OUTER HOUSE, COURT OF SESSION

[2024] CSOH 4

A91/13

OPINION OF LORD CLARK

In the cause

LAURA McCLUSKEY

Pursuer

against

SCOTT WILSON SCOTLAND LIMITED

Defender

Pursuer: Sutherland; Allan McDougall
Defender: Barne KC; CMS Cameron McKenna Nabarro Olswang LLP

23 January 2024

Introduction

[1] This case is one of a group of actions raised in 2013. The actions were brought by persons who claim to have suffered personal injury as a result of the inhalation of harmful substances alleged to be present in land upon which a housing development was constructed. The housing development, which is in Motherwell, is known as "the Watling Street development". The pursuer in this case was a tenant in one of the properties in the development. The defender is a limited company which provides civil engineering services.

[2] The lead case identified from the group of actions is *McManus* v *Scott Wilson Scotland Limited*. There are 43 other cases, including the present one, and these were sisted pending

the outcome of the lead case. *McManus* went to a preliminary proof in 2020. I held that the defender owed a duty of care to the pursuers but had not breached that duty in any of the ways argued for the pursuers. A reclaiming motion (appeal) was lodged on behalf of the pursuers and it was heard and refused by the Inner House in 2021. Permission to appeal to the Supreme Court was refused.

[3] The present case called before me for a diet of debate. The defender contends that this pursuer seeks to establish that the defender was in breach of the same duty that the defender was held not to have breached in *McManus*. The averments in this case are said to be in all material respects the same as those for the pursuers in *McManus*, with this case prepared by the same solicitors and presented by the same counsel. It is argued that the pursuer's case should be dismissed because of the doctrine of *res judicata*, or as being irrelevant or because it is an abuse of process. The pursuer argues that these principles do not apply and that there are additional averments in this action, including a further alleged breach of duty, that were not made in *McManus.*

[4] The legal form of the defender's business, and its name, have changed over time. When the alleged breaches of duty are said to have occurred (1990-2001) a predecessor carried out the work. References herein to the "defender" should be taken to cover the present company and its predecessor.

Submissions

Submissions for the defender

Res judicata

[5] In *Grahame* v *Secretary of State for Scotland* 1951 SC 368 at 387, the Lord President (Cooper) gave the classic statement of the plea of *res judicata.* The plea was considered by

the First Division in *RG* v *Glasgow City Council* 2020 SC 1 where the Lord President (Carloway) said that it is sufficient if the interest of the parties in the first and second action is the same and there is no need for excessive concentration on the precise nature of the remedies sought in each action. The facts found in *McManus* were about the site works and investigations undertaken by the defender which are said to have been negligent by the present pursuer. The interests of the pursuers in *McManus* and the present pursuer are the same. The question is what was litigated and what was decided. The key question was breach of duty and it was decided, on those same facts, that there was no breach. Decisions were reached on generic issues which arise in the present case.

Relevance

[6] The same arguments can be viewed through the lens of relevancy (see eg *Friel* v *Brown* 2020 SC 273). On the facts the pursuer offers to prove, it has been conclusively determined that the defender fulfilled its duty of care to a person in the position of the pursuer. In those circumstances, it can be said that the pursuer's case will necessarily fail (cf *Jamieson* v *Jamieson* 1952 SC (HL) 44) and so it can properly be said to be irrelevant.

Abuse of process

[7] Reference was made to *Virgin Atlantic Airways Ltd* v *Zodiac Seats UK Ltd* [2014] AC 160 (at para [25]), where Lord Sumption described *res judicata* and abuse of process as "distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation." Dismissing a claim where the party pursuing it is guilty of an abuse of process is an inherent power of the court: *Shetland Sea Farms Limited* v *Assuranceforeningen Skuld* 2004 SL 30, (at para [143]). A case which wastefully occupies the

time and resources of the court with a claim which is obviously without merit can be categorised as an abuse of process: *Clarke* v *Fennoscandia Limited (No.3)* 2005 SLT 511 (at paras [17], [40] and [44]). In this case, the pursuer seeks to re-litigate the same issues, to lead substantially the same evidence, in the hope of obtaining a different outcome. That falls squarely within the example of an abuse of process given in *Clarke* (see also *RG* v *Glasgow City Council*, at para [32]).

