given advice that there was a good argument that the agreement was not terminable, he would have instructed the defender to sue for damages on that basis, but would not have done so had he been advised that the argument would fail. As for interim interdict, if he had been

informed at the outset that he could obtain an order which prevented UPL from telling customers that the agreement had been terminated and that they were now dealing directly with UPL, he said he would have instructed that, and had such an interdict been obtained, it would have maintained his ongoing relationship with his customers which would have allowed him either to transfer his customers to a new provider or to retain his commission from UPL.

The law

Breach of duty

[40] A number of reported decisions have applied the *Hunter v Hanley* test (above, paragraph [30]) or its English equivalent, to claims based upon allegedly negligent advice provided to clients in the context of a dispute. Many of these involve advice given by barristers, but the approach taken to the applicable standard of care, as both parties accepted, is equally apposite to advice given by a solicitor. The first proposition to emerge is that advice is not negligent simply because it turns out to have been wrong: for example, see *Saif Ali v Sydney Mitchell & Co* [1980] AC 198. Although the issue before the House of Lords in that case was whether a barrister's immunity from liability for negligence extended to pre-trial acts and omissions, the majority speeches of Lords Wilberforce, Diplock and Salmon all emphasised that a barrister, in giving advice, was exercising a judgment, and would not be liable if that advice turned out to be wrong, unless the error was such as "no reasonably well-informed and competent member of the profession could have made": Lord Diplock at 220 C. As Lord Salmon put it at 231 D:

"The barrister is under no duty to be right: he is only under a duty to exercise reasonable care and competence. Lawyers are often faced with finely balanced problems. Diametrically opposed views may and not infrequently are taken by

barristers and indeed by judges, each of whom has exercised reasonable and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent.”

[41] Second, not all arguments must always be presented to a client when advice is being tendered; in general a client pays for advice, rather than an academic treatise. In *Moy v Pettman Smith (A Firm)* [2005] 1 WLR 581 the House of Lords had to consider settlement advice given by a barrister at the doors of the court not to settle a court action on terms which had been offered, which advice the client accepted to his ultimate financial detriment. In giving that advice, the barrister did not explain all possible options to the client, there being insufficient time available. While pressures existed there which were absent from the present case, nonetheless, the case contains useful guidance on the extent to which advice must comprise an exhaustive description of potential courses of action, including those which are not recommended. Baroness Hale observed at paragraph [28] that there was a respectable body of professional opinion that a client pays for the advocate’s opinion, not her doubts; and referred to the absence of evidence or authority to support the view that no reasonable barrister would have given advice in the way that the barrister had in that case. Lord Carsewell, at [58] and [59], said that there was “considerable force” in the appellant’s arguments that:

“a client is entitled to have advice clearly stated rather than a dissertation on the respective advantages and disadvantages of different decisions”

and went on to say, at [60], that it would not be a productive discharge of advocates’ duty to give proper advice to require them to catalogue every factor which might affect the course of action to be adopted.

[42] Third, it is not negligent, in a litigation, not to run all arguments which might prevail. Authority for this proposition is *FirstCity Insurance Group Ltd v Orchard* [2003]

PNLR 9. A client sought advice from counsel and solicitors regarding a contentious situation, suggesting a potential interpretation of a contract which, if correct, would allow for matters to be resolved in the client's favour. The client was advised not to pursue the point, and lost at first instance. On appeal the Court of Appeal itself took, and decided the case on the basis of, that self-same point. In a subsequent negligence action against the solicitors and counsel, it was held that they had not been negligent and, deriving these principles from *McFarlane v Wilkinson* [1997] PNLR 578, that a barrister was never bound to plead and argue a point merely for its settlement or nuisance value; it was not negligent not to run a point if the barrister could reasonably take the view that it was not arguable; and that even where there are a range of possible points to be argued, once a well-informed and considered view has been taken as to what is the best point to argue, a barrister who runs with that point and decides not to clutter up the case with other arguments is generally not to be held to have been negligent. As Forbes J put it at [81]:

"I accept the primary submission...that the relevant advice that was given and the decisions that were made by the Defendants were, in each case, the result of professional judgment on the part of each Defendant and were such that other reasonably competent practitioners holding themselves out as competent to practise in the relevant field and acting with ordinary care, might also have given and decided."

