



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 16  
CA55/23

Lord President  
Lord Boyd of Duncansby  
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the cause

JOHN GLARE

Pursuer and Reclaimer

against

CLYDESDALE BANK PLC

Defenders and Respondents

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**Pursuer and Reclaimer: Tariq; BTO Solicitors LLP**  
**Defenders and Respondents: Dean of Faculty (Dunlop KC); Horn; DLA Piper Scotland LLP**

2 July 2022

**Introduction**

[1] The pursuer seeks reduction of a decree of absolvitor dated 26 January 2016. The decree followed a proof in a previous action between the parties. The pursuer also concludes for reduction of interlocutors refusing his motions for review of that decree and permission to appeal to the UK Supreme Court. The event which appears to have prompted

this action, some years after the decree, is the defenders' attempt to enforce a taxed award of expenses totalling almost £900,000.

[2] The pursuer contends that the defenders suborned their Head of Corporate Support, namely Douglas Campbell, to commit perjury. The commercial judge dismissed the action. He reasoned that the pursuer had not pled a relevant case that Mr Campbell's evidence had had any effect on the outcome. Substantial justice was served by upholding the principle of finality in litigation. The pursuer reclaims that decision.

## **Background**

### *The first action*

[3] On 14 February 2008 the defenders sold the pursuer a tailored business loan (TBL) of just under £4m. Interest was at a fixed rate of 7.85% per annum. The term was 25 years. The TBL was secured over Chantmarle Manor, a property which the pursuer owned and operated as a wedding venue and conference centre. Clause 8 of the TBL provided that, in the event of the loan being terminated early, the pursuer would reimburse the defenders for the "break costs" of unwinding related financial arrangements (portfolio hedging) which the defenders had entered into with third parties to mitigate the risk of default.

[4] During the TBL's term, bank variable interest rates dropped to well below 7.85%. On 21 September 2009, the defenders terminated the TBL, because the pursuer had failed to adhere to various financial covenants and to make the necessary repayments. Break costs in excess of £700,000 were added to the pursuer's liability to the defenders. The defenders appointed receivers over Chantmarle in April 2010. In February 2011 the pursuer was made bankrupt by a third party. In 2013 the receivers sold Chantmarle for just over £2m, leaving the pursuer owing the defenders just under £2.5m.

[5] The pursuer considered that the TBL had caused his business difficulties. In 2013 he raised an action for damages against the defenders based on a contention that they had mis-sold him the TBL. He averred that, if the defenders had not done so, he would instead have obtained a variable rate loan. If he had obtained such a loan, his business would not have failed. He would not have been made bankrupt. He would not have lost Chantmarle. The defenders admitted liability, but disputed causation. They maintained that the pursuer would not have obtained a variable rate loan, had he not been mis-sold the TBL. His business would have failed in any event.

[6] This first action went to proof in 2015. The Lord Ordinary found in favour of the defenders ([2015] CSOH 184). He determined that: (i) the “keystone” of the pursuer’s case was his claim that, if he had not been offered the TBL, he would have sought and obtained a variable rate loan. The Lord Ordinary was not satisfied he would have either sought or obtained such a loan (para [40]); (ii) the pursuer was not a credible and reliable witness. His evidence about what he would have done, if he had obtained a variable rate loan, was heavily influenced by hindsight (paras [31] – [32]). That hindsight extended to his account of past events. This was very different from the view which he had held at the time (para [33]). He had a propensity to blame his difficulties on the TBL and to dismiss more obvious causes. At the time when, in 2008, his business was in difficulty, the interest rate on a variable rate loan would not have been materially different from that on the TBL; (iii) certain aspects of the pursuer’s evidence were incredible (para [34]). These related to his inability to recollect an application to Lloyds TSB for a fixed rate loan and the availability of substantial financial assistance from his former wife. The pursuer sought to influence the evidence of others, notably that of his former wife, for his own benefit (para [35]); (iv) the defenders would not have offered the pursuer a variable rate loan. The Lord Ordinary

accepted Mr Campbell's evidence that the defenders required protection against the pursuer becoming unable to service the loan, should interest rates have risen. The pursuer would probably have been offered the alternative of a 25 year loan with an initial 5 year fixed rate (para [43]); and (v) even if the pursuer had obtained a variable rate loan, his business would still have failed (para [47]). The assumptions underpinning the pursuer's case to the contrary were ill-founded (paras [48] – [73]). Accordingly, decree of absolvitor was granted.

### *The present action*

[7] The pursuer seeks reduction on the basis that the defenders had suborned Mr Campbell to give perjured evidence in the first action. For the purpose of testing the relevance of the pursuer's pleadings, that averment must be taken *pro veritate*. The pursuer avers that Mr Campbell lied about how the TBL's break costs had been calculated.