[8] In *Society of Lloyd's* v *Fraser & Ors* [1998] CLC 1630 at 1650, the Court of Appeal said that it is an abuse of process for parties coming within a scheme of marshalled litigation to seek without justification to avoid the outcome of the cases which have been selected for hearing. In *Ashmore* v *British Coal Corporation* [1990] 2 QB 338 the plaintiff was not bound by the findings of an earlier "sample" action that had been selected by the court to litigate one of many equal pay claims. The court decided that where sample cases had been selected to enable the tribunal fully to investigate and make findings on all relevant evidence, re-litigation of the same issues would defeat the purpose of sample selection and be contrary to the interests of justice and public policy. This approach has echoes in this jurisdiction: *Greig* v *Magistrates of Kirkcaldy* (1851) 13 D 975 (at 981). Whether *McManus* was a "test" case or a "lead" case is a distinction without a difference. It formed part of a managed cohort of cases.

Submissions for the pursuer

Res judicata

[9] For the doctrine of *res judicata* to apply, the principles set out in cases such as the following must be satisfied: *Primary Health Care Centres (Broadford) Ltd* v *Ravangave* [2009] CSOH 46, *Durkin* v *HSBC Bank* Plc [2016] CSIH 93, and *McPhee* v *Heatherwick* [1977] SLT (Sh

Ct) 46 (approved by Lord Macfadyen in *Irving* v *Hiddleston* 1998 SC 759). Applying the principles, in *RG* v *Glasgow City Council*, the court concluded in that case that: "the *media concludendi* in the two processes [was] different and *res judicata* cannot therefore apply with full force and effect" (at para [29]). While the court is entitled to give weight to some, if not all, of the facts determined in the *McManus* action, this pursuer will adduce evidence on causation of loss and on breach of duty which was not previously before the court. Dismissal of an action on the basis of *res judicata* would amount to a significant interference with a fundamental right of access to justice in respect of an individual who is a different person with their own distinct legal rights.

[10] The point referred to by the defender on "the same parties", made in *RG* v *Glasgow City Council* (at para [27]), is a reference to established case law that applies where the new pursuer is a representative of the same legal interest as the previous pursuer, or that the legal interest of the new pursuer is derived from the same legal interest as the previous pursuer (see *Earl of Leven and Melville* v *Cartwright* (1861) 23 D 1038; *Carmichael* v *Anstruther* (1866) 4 M 842). There is no contractual agreement with the defender, or between the pursuers, that the outcome of *McManus* is to be binding in respect of any other pursuer. The pursuer in this case is a different person from the pursuers in *McManus*. She is suing as the occupier of different premises, and as having her own separate legal interest in the subject-matter of the action. A common interest in a common subject-matter is a different thing from being the same parties in two separate claims for damages: *MacArther* v *County Council of Argyll* (1898) 25 R 829.

Relevance

[11] The appropriate principles to be applied are those set out in *Jamieson* v *Jamieson* (Lord Normand at 50) and *Miller* v *SSEB* 1958 SC (HL) 20. The onus is on the defender to show that even if the pursuer succeeds in proving all that is averred, she is bound to fail. The ability to refuse a case to proceed at debate should not be used in a way that would cause injustice by denying a pursuer the opportunity to prove averments unless the case must fail. It is not axiomatic that if one pursuer cannot prove all that is required for a case of fault in relation to the defender's actings, a different pursuer could not necessarily prove fault in relation to the same actings. In any event, although the pleadings in the two cases are necessarily similar, they are not identical. There are additional averments of fact and additional averments of fault which have been made in light of advice of the further expert in relation to issues of causation.