[43] Before leaving *FirstCity*, I should point out that the issue there was whether all points in support of an argument leading to a particular outcome ought to be taken, in contrast to the issue in the present case which is whether a more favourable outcome ought to have been advised upon, and pursued.

[44] On the other hand, there have been instances where the court has held that advice given by a solicitor was not only wrong, but negligent. One such case was *Levicom International Holdings BV v Linklaters* [2010] PNLR 29, where the defective advice pertained

to the construction of a clause in a share sale agreement, and associated advice as to choice of remedy, including advice to commence arbitration proceedings. The Court of Appeal held that the solicitors were negligent in two respects: (a) for advising that a clause was clear when it was not and (b) because the advice failed to deal adequately with the remedies. It should be noted that the Court of Appeal did not go so far as to hold that the solicitors' construction of the clause was wrong, or negligently formed. The view of Stanley Burnton LJ was that the negligence lay in not advising that the clause was unclear; and in failing to take a balanced view, instead giving "bullish" advice about the prospects of success: see paragraphs 246 to 252 of his judgment. Lloyd LJ, by contrast, found that the negligence lay in the advice as to remedy and in particular the quantum of damages: paragraph 276. Jacob LJ agreed with both judgments (paragraph 282), but made clear, in the following paragraph that he saw the case as being one where the fault lay in giving advice that the client had a strong case (when, by inference, it did not). One striking feature of the case is that although Lloyd LJ referred to the standard of a reasonably competent solicitor, there does not appear to have been any expert evidence as to what that standard was, the court reaching its own views on that matter (Stanley Burnton LJ stating, for example, at paragraph 249, what appeared to be his own view that the solicitors could not "sensibly" have advised that the clause was clear). All that can be taken from *Levicom* is that a solicitor who fails to consider all relevant factors, resulting in an unbalanced view being presented to the client, may be held to have fallen short of the standard of the ordinarily competent solicitor exercising ordinary care, but, whatever the position may be in England, in Scotland expert evidence would always be required before the court could find negligence established (*Tods Murray WS v Arakin Ltd* 2011 SCLR 37, Lord Woolman at [92]).

[45] Another case concerning negligent advice arising out of construction of a contract is *Queen Elizabeth's Grammar School Blackburn Ltd v Banks Wilson (A Firm)* [2001] EWCA Civ 1360, where a solicitor had to advise on the meaning of a covenant which restricted the height to which a new building could be constructed. The advice given was relied upon by the client, which instructed building work in accordance with the advice, but subsequently, after a dispute had arisen with the party in whose favour the covenant had been drawn, had to modify its plans. It was accepted in that case (at paragraph 29) that if there was "real scope for dispute" about what the covenant meant, that ought to have been drawn to the client's attention. Counsel for the pursuer submitted that this case was authority for the proposition that whenever a contract requires to be construed, in whatever context, advice must be given about any clause if there is "real scope for dispute" about it, but I do not consider that the case justifies that conclusion. Advice given to a client who then acts upon it (leading to a risk of litigation) does not necessarily give rise to the same duties as advice given after a dispute has arisen; but in a sense the point is academic since, as I have already pointed out, expert evidence about the standard of care is in any event required; and neither Mr Blyth nor Mrs Webster expresses their view in those terms.

Terminability of a contract

[46] There is no real dispute about the underlying law as to terminability of a contract, or when a term as to notice may be implied; rather about the application of the law to the agreement in question. Parties agree that the starting point is McBryde, *The Law of Contract in Scotland* (3rd edition). At paragraph 9-14, Professor McBryde discusses the duration of a contract which lacks an express term on duration, expressing the view that three questions arise: (1) is it possible to imply a term on duration? (2) If the contract is of indefinite

duration, may it be ended by notice given by one party? (3) If the contract may be ended by notice must there be a period of reasonable notice or does notice take effect immediately?

