SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 65

CA22/17

JUDGMENT OF SHERIFF N A ROSS

In the cause

LACHLAN MACDONALD

Pursuer

Against

CLYDESDALE BANK PLC

Defender

Pursuer: Reid, advocate
Defender: Tyre, advocate

Edinburgh, October 2017: the sheriff, having resumed consideration of the cause, sustains the defender's fourth plea-in-law (prescription) and assoilzies the defender from the craves of the initial writ; fixes a hearing on expenses on a date to be afterwards appointed, unless parties agree expenses in which case the hearing will be discharged as unnecessary.

Note:-

[1] This action called as a debate. The pursuer is a property developer who obtained finance from the defenders. His written averments state that in about 2008 this finance amounted to about £2,555,000, and consisted of term loans, a business loan and a development overdraft. He claims that, owing to a misrepresentation in negotiations about 2009, he was induced to act in a way that caused him loss. During discussions between 2007 and 2009, the defender proposed restructuring the entire lending portfolio into a tailored

business loan. The pursuer did not consider this was financially attractive to him. Discussions continued. In about August 2009 the pursuer and the defender's representatives had a meeting. The pursuer confirmed that he did not wish to restructure the debt. He wished to repay the development overdraft element. He claims that he was told, incorrectly, that if he repaid the development overdraft he would be in default of the term loans and business loan, and this would require a restructuring of the entire lending portfolio. He believed this to be true, acted in reliance on this statement, and renewed the development overdraft. He was charged various fees and paid increased interest on the development overdraft, and these form his claim. The pursuer claims that the defender was in breach of a duty of care not to make statements which were inaccurate or misleading and separately, in the context of a long-standing relationship based on trust and confidence, breach of a duty to correct the misrepresentation.

[2] The defender seeks dismissal of the action on two distinct grounds. The first is that there was no duty of care. The second is that the claim has prescribed.

Duty of care

[3] The defender's argument is that there was no duty of care. *Caparo Industries plc* v *Dickman* [1990] 2 AC 605 provides that the core elements are a sufficiently proximate relationship, foreseeability of damage, and that it is fair, just and reasonable to impose such a duty. Where, as here, the claim is for pure economic loss, there requires to be a special relationship akin to a contract, an assumption of responsibility by the defender to the pursuer, and reasonable reliance (*Hedley Byrne* v *Heller Partners* [1964] AC 465). In a situation where the defender was not engaged to act as financial adviser, and where the documents contained advice to seek independent legal advice, no such responsibility had been

assumed, could be identified or could lead to reasonable reliance, and it could not be fair, just and reasonable to impose a duty of care.

[4] The pursuer relies on *Cramaso LLP* v *Viscount Reidhaven's Trustees* [2014] UKSC 121, which endorses a statement that, in such a claim for misrepresentation, it will usually be unnecessary to return to these usual tests for a duty of care. Such a duty will invariably exist where a pre-contractual representation was made inducing the pursuer to enter into the contract. While the law does not impose a general duty of care in the conduct of contractual negotiations, a duty of care will arise in respect of representations which the representor can reasonably foresee are likely to induce the other party to enter into the contract, unless there are circumstances (for example, express disclaimers, time limits or non-foreseeability) negativing such a duty. Cramaso was followed in *Royal Bank of Scotland* v *O'Donnell* 2015 SC 258:-

> '…there is no obligation on a party to make any factual representation during contractual negotiations. If a party does say something, however, legal consequences may follow if it is inaccurate.' (at paragraph [39])

[5] Counsel for the defenders sought to avoid this difficulty by relying on a feature of the development overdraft, namely that it was not a new contractual negotiation but an annual renewal of a pre-existing contract. Accordingly, runs the argument, any post-2009 variation does not create a distinct duty of care situation. In my view this point is not correct in principle. First, the foregoing dicta are not confined to any particular species of negotiation, so are not excluded for post-contract alterations or renewal of an existing contract and are apt to cover the present facts. Second, on inspection, the overdraft facility (lodged at 5/1 of process) dated 13 June 2007 has an expiry date of 1 July 2008. It is a one-year facility, repayable or cancellable on demand by the defender. It contains no terms regulating (as opposed to anticipating) renewal (see clause 3.2, whereby it will be cancelled

unless the defender agrees otherwise, and subject to terms and conditions). It is therefore not accurate to regard it as merely a continuation or variation of an existing contract (akin, say, to the detailed rent revaluation provisions in commercial leases). Rather, on its terms, each overdraft renewal was a new contract, no doubt very similar to the superseded contract but with scope for innovation and change and, indeed, refusal. Each annual renewal relied on the same misrepresentation, which gave rise to a further loss.