Abuse of process

[12] Reference was made to the *dicta* in *Moore* v *Scottish Daily Record and Sunday Mail Ltd* 2009 SC 178, *Hepburn* v *Royal Alexandra Hospital NHS Trust* 2011 SC 20 and *Clarke* v *Fennoscandia*. Every person has a right of access to the courts to settle disputes. Dismissal of an action on the basis of an abuse of process is a significant interference with a fundamental right of access to justice. It is a draconian power which should be regarded as an option of last resort: *Tonner* v *Reiach and Hall* 2007 SC 1. This power is only exercised in cases which might otherwise be considered to be manifestly unreasonable or inconsistent with the courts obligations in the administration of justice.

[13] The present pursuer is entitled to raise and continue her own action against the defender. She is not bound to accept that the decision in the previous action is

determinative of her own right of action against the defender notwithstanding the factual background is the same. Further, and in any event, the conduct of the *McManus* litigation was substantially affected by the relatively late withdrawal of the expert witness instructed for the pursuers. The evidence led in *McManus* exposed an overlap of issues concerning the remediation of the ground and the causation of harm. As issues concerning causation were not a matter for proof the pursuers in *McManus* did not instruct a new expert witness on causation issues to replace their original expert. The defender's evidence included aspects related to causation which the pursuers' expert in *McManus* had not been instructed to deal with. Moreover, the pleadings in the present action are not identical to the pleadings in the *McManus* action. The pleadings in the present action take account of the advice of a further expert witness instructed for the pursuer.

Decision and reasons

Context

The pursuer's pleadings

[14] The pursuer's averments in this case in relation to existence of duty and breach of duty have a substantial degree of similarity to those in *McManus*. The history is set out in a similar manner. The averments are slightly restructured, in effect breaking up some of the Articles of Condescendence in the *McManus* pleadings. But while much of the averments coincide, additional averments are made by this pursuer.

[15] It is not necessary to set these out in full detail, but they include factual averments about investigations the pursuer says should have been carried out and a claim that there has been a further breach of duty by the defender. For example, it is said that no consideration was given to the potential presence of VOC (volatile organic compounds), no

further laboratory analysis was undertaken on samples that exhibited elevated cyclohexane/toluene extract and the specific nature of the organic materials was not identified. Presence of these contaminants would, it is averred, have had potentially significant implications for the development of the remediation strategy. The failure to properly investigate the potential for the presence of residual VOCs on the site and the failure to provide proper topsoil capping on the site are averred to have undoubtedly led to the presence of contaminants in shallow soils, that would not otherwise be present if the works had been undertaken to a higher standard and suitable validation of the garden areas undertaken. The further breach of duty averred is that any reasonably competent environmental consultant would have been able to identify the lack of proper capping materials on the properties.

[16] On behalf of the pursuer, it was suggested (as noted above) that evidence relevant to causation which also impinged on breach of duty is to be led in this case, should it proceed. The broad point made for the pursuer appeared to be that there were matters relevant to causation, but also to breach of duty, heard as evidence at the proof in *McManus* and that the pursuers were hampered by not being able to lead evidence on these matters, which the present pursuer can now do. It was submitted that evidence of material still present in the ground has a bearing on what the defender should have done. Senior counsel for the defender expressed the view that if there is evidence relevant and admissible on breach of duty which also overlaps with causation then it should have been led in *McManus.* Senior counsel also submitted that as a matter of form and substance the new alleged failures and duty were covered by the proof in *McManus* and would not have any effect on the core finding that the remedial solution proposed was suitable. However, that submission was not developed. Indeed, I was not addressed, by either party, on any detailed analysis of the

specific new averments in this case to seek to show whether or not the outcome could differ from that in *McManus*.

Group litigations in Scotland

[17] Before 2018, group cases were covered by a specific Practice Direction. It is now possible to apply to the court for permission to bring group proceedings under Part 4 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. A central theme of Part 4 of the 2018 Act is that there is a court-appointed representative party on behalf of the group. More details of the rules are set out in the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Group Proceedings) 2020. These state that where the Lord Ordinary gives permission for group proceedings to be brought the Lord Ordinary is to make an order which *inter alia* "specifies that group members may withdraw their consent to being bound by the group proceedings" (26A.12(1)(f)). Part 9 of the Act of Sederunt deals with an interlocutor, given in group proceedings and, at 26A.28(1)(b) states that it

> "binds all such persons, other than any person who has, as at the date of the interlocutor, withdrawn their consent to their claim being brought in the proceedings".