As he points out at paragraph 9-15, the first task is to construe the terms of the contract before considering what might be implied. Properly construed, the contract may have an express term on duration, otherwise it may be possible to imply such a term. An example cited of a term being implied as to duration is *Galbraith & Moorhead v Arethusa Ship Co Ltd* (1896) 23 R 1011, where the pursuers had offered to take £500 in shares in the defender in consideration for being appointed sole chartering brokers for the defender's ship and that all charters were to be done through the pursuers. The court rejected the defender's argument that the contract was terminable at will and the suggestion that the contract could be described as perpetual, since it could come to an end in a number of circumstances.

Lord Adam commented at 1015 that he had great difficulty in holding that an agreement for which consideration had been given could be terminated at will by the other party. It may, perhaps, be debated whether that is truly an example of a term being implied, or whether the case turned on construction of an express term of the contract; but either way a parallel can be drawn between the facts in that case and this, where the pursuer contends that the duration for which commission must be paid is the period of time for which the customer traded with UPL.

[47] Nonetheless, there are authorities pointing the other way: as Professor McBryde goes on to say, it is highly unlikely (although not impossible) that the parties will enter into an agreement for perpetuity which cannot be terminated by any of them. The most extreme example is *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387, where although the agreement in question was expressed to be "for all time hereafter", the court nonetheless implied a term that it was terminable on reasonable notice.

The pursuer's case

[48] The pursuer contends that in all the foregoing circumstances, the defender breached the express term (which, if not expressed, would have been implied in any event) in its letter of engagement that it would use reasonable skill and care in the performance of the services to be provided by it, and/or its common law delictual duties to like effect, when advising the pursuer in relation to its dispute with UPL. Specifically, the substance of the pursuer's case is that, having regard to Mr Blyth's evidence, the pursuer should have been advised of the non-terminability argument, and the availability of interim interdict as a remedy, (although by the end of the proof, although not formally departing from the interdict branch of the case, counsel for the pursuer did not press it with any great vigour); and that a failure to give that advice was negligent. Further, the pursuer argues that if advice as to non-terminability had been given, the pursuer would have accepted it and would have been successful in retaining all or most of its business. Finally, it argues that, properly advised, it would have pursued an action for damages against UPL for payment of three and a half years' commission, ie £350,000, which would have had a substantial chance of success. A loss of a chance approach should be adopted. Applying a percentage of 75% to that figure gave £262,500 from which fell to be deducted the sum recovered in respect of damages, £30,000, so that the damages to be awarded to the pursuer were £232,500. It is important to note what the pursuer's case is not: it does not claim that the advice which was actually given - first, to seek damages, by negotiation and then by court action, and then to accept an offer, all based on the agreement being terminable on reasonable notice - was negligent.

The defender's response

[49] The defender resists all branches of the pursuer's case, primarily on the basis that, accepting Mrs Webster's evidence in preference to Mr Blyth's, the advice given by the defender was not negligent. Even if it was, the defender's position is that it had no causative effect and that ultimately the action would have settled on the same basis as was in fact achieved. Finally, the defender argues that if an action against UPL, based on non-terminability, had proceeded all the way to proof, it would have failed, so that the pursuer has failed to establish any loss.

Decision

Breach of duty

[50] By way of introduction, I agree with counsel for the defender that this is, in large measure, not really a "practice" case at all. To the extent that there is a normal practice when a client is involved in a contentious matter, it is to consider the options open to the client and give advice thereon, within a reasonable timescale, which is what the defender did. The real dispute is in relation to the third of the three matters in Lord Clyde's *dictum* in *Hunter v Hanley*: whether the advice given was such that no ordinarily competent solicitor, exercising ordinary care, would have given it.