[6] In my view, the pursuer's pleadings satisfy the legal requirements for pleading such a case. The duty of care discussed in *Cramaso* and *O'Donnell* is clear, of broad scope and encompasses the situation which the pursuer avers. There is no requirement to aver special skill, or any particular type of relationship other than that of contracting parties. In my view, the pursuer's averments adequately bring the pursuer within these principles. Even if I were wrong on this, it is not possible at this stage to say that the pursuer's case must necessarily fail even if all the averments were proved (*Jamieson* v *Jamieson* 1952 SC (HL) 44). For these reasons, the defender must fail on this point of relevancy. Whether, in fact, there are reasons to limit or exclude the duty, remains a live question for proof. I note, for example, that the pursuer relies on representations about a contract which in fact he must have had in his possession and could read for himself, that he was advised to take legal advice, and that he apparently took no action. Such issues must await proof.

[7] That is not to say that there are not fundamental problems with the pursuer's pleadings relating to breach of contract, but as this is relevant to prescription I will deal with it below.

Prescription

[8] The alleged founding misrepresentation is dated August 2009. This action was raised on 6 December 2016. The defender relies on sections 6(1) and 11(1) of the Prescription (Scotland) Act 1973 (the '1973 Act') and seeks dismissal of the action on the basis of prescription of any such obligation. The pursuer relies on sections 6(4) and 11(2) to resist this proposition, and adopts the position that evidence must be led before these matters can be resolved.

[9] It is for the pursuer to bring himself within these sections, because more than five years has passed since the operative date. Section 6(4) provides that in computing the prescriptive period, no period shall be reckoned as part of that period where:-

> '…by reason of…(ii) error induced by words or conduct of the debtor or any person acting on his behalf, the creditor was induced to refrain from making a relevant claim in relation to the obligation…Provided that any period…shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error…'

[10] The defender relies on the caveat that the pursuer could with reasonable diligence have discovered the error. That is a question of fact which I discuss further at paragraphs [24] to [27] below.

The Pursuer's Position on Prescription

[11] The pursuer's submission was that the pleadings centre around a dispute on the question of whether the pursuer could or could not with reasonable diligence have discovered the error prior to 6 December 2011, the date five years prior to raising the action. As such, it was submitted, this debate is akin to trial by pleading, a process which was

expressly disapproved in *Heather Capital Ltd (in liquidation)* v *Levy & McRae* 2017 SLT 376. Accordingly, the pursuer's awareness of a claim should be made the subject of evidence.

[12] Separately, the pursuer contends that under section 11(2) of the 1973 Act the pursuer relies on a continuing term of the parties' contract, leading to a continuing duty on the defender which did not cease until the termination of the parties' relationship in 2012.

The Defender's Position on Prescription

[13] The defender's first submission was that August 2009 was the date upon which the claim arose, being the date of the loss, when the pursuer relied on a misrepresentation. The claim is for renewal fees and interest payable on the development overdraft, and which were provided for in the original offer letter of 2007. The pursuer therefore knew that he was paying such fees and interest from 2009 onwards. The claim is therefore long prescribed.

[14] The defender's second submission was that, in the particular circumstances, the pursuer could not shelter behind lack of knowledge until August 2012, the date of termination of the parties' relationship.

[15] The pursuer's only positive assertion in relation to the prescription argument is met by the defender's third submission. The pursuer asserts that prescription does not apply, because the wrong was a continuing one. Section 11(2) of the 1973 Act provides that where the act or default is a continuing one, the loss, injury or damage is deemed to have occurred on the date that the act or default ceased. The pursuer identifies that it was only at the end of the parties' relationship, in 2012, that the default ceased.

[16] The defender challenges this, on the basis that there was a single act or default, which occurred on the making of any negligent statement. There could be no continuing default, because there is no duty of the type relied upon by the pursuer.

Discussion on Prescription

[17] In my view the pursuer is not entitled to rely simply on attacking the defender's position. The five-year period was long expired before this action was brought, and so the pursuer must bring himself within the five year period, namely to justify delay at least as far as 6 December 2011, the date occurring five years before this action was raised. The onus is on him (Johnston; *Prescription and Limitation* (2nd edition at paragraph 22.18).