Mr Campbell testified that the TBL's break costs arose as a consequence of general portfolio hedging. This was consistent with the defenders' public pronouncements at the time.

According to the pursuer, this was untrue. Instead, the defenders had entered into individual hedging transactions for each loan. These were known as mirror swaps. Break costs on a 5 year fixed-interest loan would have been about £315,000. If the pursuer had had the benefit of the £400,000 difference between the break cost figures, he would have been able to sell Chantmarle, re-started a residential property business, and avoided bankruptcy. This sale and restart contention is materially different from the one that had been advanced in the first action, whereby, but for the TBL, his business would not have failed.

[8] The defenders do not accept that Mr Campbell gave perjured evidence. In any event, they contend that the pursuer's action is irrelevant. The pursuer did not offer to prove that Mr Campbell's evidence was central to the Lord Ordinary's decision. He did not offer to

prove that Mr Campbell's evidence caused the failure of the "counterfactual" which he advanced; simply that, instead of claiming that his business would have survived, he would have, in the course of the first action, advanced the sale and restart scheme.

### **The commercial judge's decision**

[9] The commercial judge stressed the importance of finality in litigation (*Rankin v Jack* 2010 SC 642 at para [25]). The principle of finality could be displaced, and a decree recalled, where the interests of justice so demanded. Reduction was a matter for judicial discretion. Each case turned on its own facts and circumstances. The remedy was only applied in exceptional circumstances. The test was higher for decrees *in foro* than for those in absence. Reduction should only be granted where it was necessary to ensure substantial justice. The existence of an alternative remedy was not an absolute bar to reduction (*Campbell v Glasgow Housing Association* [2011] Hous LR 7 at para [48]).

[10] Perjury did not *per se* constitute a relevant case for reduction. The pursuer must aver a fresh set of facts which amounted to a fraud on the court (*Mackintosh's Tr v Stewart's Trs* (1906) 8 F 467 at 473). Subornation of perjury by a party would be such a fraud (*Begg v Begg* (1889) 16 R 550). The pursuer must demonstrate a causal link between the perjury and the ensuing judgment (*Mackintosh's Tr* at 474). Although no plea of *res noviter* was advanced, the same principle applied. A party may only found upon matters unknown to him during a previous action, if he can show that he could not with reasonable diligence have discovered them at the time (*McCarroll v McKinstery* 1926 SC (HL) 1).

[11] The pursuer had had the opportunity, in the first action, to recover information outlining the true position regarding the break costs. He did not take that opportunity. His explanation for not pursuing this was "reasons of economy". That was not sufficient. The

disputed evidence was adduced in cross-examination, in the course of a line of questioning which was only tangentially relevant, the defenders having conceded that they should never have sold the defender the TBL in the first place and thus no break costs ought to have arisen. This was a “shaky start” to an allegation of miscarriage of justice.

[12] The pursuer’s action was irrelevant because the pursuer did not offer to prove that Mr Campbell’s evidence had any causative effect on the Lord Ordinary’s decision. The pursuer required to plead a link between Mr Campbell’s evidence and the Lord Ordinary’s decision. He had not done so. The Lord Ordinary did not refer to the calculation of the break costs. It was not a material issue before him. The problem was not that the Lord Ordinary believed Mr Campbell’s evidence about break costs; it was that he disbelieved the pursuer’s evidence about what he would have done had the defenders not mis-sold him the TBL.

[13] The commercial judge noted the pursuer’s position that, had he realised that Mr Campbell’s evidence was untrue, he would have amended his case and advanced his sale and restart scenario. The judge identified four difficulties with this. First, it relied upon the bank’s public pronouncements as well as Mr Campbell’s evidence, but only the public pronouncements could have influenced the pursuer as Mr Campbell’s testimony had been adduced after the pursuer had closed his proof. Secondly, a motion by the pursuer for leave to amend, and effectively to restart his case, was very unlikely to have succeeded. Thirdly, the pursuer was aware of the issue of break costs in the first action, having made (unanswered) calls in his pleadings about them. He knew, or should have known, that the first action would be his only opportunity to prove his case, but he had opted not to seek recovery of the relevant information. Fourthly, any argument based on the amount of the break costs being lower was misconceived. First, the defenders had conceded in the first

action that no break costs should have been applied. If the defenders were wrong about that, their error could only have benefitted the pursuer. Secondly, it was obvious that the break costs of a 5-year fixed interest loan would have been lower than those of a 25-year one. If the pursuer had the former in contemplation during the first action, he could have investigated the position then.