[51] On that issue, expert evidence has been given by two solicitors, each expressing a different opinion. The approach to be taken where there is competing expert evidence in a professional negligence case was considered by Lord Tyre in *Hannigan v Lanarkshire Acute Hospital NHS Trust* [2012] CSOH 152 at paras [24] to [27], citing with approval a decision of Lord Hodge in *Honisz v Lothian Health Board* 2008 SC 235 at paras [39] to [40]. Summarising that approach: (i) the court's function is not to prefer one school of thought over another;

(ii) if a defender leads evidence that other responsible professionals would have done what the impugned professional did, that does not necessarily lead to a finding that there was no negligence; (iii) that is because, exceptionally, a practice perpetuated by the second body of opinion may not stand up to rational analysis.

[52] That was said in the context of medical negligence. Where the negligence, as here, is said to consist of the view taken of a contract and the remedies available under it, the court is, at the rational analysis stage, without supplanting the role of the experts, able to test the expert evidence against its own view of the law.

[53] Applying that approach here, the short answer to the pursuer's claim of negligence is that there is no rational basis for rejecting Mrs Webster's evidence to the effect that not all ordinarily competent solicitors would advise a client about all arguments which were merely stateable, and that the non-terminability argument was sufficiently weak that advice need not have been given about it; further that not all ordinarily competent solicitors would have advised the pursuer to seek an interim interdict. Consequently, the pursuer has failed to establish that the defender breached its duty of care in any respect. However, in deference to the arguments presented, and because the pursuer's position is, in effect, that Mrs Webster's view does defy rational analysis, I will consider the position in a little more detail, dealing first with the non-terminability argument, and then with interim remedies.

Failure to advise that the agreement was arguably not terminable

[54] I need not say much about whether there is a practice among solicitors of advising a client involved in a contentious situation about all stateable arguments which might be deployed. Accepting Mrs Webster on this, I reject the argument that there is any such practice. It is not in accordance with Mr Blyth's original view that the client should be

advised of all key arguments. Further, such a practice would be virtually meaningless and unworkable: to require advice on all stateable arguments would be to set the bar far too low, and would set solicitors, particularly those advising on an urgent problem, a virtually impossible task. The depth of the advice must necessarily depend on the circumstances in which it is given and is ultimately, as Mr Blyth accepted in cross-examination, a matter of judgment: a client who is about to embark on a certain course of action (such as in *Queen Elizabeth's Grammar School*) may require to be advised on risks where there is a real scope for dispute (which, in passing, seems to set the bar higher than does "stateable"); whereas a client on the steps of the court may need to be told less, as in *Moy*. As it was put in that case by Lord Carsewell, a client generally pays for advice, not a dissertation on the law.

[55] The better question to ask in the present case is whether the argument that the agreement (and hence the obligation to pay commission) was not terminable by unilateral notice was sufficiently strong that the defender ought to have advised the pursuer about it.

[56] Two additional points fall to be made at this stage. First, although Mr Blyth in his opinion seemed to draw a distinction between termination of the agreement, and the obligation to pay commission, suggesting that the latter might survive termination of the agreement, a distinction which Mrs Webster also drew, the parties are agreed (as did Mr Blyth and Mrs Webster at their meeting) that termination of the agreement would result in the obligation to make payment coming to an end, and so any such distinction is inconsequential (or would have been assumed to be so by the ordinarily competent solicitor). Second, this case is the obverse of *Levicom*. Rather than advising a bullish strategy predicated on one construction of a contract which favoured the client, the defender advised a more conservative approach based on a less favourable construction which it thought was

the correct one. The pursuer's complaint is not that it commenced proceedings and incurred unnecessary expense on the basis of ill-considered and unbalanced advice, as was the case in *Levicon*, but that it was not advised of a potential argument which, had it been pursued might (the pursuer says, would) have resulted in it achieving a higher sum in damages than it actually managed to achieve.