[18] The pursuer therefore requires to aver and prove sufficient facts to prove this position. The pursuer appears to recognise this, and seeks a proof. In my view, however, the pursuer's averments are not capable of supporting any relevant position at proof, for reasons set out below.

[19] The pursuer's main argument is that he can rely on section 6(4), and 'any period during which by reason of…error induced by words or conduct of the debtor or any person acting on his behalf, the creditor was induced to refrain from making a relevant claim…'. The pursuer's submission was that he 'relies on the error induced by the conduct of Mr Girot', a reference to the 2009 misrepresentation.

[20] This submission must fail, for two reasons. First, the submission confuses two entirely separate events. The first is the wrong itself. The second is any delay in raising an action, attributable to the debtor's inducement. The error induced by the conduct of Mr Girot is the foundation of the action. It provides the start date of the meeting in August 2009. But when one asks why this action was not raised within five years of that date, reference to the misrepresentation of 2009 does not answer the question. The pursuer started suffering loss from 2009 onwards. He cannot blame the defender's initial wrong for also explaining the delay in raising any action.

[21] The second reason is that August 2009 is the date from which the prescriptive period is calculated. On around that date, on reliance on the statement, he entered into another annual renewal of the overdraft facility. He therefore knew that he was suffering the loss of which he complains, namely increased interest charges and other payments. His position was that in 2009 he did not know and could not have reasonably been aware of the misrepresentation. On the basis of *Gordon* v *Campbell Riddell Breeze Paterson* LLP 2016 SLT 580 he was fixed with knowledge both of the loss and of the wrongful act.

[22] Although the present case might be distinguished from *Gordon*, in that the pursuer does not rely on section 11(3), but relies instead on section 11(2) (discussed below), in my view this does not assist the pursuer. In the present case, *Gordon* remains authority for the proposition that time starts to run once the loss is incurred, which it clearly was in this case in 2009. This was an ongoing loss until the relationship ended in 2012. While there might be a claim for any losses incurred after 6 December 2011 no such claim is identified. None can reasonably be inferred from the facts, because any last reliance was likely to be at annual renewal in around July 2011. This is not enough to save the case. I consider I am bound by *Gordon*, and therefore this action falls to be dismissed. I note in passing that the concurring judgements in *Gordon* do suggest that the case was not as hard as it appears, because in fact the pursuers had notice that 'something had gone wrong' very early in that case. For the reasons discussed, I would sustain the defender's plea of prescription on this ground. I would also sustain it for the reasons discussed below.

[23] At this point I turn to address an argument which was not sufficient to trigger the prescription plea, namely the defender's argument on the facts. Counsel for the defender submitted that the claim had prescribed. The argument is as follows:-

[24] The defender's position is that the pursuer could not shelter behind lack of knowledge until August 2012, the date of termination of the parties' relationship, because he was by that date on notice that something had gone wrong. He therefore 'could with reasonable diligence have discovered the fraud or error' for the purposes of section 6(4). The defender's submission relies on two letters, the latter of which is incorporated in the pleadings. The first is of limited assistance – a letter dated 14 May 2010 by the defender to the pursuer setting out a position that conflicted with the advice, and therefore correcting it. I record that the terms of that letter are not clear enough to be self-evident, and would require proof as to their meaning in context, so I shall not discuss that letter further here.

[25] However, a second letter dated 12 September 2011 is relied upon as showing that the pursuer was well aware of his claim at that date. The pursuer's pleadings offer no response. They are silent on this letter, and rely only on a mute denial. The matter was pressed in written and oral submission, and the pursuer's counsel did not proffer either denial of the letter or analysis or explanation of its terms. The letter of 12 September 2011 bears to have been written by the pursuer to the defender, and contains a lengthy and detailed discussion of the parties' financial relationship. It bears to refer directly to a claim. In relevant parts it reads:-

> '…What I fail to understand is why restructuring (or removing) one facility reaching the end of its natural term should permit the Bank to demand the entire portfolio be restructured…When I rejected the proposed restructuring as being completely unfair and unworkable, I offered to take the entire borrowing elsewhere. I was advised that if I proceeded to do this, then I would be obliged to make good the penalty clauses within one of my facilities – to the tune of around £60k. Bizarrely it appeared the Banks wanted to change the contractually agreed terms of the existing facilities as it was losing money (I believe the sum of 60k per annum was mentioned), but if I took this problem away from the Bank by refinancing elsewhere, the Bank would charge me 56k for the privilege of helping it out of this hole…Needless to say, I found that to be a particularly high-handed and autocratic approach…Essentially I therefore had little option but to leave all facilities as they were, whilst making it clear that I would not accept any increase in the interest rate margin…I was in essence forced