[14] The commercial judge did not consider that Mr Campbell's evidence had resulted in the Lord Ordinary forming a negative impression of the pursuer's credibility and reliability. The Lord Ordinary's rejection of the pursuer's evidence was not based upon his acceptance of Mr Campbell's evidence. The Lord Ordinary's comments (at para [34]), which outlined his reasoning, were independent of Mr Campbell's evidence.

## **Submissions**

### *Pursuer and Reclaimer*

[15] The commercial judge erred in holding that, taking his pleadings at their highest, the pursuer was bound to fail. First, the commercial judge failed to grasp the exceptional and serious nature of the allegations against the defenders. Mr Campbell was the defenders' most senior witness. The defenders in the first action had met the pursuer's averments about the break cost with bare denials. It was not until Mr Campbell gave oral evidence that any explanation of the break costs had been given. The true position had been concealed until 2023, after the present action had been raised.

[16] The pursuer accepted that, although he had not taken all possible steps to investigate the break costs, he had sought the relevant information in correspondence, placed calls in the pleadings, and, on the eighth day of the proof, cross-examined Mr Campbell on the costs. Notwithstanding their duty of candour, the defenders had withheld the information,

failed to engage with the issue in their pleadings, and ultimately suborned perjury. It would be a substantial injustice for his case to fail because he had not exhausted every avenue.

[17] Secondly, the commercial judge set the bar too high in requiring the pursuer to prove that he would have succeeded in the first action, but for the defenders' fraud on the court. The correct approach was not to ask whether the outcome of the first action, but for the alleged perjury, would have been different, but whether it could have been different. The break costs were material to the argument that the pursuer could have advanced in the first action. The pursuer had to prove what he would have done had the defenders not mis-sold him the TBL. Had he known the true position, sale and restart would have been viable and the first action would have succeeded.

[18] Thirdly, the commercial judge had failed to take the pursuer's averments *pro veritate*. He had placed considerable weight on the defenders conceding, in the first action, that no break costs should have been charged. No such concession had been made. The defenders' concession related only to the period for which the interest rate would have been fixed. Break costs would still have been levied on an alternative variable rate loan agreement. The judge's observations, about the lack of any averments relating to the causal effect of Mr Campbell's evidence or an offer to prove the defenders' subornation of perjury caused him to lose the first action, ignored specific averments to that effect.

[19] Fourthly, the commercial judge erred in finding that the Lord Ordinary's rejection of the pursuer's evidence was not based on his acceptance of Mr Campbell's testimony. Their evidence had conflicted. Both had given evidence about the fixed-interest period in an alternative loan arrangement. The Lord Ordinary accepted Mr Campbell's evidence. By implication, he must have rejected the pursuer's testimony. The judge had underestimated



the significance of Mr Campbell's evidence on the Lord Ordinary's assessment of the pursuer's credibility.

*Defenders and respondents*

[20] The commercial judge correctly weighed the allegations made against the defenders. He gave them detailed consideration in his opinion. The break costs were irrelevant to the Lord Ordinary's reasoning in the first action. They were similarly irrelevant in this action. The defenders accepted that the TBL had been mis-sold. There would have been no break costs, because there would have been no TBL. Any deception concerning the quantification of non-existent costs could never have had a causative effect on the outcome of the proof. The pursuer was in the same position as the unsuccessful pursuer in *Mackintosh's Tr v Stewart's Trs*. All he could do now was disprove a statement made by Mr Campbell in the course of cross-examination. Like *Mackintosh's Tr*, this was not enough to found a case for reduction on the basis of perjury. The Lord Ordinary had attached little, if any, weight to break costs.

[21] The commercial judge was correct to hold that the pursuer did not offer to prove that Mr Campbell's evidence had any bearing on the Lord Ordinary's decision or that it caused him to lose a litigation which he could have won. The pursuer's case was not that Mr Campbell's evidence caused the first action to fail. Rather, had he known what he now knew, he would have advanced a different case. His difficulty was that he had already pled his case, led evidence, and closed his proof. The Lord Ordinary disbelieved the pursuer. The judge was correct to find that Mr Campbell's evidence about the break costs had no bearing on that assessment.

[22] The commercial judge was correct to rely upon the concession made by the defenders in the first action about break costs. The proof proceeded on the basis that liability was admitted. The pursuer failed for reasons unrelated to Mr Campbell's evidence. Even if the concession had not been made, break costs were mentioned only once in the Lord Ordinary's opinion, when he excluded them from his hypothetical calculation on quantum. His alternative case could only be relevant if there had been a plea of *res noviter*. Any such plea, and any motion to amend after the pursuer's proof had closed, would have been bound to fail, given that the pursuer could have discovered the true position during the first action by using commercial court case management powers or seeking a commission and diligence.