So, under the new scheme, there is a default position that the outcome of the group proceedings is binding on the group. Part 4 of the 2018 Act has no retrospective effect and does not apply to the present group of cases.

[18] The cohort of cases which include the present action were covered by Practice Direction No 1 of 2013: "Personal Injury Actions relating to alleged ground contamination at the Watling Street Development in Motherwell". The Lord President, having consulted with parties in the proceedings, made the directions. Among other things, the directions state that each action would proceed as an ordinary action and that the pursuer and

defender required to take certain steps. The court was given powers, including to determine further procedure, to order each party to produce a statement of valuation of claim, to order the appointment of actions to procedure roll hearings or proofs on all or any parts of the action and to sist actions or make "such other order as it thinks fit for the speedy determination of the actions". The Direction states:

> "13. The nominated judge shall give early consideration to whether in order to determine or give guidance on any generic issues in the actions, the lead actions which the parties have identified are appropriate to be progressed at an advanced rate."

The Direction does not state that the outcome of the lead action will be binding.

[19] As noted, *McManus* proceeded as the lead action. Following a debate in that case, a reclaiming motion and refusal of an application to appeal to the Supreme Court, it came before me for a proof before answer to be fixed. Each side set out the matters to be determined. Initially, the proof was fixed to deal with these issues: (i) the nature and scope of duties owed by the defender, whether contractual or delictual, and to whom were they owed; (ii) breach of duty; (iii) causation; (iv) the substances present in the house and their quantity. The court was then advised that one of pursuers' experts, Mr Brien, had a conflict of interest and was no longer available, raising problems with the pursuers being able to properly address the third and fourth issues. The proof before answer was therefore restricted to the first two issues.

[20] Following my decision in *McManus* and the refusal of the reclaiming motion, when the pursuers sought to appeal to the Supreme Court, it was submitted that this was in effect a Scottish version of a "Class Action" and that "directions had previously been given which effectively sought to treat this case as the lead case". The pursuers went on to submit that

> "Given the potential consequences of the Lord Ordinary's decision to a large number of vulnerable people, it is right in principle that the Supreme Court should adopt a

> more expansive approach to its consideration of the application for permission than might otherwise be appropriate were the only persons concerned in the matter the two individual Appellants".

[21] It can readily be inferred from that proposition that the two issues dealt with in *McManus* were indeed generic. That is also reflected in what was said by the Inner House when refusing leave to appeal to the Supreme Court:

> "[6] The Lord Ordinary heard a proof before answer on two issues:
>
> 1. What duties (whether contractual or delictual) did the defender owe in relation to the work it undertook at the Watling Street site, to whom did it owe those duties, and what was the scope of those duties?
>
> 2. Did the defender breach any of those duties in the course of the remediation of the Watling Street site?"

[22] The pursuer in the present case contended that in *McManus* the defender "rejected in advance of the proof any notion that the outcome of that litigation is binding on them as regards proof of negligence". In submissions, counsel for the pursuer referred to an email on this matter but it was not put before the court. The defender did not accept that it had made the statement suggested by the pursuer.

[23] Accordingly, while not subject to any express term or agreement that the decision in *McManus* would be binding, it is a lead action which dealt with issues generic to all actions in the group and, on behalf of the pursuers in that case, it was submitted to be akin to an English Class Action.

[24] Against that background, I turn to address the three issues raised.

Res judicata

[25] In *Grahame* v *Secretary of State for Scotland* (at 387), the Lord President (Cooper) described the plea of *res judicata* as:

> "common to most legal systems, and is based upon considerations of public policy, equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis."

The key questions in that regard, the Lord President stated are "What was litigated and what was decided?"