[57] Dealing first with Mr Blyth's evidence, I consider that it is weakened by a number of factors. I agree that, viewed in a vacuum and at first blush, there is an argument to be made that the first bullet point of the agreement entitled the pursuer to commission on orders placed by a customer for so long as the customer was trading with UPL. On one view, the facts are similar to those in *Galbraith & Moorhead*. However, ambiguities arise from the words "for the duration of which the customer shall trade based on the schedules below". The first is: what are the schedules below? Mr Blyth assumed that to be a reference to the next two bullet points, referring to £3 and £2 per pallet, but that was always likely to be a dubious interpretation, since "schedule" connotes a separate document, which Mr O'Neill confirmed in his evidence. Had there been a proof on the meaning of the agreement, extraneous evidence would have been required on that point. The second, related, ambiguity is whether the words "based on the schedules below" apply to the duration [for] which the customer trades; or to the obligation to make payment. The absence of a comma suggests the former, and if that is correct, it follows that the pursuer was entitled to commission only for so long as its customers traded with UPL on the basis of tariffs contained in separate schedules; meaning, as counsel for the defender pointed out, that UPL could have ended its obligation to pay simply by changing those tariffs; from which it further follows that the parties are unlikely to have intended that either the relationship between them, or the obligation to make payment, would last in perpetuity.

For that matter, UPL, had the point occurred to it, could have avoided any obligation to pay commission, not by terminating the agreement, but by changing its tariffs. A further indication that the parties did not intend the agreement to be in perpetuity comes from the reference in the second and third bullet points to the “duration of the account”. All in all, the agreement is laden with ambiguities, and I do not agree with Mr Blyth that it was clear and unambiguous. Mr Blyth’s view as to the strength of the argument was also predicated in part on his view that the only obligation incumbent on the pursuer was to introduce a customer and that as soon as it had done that, it was entitled to commission for so long as the customer traded with UPL without the pursuer having to do anything further.

However, that is at odds with the provision in the agreement that the pursuer account manage the customer database, whatever that means (another area where extrinsic evidence might have been required), and this, too, diminishes the weight to be attached to Mr Blyth’s view. Indeed, by the end of his evidence Mr Blyth had softened his position to the extent that he said there were a number of matters he would have had to discuss with the client before forming a final view.

[58] However, the matter does not end there because advice was not being given in a vacuum but in a context where UPL was contending that the pursuer was in breach of its own obligations under the agreement. Had UPL been able to establish material breach on the part of the pursuer, it would have been entitled to terminate the agreement without notice, a factor which the defender also had to take into account in formulating its advice.

[59] As Mrs Webster pointed out, the questions of whether the agreement was unilaterally terminable and whether it was terminable upon reasonable notice being given were closely related; indeed, opposite sides of the same coin (perhaps, if such a thing were to exist, a three-sided one, since the third possible scenario was that the agreement was

unilaterally terminable without any notice period). Thus, the question comes to be whether no ordinarily skilled solicitor exercising ordinary care would have advised, as the defender did, that the agreement was terminable on reasonable notice (assessed by the defender as being anything between three and nine months, with which no issue is taken); or would such a solicitor, in giving advice, have raised the argument that the agreement was not terminable. While it may well be that other solicitors, as Mr Blyth did, might have formed a different view on the strength of the non-terminability argument, standing the ambiguities in the agreement I accept Mrs Webster's evidence, in preference to Mr Blyth's, that not all ordinarily competent solicitors would have done so, and that the defender's view was a reasonable one for them to hold. Further, I do not see anything irrational in a solicitor, having formed a view (rightly or wrongly) on the meaning and effect of a contract, being under no duty to advise the client of counter arguments, which would run contrary to the notion that a client pays for the solicitor's advice, not his doubts, or for a dissertation. If the client does not like the advice which it is being given, it is always free to accept a second opinion elsewhere. I therefore accept Mrs Webster's evidence that not all ordinarily competent solicitors would have advised the pursuer about the non-terminability argument.