> into this position as a result of the Bank's failure to negotiate an alternative way forward that did not penalize me so heavily…I have previously provided you with details of the additional monies I consider unjustifiably taken from my account – in excess of £30k. My position remains that I consider this money should be refunded and trust that escalation of this complaint to the Customer Engagement team will expedite this. Should that not be the case, I will not hesitate to take further action, whether it be through the Ombudsman or direct legal procedures or both. If that is the procedure I have to follow, I will be citing, amongst other issues, the additional third party costs and penalties I have suffered as a result of the strain placed on my cash flow by the Bank's actions.'

[26] The defender relies on that letter to show full knowledge in September 2011. I have some sympathy with that position. The letter shows a recognition that a claim against the bank was available and, in fact, threatened. If that is correct, then by the date of this letter there was no excuse for not raising an action, and waiting more than five years means the action is prescribed. In the absence of any comment, of any sort, in the pursuer's pleadings, it is difficult to know what to make of this letter. While the pursuer may deny the letter, the lack of pleading means that at proof they could lead no competing explanation. The pursuer's silence is not satisfactory, on what may be a central issue in the case. It is not acceptable for a party to shelter behind pleadings when the existence and content of this letter is put in issue and is within his own personal knowledge (*Ellon Castle Estates Company Limited* v *MacDonald* 1975 SLT 66; *EFT Finance Limited* v *Hawkins* 1994 SLT 34). In *EFT Finance Limited*, the Lord Ordinary stated:-

> 'It appears to me that in these circumstances the defender's pleadings are… "exiguous and evasive". In this situation, in my opinion, I am entitled to infer that the defender simply has no response to make to the averments…If I am right in this respect, the consequence is that I am able to proceed upon the basis that those averments are well-founded.'

[27] This action is being dismissed for other reasons, so this becomes a matter of record only. Having considered these terms it appears, read with the most favourable gloss to the pursuer, that the complaint in the letter might be categorised as not about the 2009

misrepresentation, but rather the high fees and interest demanded. If so, it would be wrong, without hearing evidence, to assume this to be an unequivocal recognition of the present claim, and to that extent I agree with the pursuer's position (*Heather Capital,* above) that trial by pleadings is to be discouraged. I would, narrowly, have allowed proof on this point. However, the letter does not operate to save the pursuer from the operation of *Gordon*.

The Underlying Claim

[28] During consideration of this case it became apparent that there is an intrinsic flaw in parties' analysis of the claim. It would lead, even if I were wrong on the foregoing, to the pursuer's pleadings on time bar being denied probation as irrelevant. This prevents the pursuer leading any positive case on prescription and, the onus being on him to explain the five year delay, the defender's prescription plea must succeed. There are two elements:

(a) 'Duty to correct'

[29] I have held that, overall, this is potentially a duty of care situation based on misrepresentation. The specific duty, in context, would be not to make misleading statements thereby inducing a contract. That is set out in article 5 of condescendence. No 'duty to correct' is pled there. However in article 6, in response to the prescription argument, the pursuer avers that the:

'defender could have corrected the mis-statement in these communications but chose not to do so.'

On plain reading this passage does not claim this is a duty. It is averred that the pursuer was 'induced to refrain' as a result of a positive choice not to inform. It is not clear what to

make of this averment. This matter went undiscussed. I will not permit the averments about 'correction' to proceed to probation, for two reasons:-

[30] The first is that, on a purely pleading point, the pursuer has not averred that the 'failure to correct' is to be regarded as a duty in law. It is incumbent on the pursuer to make a plain and understandable case. In this respect he has not done so. There is no fair notice of his position.

[31] The second, more substantive, point is that I do not accept, in the absence of submission, that this amounts to a relevant statement of the law of delict. No authority was cited for a 'duty to correct' a misrepresentation in such circumstances. If there were such a duty, it would mean that claims in delict could never be time-barred, because once a misrepresentation was made there would be a continuing duty to put it right. The debtor would be in permanent breach of contract. A claim based in misrepresentation would enjoy entirely different treatment under the 1973 Act from any other claim in negligence, for example the negligent service of notices in *Gordon*.