[23] The pursuer required to make relevant and specific averments that Mr Campbell's evidence caused him to lose a case which he should have won (*Begg v Begg* at 555). The commercial judge was correct to find that he did not do so. He could not do so because of the Lord Ordinary's finding that he would not, had he not been mis-sold the TBL, have obtained a variable rate loan as distinct from a 5 year fixed term loan, variable thereafter. That was a finding which went to the heart of his case and on which Mr Campbell's evidence had no bearing. The correct counterfactual was what would have happened if Mr Campbell had not given the perjured evidence about break costs, or not given evidence at all. The result would have been the same.

[24] The commercial judge's treatment of Mr Campbell's evidence was correct. Mr Campbell's evidence had nothing to do with the Lord Ordinary's critical findings that: (i) the pursuer would not have sought or obtained a variable rate loan; (ii) the pursuer's business would not have survived even if had he obtained such a loan; and (iii) the pursuer

had failed to establish loss. Any one of these findings would have been fatal to the pursuer's case in the first action and none of them were, or could be, challenged in this action.

### **Decision**

[25] A pursuer in an action for reduction of a decree *in foro* must demonstrate exceptional circumstances whereby reduction is necessary to ensure substantial justice, notwithstanding the principle of finality (*Campbell v Glasgow Housing Association* [2011] Hous LR 7, Lord Woolman at para [48] citing, *inter alia*, *Adair v Colville & Sons* 1926 SC (HL) 51). The pursuer must plead: (i) a relevant and specific case that the defender had perpetrated a fraud on the court (*Begg v Begg* (1889) 16 R 550, Lord Young at 555); and (ii) a causal link between the fraud and the outcome (*Mackintosh's Tr v Stewart's Trs* (1906) 8 F 467, Lord Kinnear at 474). It is sometimes thought that if, after a decision has been taken, the unsuccessful party can prove that a witness had perjured himself, that party can seek effectively to retry the case. Were that to be the position, there would be no end to the investigation of fact in litigation.

[26] The pursuer avers a causal chain which begins when Mr Campbell was cross-examined. This was after the pursuer had closed his proof. He maintains that, had he known the true position, he would have brought that to the court's attention and sought to amend to advance his sale and restart contention. Thus, the perjury is not said to have caused the failure of the pursuer's then case. It is claimed that it prevented him from advancing a different case which would, or at least could, have succeeded. There are several flaws with this argument. First, any motion to amend and thus to advance an entirely different case would almost certainly have failed, especially given that the pursuer could not have satisfactorily explained why that case had not been made earlier (*Marine Harvest (Scotland) v Nemi Forsikring* [2011] CSOH 91, Lord Hodge at para [15]). The motion, even if

successful, would have had the effect of adjourning the proof and amending not only the pursuer's case but allowing the defenders to alter theirs in response. The whole claim for damages would have required complete reworking and the witnesses re-precognosed and then examined again in chief and cross. This simply would not have been permitted.

[27] Secondly, what the pursuer is really attempting is the introduction of *res noviter veniens ad notitiam* (newly discovered information) which only came to his attention in 2023. This is illegitimate not only because that is not what is pled but also because the *res* (thing) could have been discovered in the course of the action (*Grier v Lord Advocate* 2023 SC 116, LP (Carloway), delivering the opinion of the court, at para [146] citing *Rankin v Jack* 2010 SC 642, Lord Reed at para 37; *McCarroll v McKinstery* 1926 SC (HL) 1 Lord Sumner at 7). The pursuer makes it clear that, prior to the proof, he was interested in the calculation of the break costs; hence his calls on the defenders. He could have obtained the relevant information by the relatively simple expedient of a court order.

[28] Thirdly, the Lord Ordinary was not persuaded that the pursuer would have obtained a variable rate loan, had he not been offered the TBL. That was the "keystone" of his action (para. [40]) and "the starting point of his case" (para [46]). The Lord Ordinary considered the prospects of the pursuer's business, had he obtained a variable rate loan. He concluded that the business would nevertheless have failed because the interest rates would have been similar at the time of that failure. He gave no indication that the evidence about break costs could have had any effect on this conclusion.

[29] The question for the commercial judge was whether, in the specific circumstances of this action, the perjury caused the pursuer to lose an action which he would, or at least could, otherwise have won. He answered that in the negative. The seriousness of the allegation does not avoid the need to plead a relevant and specific case. Founding upon

bare averments that the pursuer would have succeeded, and then submitting that, because the pursuer's pleadings are to be taken *pro veritate*, the commercial judge was bound to hold that a relevant case had been pled, is not sufficient. The pursuer must state how the subornation of perjury could have caused the Lord Ordinary to find in his favour. The pursuer has failed to do that.

[30] The principle of finality must be applied and the reclaiming motion refused. The court will adhere to the interlocutor of the commercial judge dated 6 October 2023.