[60] For these reasons, it cannot be said that in advising the pursuer to base its strategy as they did, and in not advising of the argument on non-terminability, Mr Duncan and Mr Breakey fell below the requisite standard of care. This conclusion can be tested by turning the case on its head, and asking what the position might have been had they given advice not only that the agreement might not be terminable, but that the pursuer should seek damages of in excess of £300,000 on that basis; but that the argument had failed after proof for the reasons set out in paragraph [57], and the pursuer had been awarded damages based upon a reasonable notice period. On the basis of *Levicom*, the pursuer might well have

had an argument that the defender had been negligent for having failed to give balanced advice or to point out the risks inherent in the recommended course of action.

[61] One final point to make is that although the defender did not advise on non-terminability or expressly argue that to UPL, Brodies' letter of 28 May 2020 proceeds on the basis that the argument *had* been advanced, and offers a robust explanation as to why they considered that the argument was flawed. So, even if the defender had advised the pursuer to claim damages of in excess of £300,000 on that basis in the first instance, the response would surely have reinforced its own view that the argument was unlikely to succeed and that damages should be sought on a more modest (but achievable) basis.

[62] For all these reasons, the pursuer's case on liability in relation to the non-terminability argument must fail.

Failure to advise on interim remedies

[63] Here, the expert evidence scarcely conflicted at all, since not even Mr Blyth was of the view that interdict ought to have been applied for, his criticism being mainly directed to the fact that the necessary advice was given too late. But if the advice not to seek interim interdict would have been the same whenever given, then any failure not to give full advice earlier could have had no causative effect.

[64] However, exploring the matter a little more deeply, the key facts which emerged from the evidence in relation to the efficacy of seeking interim interdict, and advice which should have been given about doing so, are: (i) by the time the defender was first instructed, UPL had already contacted the pursuer's two largest customers (albeit that was not known by the defender until 17 April 2020); (ii) those customers which UPL wished to retain for itself were content with the service being provided by it; (iii) any switch to an alternative

contractor would have resulted in the customers being charged more than by UPL; (iv) Mr Duncan and Mr Breakey were unaware of the pursuer having reached any arrangement with an alternative contractor; and (v) there was nothing to prevent Mr O'Neill from contacting his customers himself, as the defender advised him to do, and which he did.

[65] It was agreed that the ordinarily skilled solicitor, exercising reasonable care, would have considered the possibility of seeking interim interdict. As the contemporaneous evidence shows, this was considered by Mr Duncan and by Mr Breakey, but they advised the pursuer, instead, to pursue a commercial settlement. Neither expert criticised that advice. On the basis of their evidence it is impossible to criticise the advice given by the defender in relation to interim interdict, let alone find that it fell short of the standard of the ordinarily competent solicitor. It was reasonable of the defender to recommend that the pursuer follow a strategy of trying to achieve a commercial settlement without recourse to litigation of any sort. As Mr Blyth pointed out, seeking interim orders is attendant with risk; not only the risk of being found liable in expenses should interim interdict not be granted; but the risk of being found liable in damages to the interdicted party, should interim interdict be granted which was ultimately found not to have been warranted. Further, Mr O'Neill himself conceded in evidence that by 17 April 2020, when his two major customers had already been told of the termination, an interdict preventing customers from being told would have been of little practical utility. The defender did give positive advice to Mr O'Neill that he should contact his customers to tell them that there was an ongoing dispute with UPL; and counteracting the misinformation in that way seems at least as effective a solution to the problem facing the pursuer as an interim interdict would have been.

[66] Accordingly I do not consider that the defender was in breach of duty either in advising the pursuer as it did in relation to interim interdict, or in failing to seek interim interdict.

[67] That is sufficient to dispose of the case in the defender's favour, but, lest I am wrong in reaching that conclusion, I will go on to consider causation and *quantum* of damages.