[32] In my view this claim operates as an illicit attempt to circumvent the 1973 Act. While a misrepresentation may have a continuing effect, and may be relied upon in relation to several contracts, it cannot found an endless series of claims. The pursuer relies on the long-term nature of the 'relationship'. He is entitled to do so for the period of five years following the triggering event. He is not entitled to create a new duty which is parasitic on the original duty, and which is endless. It also would circumvent the effect of *Gordon*. In the absence of specific submission I will not discuss this case further. It is enough that the pleadings do not describe this as a duty. As such, the averments introduce no relevant case and would fall to be refused probation, were the prescription plea not being sustained on other grounds.

(b) 'Breach of contract'

[33] Separately, the pursuer tries to introduce a 'duty to correct' as a contractual duty. In my view this is fundamentally misconceived, and has led to some confusion in this action. In answer to the prescription point, the pursuer avers:-

> 'Separatim the defender was under a continuing contractual duty to the pursuer to correct the misrepresentation which it had made. Reference is made to Article 5.'

[34] I assume this is a reference to an implied contractual term. Following this through, Article 5 refers to the duty of care, then states:-

> 'Separatim the contractual relationship between the pursuer and the defender in respect of the Development Overdraft was a long-term relationship between the parties…involved a high degree of communication, co-operation and predictable performance based on mutual trust and confidence. There was a mutual expectation of loyalty. It was an implied term of that contractual relationship that the defender would act in good faith in its dealings with the pursuer. Specifically, it was an implied term that, in the event a misrepresentation was made, said misrepresentation would be corrected by the defender.'

[35] The short riposte is – what contract? Only one contract appears to be relied upon in this context, namely the development overdraft. While on the pleadings the parties might loosely be regarded as being in a long-term financial relationship, this was not a long-term contract. It was a facility renewed from year to year. Each was a new contract on, potentially, new terms. It could be terminated by the bank at any time. Repayment was on demand. While there may have been an understanding that overdraft facilities would be renewed, that cannot be described as a contract.

[36] I would also have denied probation to these averments about breach of an implied term of contract, for the following reasons:-

[37] First, no contract is coherently identified which can be founded upon, as a matter of pleading. It is not enough that a contract was ultimately entered into.

[38] Second, in the event that 'contract' refers to one of the development overdraft facility contracts or one of the term loan contracts, it is immediately apparent that no such implied term arises. It would not be necessary for business efficacy, for example, to imply a term that the defender did not make a misrepresentation, because such a misrepresentation would precede and pre-exist the contract, and is therefore not part of the subject-matter of the contract itself. That is why warranties exist, to create such a contractual nexus. There are none here.

[39] Third, there is no conceptual recognition of the interrelationship between delict and contract. This action is founded on a delictual wrong of misrepresentation. Mysteriously, a contractual duty is said to arise. The duty arises from negotiations leading to renewal of the development overdraft facility, presumably from year to year. But the renewed contract is the loss, not the wrong. It is the result, not the cause. It cannot be the source of any implied term, because it is the result of the breach of duty and did not exist at the time of that breach. It might be the direct cause of loss, and the measure of loss, but it is not the breach of duty.

[40] This confusion arises because, unlike most reported cases of prescription, the wrongful act here is the same type of act covered in sections 6 and 11 of the 1973 Act, namely induced error leading to reliance. As such, 'induced error' is both the wrongful act and the excuse for not raising the action timeously. It is both the delict which founds the case and the statutory exemption which extends the time bar. The pursuer has blurred the boundaries to keep his case alive.

[41] For completeness, the pursuer cited *John G Sibbald* v *Johnston and another* [2014] CSOH 94, where the Lord Ordinary met a similar plea, and identified that the task for the court was to identify the act, neglect or default founded upon, and then to determine whether it was a continuing one. That case, however, was entirely different. In a construction contract, there

was a contractual duty to remedy defects until practical completion. Here, there is no such contract or term.

[42] It follows that none of the pursuer's arguments are relevant or sufficiently specific to be permitted probation; that the pursuer cannot bring himself within section 6(4) as a result; and that the defender's plea of prescription must be sustained. Had I not already sustained the plea of prescription, I would in any event have done so for the following reasons:-

[43] First, because both the contract case and any delictual 'duty to correct' case are irrelevant (see above) these averments in article 6 (from 'quoad ultra denied' to the end of the article, and any other reference to breach of contract) and article 5 (from separatim to the penultimate sentence, inclusive) would have been denied probation.