[26] In *RG* v *Glasgow City Council*, the Lord President (Carloway) said (at para [27]):

> "The reference to the 'same parties' should not be construed too strictly. It is sufficient if the interest of the parties in the first and second action is the same (*Gray* v *McHardy*, Lord Justice Clerk (Inglis), p1047; *Glasgow Shipowners' Association and ors* v *Clyde Navigation Trs*, Lord Shand, p699; *Allen* v *McCombie's Trs*, Lord President (Dunedin), p715). Equally, in relation to the *media concludendi*, excessive concentration on the precise nature of the remedies sought in each action should be avoided in favour of a simple inquiry into 'What was litigated and what was decided?' (*Grahame* v *Secretary of State for Scotland*, p387)."

In that case, the court determined that the interests of the reporter and the local authority were not truly different, both being manifestations of the state. Similar approaches were taken in the earlier cases founded upon. For example, in *Allen* v *McCombie's Trs* an action by one beneficiary against trustees to replace a sum allegedly lost by wrongful investment would be *res judicata* in respect of the other beneficiary, if she were to bring an action on that same basis.

[27] The pursuer here is of course a different person from the pursuers in *McManus*. The pursuer sues in respect of a different property in the housing scheme and has her own pecuniary interest. However, this pursuer requires to establish existence of duty and breach of duty by the defender, before the court can go on to consider causation and loss. These first two points are the only issues focussed upon in *McManus*. Those issues are generic and in which all pursuers have the same interests. Differences about causation and loss are not relevant. Ample time was given in *McManus* for the parties to gather all of the relevant

expert evidence and other information on these generic issues. As a result, the interests of the parties in both cases are sufficiently similar to meet this part of the test on *res judicata*.

[28] I note that in the reclaiming motion in *McManus* it was submitted on behalf of the pursuers as reclaimers (explained at para [40] in the Opinion of the Inner House) that some of the issues the Lord Ordinary took into account went beyond the scope of the proof, because they concerned causation rather than the existence of a duty or the occurrence of a breach. The Inner House (at para [63]) rejected the contention that the Lord Ordinary had regard to matters which were irrelevant and inadmissible. This provides clear support for the view that parties were able, if so minded, to bring before the court in *McManus* the matters now relied upon in the additional averments for the pursuer, albeit that the pursuer claims that having lost one of its experts the new expert used in *McManus* could not give such evidence.

[29] However, that leaves open the question of *media concludendi*. The concept is discussed by Lord Hodge in *Primary Health Care Centres (Broadford) Ltd* v *Ravangave* (at para [23] *et seq*). It had previously been referred to as an "abstract expression". In short, Lord Hodge concluded that the precise meaning of the phrase and the difference between it and the subject matter of the action may not matter. He referred to *Grahame* in which the Lord President stated that judges were "directed to look at the essence of the matter rather than the technical form, and simply to inquire - What was litigated and what was decided?" Lord Hodge also referred to the decision of the House of Lords in *Glasgow and South Western Railway Co* v *Boyd & Forrest* 1918 SC (HL) 19, 1918 1 SLT 14, where two of the judges mentioned in their speeches that *res judicata* would apply where the pursuer in the second action had the opportunity to plead a case in the earlier action but had failed to do so. There are, of course, different pursuers in the cases here. In any event, Lord Hodge did not

consider that matter to be relevant to what was litigated and what was decided: a matter that is omitted is not part of the same *media concludendi*. Here, there are additional averments and an alleged further breach of duty. Even if these can be viewed as wrongly omitted by the pursuer in *McManus,* I cannot at this stage be satisfied that in the present case this aspect of the test for *res judicata* is met.