Causation

[68] As counsel for the defender submitted, causation in the present case requires to be considered in stages. First, what advice ought to have been given? Second, what would Mr O'Neill have done had the pursuer received that advice? Third, what would the outcome of that have been? The first question turns on the expert evidence. What the pursuer would have done requires to be established on a balance of probabilities. To the extent that establishing loss depends on the hypothetical action of a third party, or success of a court action, the relevant test is whether there is a substantial chance that the third party would have acted so as to confer the benefit, or that the court action would have been successful: *Harrison v Bloom Camillin* [2001] PNLR 7, [82] to [103]; *Boateng v Hughmans (A Firm)* [2002] PNLR 40, [30] to [36]; *Centenary 6 Ltd v TLT LLP* 2023 SLT 555, Lord Ericht at [31] to [35]. Counsel also submitted that where establishing loss depends on what a court would have decided, and the court hearing the claim for professional negligence is in a sufficiently informed position to make a decision on that issue, that court should make a ruling on the point, as Lord Ericht did in *Centenary 6*, rather than assessing damages on a loss of a chance basis. On this point, see also *Harrison* at [101] to [103] where Neuberger J (as he then was) took a more nuanced view. *Harrison* also makes clear, at [84], that when the court is considering what would have happened in a notional action, it need not assume that

the action would have proceeded all the way to proof or trial, but can take into account the possibility that the action would have settled.

[69] As regards the advice which ought to have been given, parties disagreed as to what counter-factual position should be adopted. Counsel for the pursuer submitted that the court should ignore the advice actually given by Mr Duncan and Mr Breakey that a commercial settlement should be pursued on the basis of the agreement being terminable, and proceed on the assumption that advice had been given to litigate on the strength of an argument that the agreement was not terminable; in other words, as counsel for the defender put it, the pursuer was inviting the court to assume that Mr Blyth had been parachuted into the case and given advice to litigate on that basis. Counsel for the defender went on to submit that the correct counterfactual was simply that if non-terminability had been raised as an argument, Mr Duncan and Mr Breakey would still have given the same advice as to what the pursuer should do. I prefer the defender's submission. It is a leap too far to say that not only should the argument have been raised with the pursuer but that the advice should have been that it was likely to succeed and that the case should be litigated all the way to proof if necessary on that basis. That was not Mr Blyth's view, nor was it the pursuer's case on record. It follows that even if advice had been given about the possibility of the argument being made, a failure to give that advice has not resulted in any loss, because the defender's advice would still have been to raise the same action as was raised which would still have had the same outcome. A theme that emerges from the email correspondence is that Mr O'Neill was willing to accept the advice he was given, even when it ran contrary to his instincts/hopes that the claim was worth more. Having accepted advice to accept £40,000, which included about £30,000 representing commissions for three or four months, when he had been told that there was a possibility, but an unlikely one, that

the court might award commission based on a notice period of nine months, it is simply not credible to suppose that in the world of the counterfactual he would have instructed litigation to be run to proof on the basis of a different argument which he had also been told was unlikely to succeed.

[70] But even if that is wrong, and advice should have been given to raise an action based on the proposition that the agreement was not terminable (in which event, I accept that Mr O'Neill would have accepted that advice) it has not been shown that that would have resulted in a better outcome for the pursuer. I have already commented on the fact that Brodies robustly scotched any suggestion that the agreement was not terminable, and it is likely that defences to a court action would have adopted a similarly robust position. The proper counterfactual here is that the same offer would have been made by UPL as was in fact made (perhaps backed by a tender, if the sum sued for was significantly higher, increasing the risks for the pursuer still further); that the advice as to settlement would have been the same; and that the outcome would have been the same. As counsel for the defender put it, the claim found a natural landing point between the parties' respective positions, and it would be pure speculation to conclude that a higher settlement would have been achieved had the sum sued for been greater. The court is in a better position to gauge what might have happened here, than in cases where the negligence lay in failing to raise an action at all, because here there was an actual action and an actual settlement, which, in my view fairly reflected the value of the claim taking account of the various arguments and risks. The value of the claim would not have been any greater had a larger sum been sued for. It is unlikely in the extreme, given Mr O'Neill's approach to advice in the real world, that he would have instructed that the action be run all the way to proof on the non-terminability argument. Accordingly, I do not consider it appropriate for me to attempt

to decide the correct meaning of the agreement, or what view the court would eventually have reached. It is likely that the action would have settled for the same sum as was eventually agreed.