[44] Second, while the pursuer might seek to rely on section 11(2) to show that loss was as a result of continuing act, neglect or default, this section only applies to a continuing act, neglect or default. There is none, and as a result of refusing probation to the averments relating to (i) failure to correct and (ii) contractual duty to correct, section 11(2) does not apply. Only one breach of duty remains on record, and that is the August 2009 misrepresentation.

[45] Third, in any event, any section 11(2) is insufficiently specified to give fair notice. The pursuer would require sufficiently to identify the date on which that act, neglect or default ceased, because that is the relevant date when the five-year period starts. In the present case, it is nowhere explained why the end of the relationship in August 2012 is the critical date, because nothing is identified as occurring on that date or as a result of the termination. That is critical here, because the five-year cut off occurs only eight months beforehand. As a matter of fair notice the pursuer's pleadings would be insufficient for proof.

[46] Fourth, the pursuer seeks to rely on the same 2009 event for two separate purposes. He could not rely on the misrepresentation as the basis for a claim, and then rely on the same misrepresentation as a reason for not raising the action earlier. Even on the hypothesis that he could not have discovered the wrongful act and was not on reasonable enquiry, he still requires a separate reason for not raising the action within the five-year period.

[47] Fifth, on the authority of *Gordon*, the prescriptive period starts running on the date that the loss was incurred, namely on or shortly after August 2009 when the one-year development overdraft agreement was signed. The pursuer again fails on a matter of fair notice. He does not give fair notice explaining why section 6(4) applies. What words or conduct of the debtor induced him to refrain from claiming? There are, following the foregoing exercise, no remaining pleadings or fair notice of what the pursuer might rely upon. The pursuer could lead no evidence explaining the delay. At the highest, the pursuer's pleadings state: 'The pursuer was unaware of the correct position during the course of his relationship with the defender'. That does not address the requirement under section 6(4) that 'provided that any period such as is mentioned…shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error…' The pursuer pleads that he could not with reasonable diligence have become aware of the inaccuracy of the statement, but gives no details or further notice. In a situation where he had the contractual documents and could read them for himself, where he had been advised to take separate legal advice, and where he knew he had a complaint of some sort against the defender, it is far from self-evident that he has an answer to the prescription plea. He requires to plead why he might. In this situation, the pursuer cannot lead any evidence to bring himself within section 6(4).

[48] Accordingly, notwithstanding his threats of 'not hesitating', the pursuer did in fact hesitate for in excess of five years, without statutory relief. The claim has therefore prescribed.

Other matters

[49] The pursuer sought deletion of certain of the defender's averments. I would not have acceded to this submission.

[50] The first point is that there is no averment of events at the critical meeting in August 2009. The pursuer claims that because these must be events within the defender's knowledge, the defender is obliged to give notice or else have the statement, and its misrepresentative quality, held as admitted. This proposition goes too far, and is inaccurately used. The defender's averments relate to the overdraft, not the meeting. In the context of a meeting which took place approximately nine years ago, the defender is entitled to put the pursuer to his proof. Just because the pursuer has now identified an August 2009 meeting as critical, it cannot be inferred that the defender must have thought that meeting in any way remarkable or memorable, or that recollection is clear enough to regard the defender as obstructive. The corollary of the defender's stance is, of course, that they can only test the pursuer's evidence, and not advance any positive case of their own.

[51] The pursuer also complains of lack of information about possible competing loss figures. The defender challenges the quantification of the case, but does not give a competing quantification. This is another instance of the same point. It is for the pursuer to prove loss. There is already a question to answer – why is pursuer is entitled to claim the whole extra fees? Would he have obtained free finance as an alternative? If not, then any costs of such alternative finance would require to be deducted from any damages. That

proposition seems an obvious one, and it is for the pursuer to meet. It would not be enough to refuse probation to these averments, but it would have been a live issue at proof.

[52] The defender also sought deletions, but I have substantially dealt with these above.

Disposal

[53] In these circumstances, I will uphold the defender's fourth plea-in-law (prescription) and assoilzie the defender from the craves of the initial writ. Parties agreed that they wanted an opportunity to make submissions on expenses, so I will reserve meantime that position. Parties should attempt to agree expenses, failing which they should contact the clerk and a hearing date can be fixed.