Relevance

[30] In *Friel* v *Brown* the pursuer sought damages for the allegedly negligent prescription of a drug, when there had been a criminal trial in which the jury had determined that the damage suffered by the pursuer was not caused by the effects of the drug. It was decided by the Inner House that dismissing the case on the basis of abuse of process was wrong but that it should have been dismissed as irrelevant. As explained by the Lord President (Carloway) (at para [19]), for the purposes of relevancy in that case, some of the issues regarding *res judicata* apply, namely public policy, equity and common sense considerations. While *Friel* was about a fact already taken to be proved beyond reasonable doubt, I do not consider that to be materially different from a fact proved (in *McManus*) on the balance of probabilities and having reached final determination. The public policy point founded upon for relevancy in *Friel* involved the strong requirement that a criminal conviction will be treated as sound. In my view, the decision reached in a first instance civil case, that is appealed but upheld, should also be treated as sound. In that regard I note that in *Greig* v *Magistrates of Kirkcaldy* Lord Cunninghame said (at 981):

> "If the objection of *res judicata* is not pleadable against a new litigant, we are at least bound to consider a right fairly tried, whether affirmed on appeal or acquiesced in, as an adjudged question, in which the decision is binding on the Court, at all events as a precedent directly in point."

Public policy, supporting decisions on the same facts and avoiding re-litigation of points that have already been decided, applies here. Equity and common sense can also allow relevancy to be the correct conclusion. It is not equitable to have the defender face the same issues in a large number of cases, when there has already been a lead action, nor does that meet the test of common sense. The decision in *McManus* is a precedent.

[31] When one also considers the standard approach to relevancy (in *Jamieson* v *Jamieson* and *Miller* v *SSEB*) a key point is the defender succeeding in showing that even if the pursuer proves all that is averred she is bound to fail. Averments are irrelevant if they are insufficient in law to render the defender liable. In *Friel* that principle, although not expressly referred to, could readily be applied based on the jury's decision in the previous case. I am persuaded that a similar approach falls to be applied here. The final and binding decisions reached in *McManus* about the allegations of breach of duty cannot, of themselves, be re-litigated. To the extent that the pursuer's case uses the same averments in *McManus* to seek to prove the same breaches of duty it is therefore irrelevant. In that regard, the defender's submissions are accepted. However, in the present case there are the further averments and alleged breach of duty and I conclude that I cannot entirely dismiss this case on the basis of relevancy, when the outcome can, potentially, be influenced or affected by the new averments.

Abuse of process

[32] The potential effect of the further averments for the pursuer also need to be considered when turning to abuse of process. To summarily dismiss a case on that ground is a draconian power, used as a last resort (*Friel* v *Brown,* at para [17]). There are cases in England in which actions in related or associated litigations have been dismissed on this

ground. Perhaps the leading example for present purposes is *Ashmore British Coal Corporation*. An industrial tribunal dealt with some 1,500 cases about women engaged as colliery canteen workers. They complained to an industrial tribunal about being employed on less favourable terms than certain male comparators. Sample cases were selected for trial representing the issues common to all claims, but the tribunal also decided that the decision in such cases, although persuasive in effect, would not be binding on the other claims. The appellant's claim was stayed (sisted). The tribunal found that the applicants in the sample proceedings had not been employed on like work with their chosen comparator, who worked alone on the night shift, and that in any event the employers were entitled to rely on a statutory provision, because the variation in the rates of pay was due to a material factor which was not the difference of sex.

[33] The Court of Appeal held that, having regard to all the relevant circumstances of the particular case, public policy and the interests of justice were very material considerations. Where sample cases had been selected to enable the tribunal fully to investigate and make findings on all the relevant evidence, re-litigation of the same issues, being analogous to a collateral attack on the tribunal's decision, would defeat the purpose of sample selection and be contrary to the interests of justice and public policy unless there were fresh evidence which entirely changed the aspect of the case. In the absence of any such evidence, since the applicant had not taken the opportunity of putting forward her claim for selection and since the issues had been fully investigated in the sample proceedings, it would be unfair to other claimants and contrary to the interests of justice to permit her to re-open the issue.