[71] Turning to interim interdict, and whether that would have achieved any better outcome had it been applied for, two potential interdicts fall to be considered: one which stopped trading, and one which stopped communication with customers. On the first of these, whatever advice had been given and whatever Mr O'Neill might have instructed, I do not consider that there was any realistic prospect of an interdict having been granted to prevent UPL from trading with persons with whom it had been trading for some years, and who wished to continue trading with it. Counsel for the pursuer attempted to downplay the likelihood of a court holding that damages would be an adequate remedy, citing *Skipton Financial Services Ltd v Allan* [2014] CSOH 106, Lord Matthews at [54]. However, the passage relied upon was in the context of an alleged breach of a restrictive covenant, and non-solicitation clause, by a former employee, and the facts were far removed from those here. In the present case, the customers had already been trading with UPL for a number of years. Another factor, not mentioned in submissions but alluded to by Mr O'Neill in an email to the defender was that a court would have been most unlikely, in the early days of lockdown (as this was) to have granted any order which might have resulted in disruption to the supply chain. Had interim interdict been applied for in these terms, the most likely outcome is that the pursuer would have been found liable in the expenses of making the motion.

[72] As regards an interdict to stop UPL from telling customers that the agreement had been terminated, it is possible that a court might have been persuaded to grant interim interdict in those terms. On this matter I disagree with Mrs Webster: I consider that by

17 April 2020, there was a reasonable apprehension that UPL had unlawfully terminated the agreement and were wrongly telling customers that the agreement had already come to an end. It was not unreasonable to apprehend that they might continue to do so. However, on the evidence, an interdict obtained after that date would have achieved little, if anything; there is certainly no evidence before the court to suggest, let alone prove on a balance of probabilities, that such an interdict would have resulted in a better outcome for the pursuer. In particular, there is no evidence to suggest that the pursuer would have been any more successful than it was in persuading its customers not to instruct UPL and to switch to an alternative provider, particularly when by doing so, their costs would increase.

Loss

[73] There is little I can add under this head, given my view on causation: for the reasons given, I consider that the pursuer's claim settled for what it was worth, factoring in the risks inherent in litigation, including the possibility that the claim was worth nothing. However, for completeness, I consider that valuing the claim on the basis that commissions would have been payable for three and a half years had the agreement not been terminated, the maximum total value of the claim would have been closer to £250,000 than to £350,000 as claimed by Mr O'Neill. The evidence showed that commissions had decreased from £88,927 in 2018 to £81,486 in 2019. Mr O'Neill maintained that volumes went up by roughly 10% during the pandemic, but that was not vouched and had been disputed by UPL. When valuing loss of a chance, the appropriate percentage should be applied to the maximum value and the sum actually recovered - £30,000 - should be deducted from the resultant figure. Aside from the other risks, there would also have been the risk, highlighted already, that UPL could have elided its obligation to pay commission by increasing its tariffs.

Increased irrecoverable expenses would also require to be factored into the equation, which as both counsel acknowledged would involve a considerable degree of speculation in the absence of any evidence as to what they might have been. Taking all these factors into account, I would have struggled to assess the loss of a chance at any more than 15%, which would value the claim at £37,500 from which the £30,000 in fact recovered would fall to be deducted along with an unknown sum for irrecoverable expenses, reducing the pursuer's hypothetical loss to nil, or as close thereto as makes no difference; all of which is another way of concluding that the advice given by the defender, far from being negligent and resulting in loss, was commercially prudent and resulted in the best outcome that the pursuer was ever likely to achieve in the admittedly unfortunate circumstances in which it found itself.

Disposal

[74] I have sustained the defender's third plea-in-law and granted decree of absolvitor, reserving all questions of expenses.