[34] I accept that in this jurisdiction abuse of process is at least capable of being used to dismiss an action, as a last resort, in circumstances in which a group of related actions have been the subject of case-management under a Practice Direction and a lead action has

proceeded and been finally determined, with all of the other cases sisted for many years to await its outcome. The pursuer's new averments concern matters which, while said to be relevant to causation and that not being an issue at the proof before answer in *McManus*, are also relevant to breach of duty. I have real difficulty in understanding that facts relevant to breach of duty were omitted because they were viewed as relating to causation. I accept the defender's position that the pursuers should have recognised in advance of the proof in *McManus* that this ought to have been the subject of evidence to be led. If, as is submitted, the pursuers had no available expert evidence on the matter because of the change in experts, the pursuers could have appealed against the decision to fix the proof. However, the question remains as to whether having not picked up, in *McManus,* the need to lead evidence on the new averments now raised, the pursuer's case in the present action becomes an abuse of process.

[35] Given the further averments and the additional alleged breach of duty, the present case was not entirely ruled by the decision in *McManus*. In all of the circumstances, I am unable to conclude that this action should be summarily dismissed on the basis that it is an abuse of process.

Outcome

[36] Further averments are made in the present case which, for the reasons stated above, take the case outwith the boundaries of *res judicata,* do not allow complete dismissal on the basis of irrelevancy and do not cause this action to be an abuse of process.

[37] But it would be entirely inappropriate for our court system to deal with this case in its entirety (or indeed each of the many other cases in the cohort) when the generic issues have already been placed before a Lord Ordinary and the Inner House and an appeal has

not been allowed to proceed to the Supreme Court. Such duplication is unacceptable. The pursuers in *McManus*, in seeking an appeal to the Supreme Court, recognised that the decision would affect all other pursuers. It would be manifestly unfair to re-litigate the same issues. My findings in *McManus* were general findings in respect of all future residents of the site. It is not appropriate that the court and the defender should be put to the time and expenses of running the same proof again. The averments in the present case which are also in *McManus* are irrelevant insofar as they are said to show the alleged breaches of duty averred in that case and repeated here.

[38] There is some degree of force in the defender's argument that where in the lead action the evidence now sought to be adduced could have been led, and should have been recognised as requiring to be lead, a fresh action should not proceed. But to get there the defender requires *res judicata*, or a complete lack of relevancy or abuse of process to apply to all averments in the present case and I have concluded that they do not.

[39] The outcome I have reached is therefore not one submitted on behalf of either party: the pursuer seeks to allow the action to proceed in full; the defender seeks dismissal. I shall allow the action to proceed but only in a restricted form. I emphasise again that the decisions reached in *McManus* about the allegations of breach of duty made there, and substantially covered in the pursuer's averments in this case, cannot of themselves be re-litigated. The Practice Direction allows me to determine appropriate further procedure. Having already dealt with the issues in a debate, and noting the likely need for at least some further factual evidence, it will not be appropriate to fix a further diet of debate. There will have to a proof before answer, albeit in restricted scope.

[40] Before I determine what remaining issues are to be dealt with at the proof before answer I require to hear from parties. Without prejudice to that generality, I will require to

consider: (i) whether any of the new factual averments were, in effect, already advanced and dealt with in *McManus*; (ii) whether any of the new factual averments can support any of the alleged breaches in *McManus* which are also pled here; and (iii) whether the factual averments made and decided upon in *McManus* have any bearing on the further breach of duty now alleged. It is possible that some reference to the evidence in *McManus* may be required for contextual purposes and it may well be that the summaries of the evidence in my Opinion in that case and in the Opinion of the Inner House suffice in that regard.

[41] I shall therefore fix a by-order hearing, to take place in early course, to be addressed on these matters. Once I have heard from parties at the by-order hearing, the limited number of issues to be dealt with at the proof before answer will be identified and any averments which are not allowed to be the subject of evidence will be excluded from probation.

Disposal

[42] On *res judicata* and abuse of process, I shall sustain the sixth and eighth pleas-in-law for the pursuer and refuse the first and second pleas-in-law for the defender. On relevancy, I shall sustain the third and fourth pleas-in-law for the defender, but only to the extent noted above. A by-order hearing will be fixed in order to identify the precise scope of the proof before answer. In the meantime all questions of expenses are reserved.