OUTER HOUSE, COURT OF SESSION

[2018] CSOH 44

A668/14

OPINION OF LADY WISE

In the cause

(FIRST) MALCOLM MACNEIL;
(SECOND) PHILIP BELL; and
(THIRD) KATHRYN LONGMUIR

Pursuers

against

ATHOLL SCOTT FINANCIAL SERVICES LIMITED

Defenders

Pursuers: Howie QC, C Murray; Lefevre Litigation
Defenders: Paterson; DAC Beachcroft Scotland LLP

27 April 2018

Introduction

[1] This is an action in which the pursuers allege professional negligence against their financial advisors. All three pursuers are partners in a firm of hairdressers in Aberdeen. The defenders are a company engaged in the provision of independent financial advice. I heard a procedure roll discussion at the instance of the defenders who contend that the pursuers' pleadings are fundamentally irrelevant and lacking in specification such that the defenders have no fair notice of the case they face at proof. Separately, there are some

specific averments that are said to be irrelevant in law, regardless of whether the case is permitted to proceed to a proof before answer.

Submissions for the defenders

[2] Mr Paterson confirmed at the outset that no argument would be presented in terms of the defenders' third plea-in-law which is to the effect that any obligation on the defenders to make reparation to the pursuers has prescribed. While he intended to reserve his position on that plea, it was not suggested that any issue of prescription could be resolved at debate. In support of his second plea-in-law that the pursuers' averments were irrelevant and lacking in specification and so the action should be dismissed, Mr Paterson divided matters into three chapters. First there was what was described as "the investment case", secondly "the fees case", and finally a miscellaneous section attacking the relevancy of certain averments in relation to the Financial Services Agency's ("FSA") conduct of business rules. His motion was that his second plea-in-law should be sustained and the action dismissed. As a fall-back position he contended that whatever else occurred certain averments should not be remitted to probation.

[3] Turning first to the investment case it is clear that the pursuers assert that the defenders failed to implement their instructions in relation to investment. However, counsel submitted that there were two crucial issues that remained unclear or confused in the pursuers' pleadings. First, the pleadings are unclear and contradictory on when exactly the pursuers' instructed the defenders and secondly there was a lack of clarity on whether the defenders were under an instruction or duty to invest for the pursuers or to provide investment advice. There was said to be a relationship between these two issues. The starting point for the difficulties identified began, it was contended, at article 4 of

condescendence (page 8 of the closed record as amended) where the following averments appear:

> "Following discussions between the first pursuer, the pursuers' firm book-keeper (Mrs Brenda Murchie) and Debbie Mitchell in about late 2005, and confirmed by way of Letters of Recommendation dated 4th January 2006, the defenders advised the pursuers that they should consolidate and combine their existing personal pension plan assets into fewer plans. In particular, Mrs Mitchell advised that the pursuers transfer their existing Scottish Widows pension plan funds into their existing Scottish Equitable Flexible Personal Pension Plans. Thereafter, the first pursuer, Brenda Murchie and Debbie Mitchell met again, to further discuss the pursuers' pension arrangements. As a result of that meeting, on the advice of Debbie Mitchell, it was agreed in late 2005 that the pursuers would transfer their own existing individual pension assets into an @SIPP Personal Pension Plan ('the pension'), along with the capital value of the property at 11 Albyn Terrace."

While it might be thought from those averments that the agreement to transfer the pursuers' individual pension assets into the @SIPP was made in late 2005, counsel then referred to an averment (at page 10) that:

> "…at no time between late 2005 and December 2012, did Debbie Mitchell meet with or speak to the second and third pursuers regarding their financial arrangements."

[4] Further, at page 8 of the closed record it is averred that the pursuers had no plans to retire early and instructed Ms Mitchell to invest and grow their capital assets with a cautious approach to risk. Reading all of these averments together, it is simply unclear when it was said that the pursuers had instructed the defenders at all. Similarly, at page 9 of the closed record there are averments that Debbie Mitchell offered discretionary investment management of pensions to the pursuers and although it is subsequently averred that the first pursuer was authorised to provide instructions to Ms Mitchell by the second and third pursuers it is not clear when that authority began.

[5] The defenders' position is that while they were financial advisors they were never investment managers to the pursuers. Accordingly it was clearly of some importance that the pursuers should offer to prove when the defenders took on investment on their behalf.

The defenders were entitled to fair notice of that matter. The absence of clarity was further illustrated in article 5 of condescendence where the following averments appear:

> "In furtherance of their prior instructions to act as discretionary investment managers, each of the pursuers also authorised the defenders in their application forms to 'make investment selections' on their behalf. That, as they were well aware, required the defenders and Debbie Mitchell to invest the pursuers' pension assets in accordance with said instructions."

At page 16 the following admissions and explanations appear:

> "Admitted that said forms also authorised the defenders to make investment selections on the pursuers' behalf. Admitted that said authorisation inter alia permitted the defenders to issue instructions to the SIPP manager on behalf of the pursuers, under explanation that, in furtherance of the pursuers' instructions, it also required the defenders actively to do so."

Accordingly, on several occasions it is emphasised by the pursuers that the defenders were instructed to carry out discretionary investment management on their behalf.

[6] Counsel submitted that, even leaving to one side the contradictions on dates and factual averments within the pursuers' case, the averments in article 7 of condescendence regarding the duties incumbent upon the defenders were also contradictory of the averred instructions. In article 7 the pursuers aver the following three duties:

> "In the exercise of such care, it was their duty to have regard to and to implement the pursuers' instructions as to their financial objectives and their cautious approach to investment risk. It was then their duty to monitor what funds required to be retained for property repair and improvement purposes and, therefore, to determine what funds were reasonably available for investment and when. It was then their continuing duty to advise the pursuers in relation to suitable investment vehicles between 2009 and the end of 2012, such as those detailed in Condescendence 9 hereof and to obtain their instructions thereon."

[7] Mr Paterson contended that a number of issues arose in relation to those averments. First, the pursuers again referred to the alleged instruction to invest. Secondly, there were no averments in fact relative to the second averred duty of monitoring the funds and determining what was available for investment and thirdly the averred duty to advise in

relation to suitable investment vehicles contradicted the basic premise of fact that the defenders were instructed to invest on the pursuers' behalf. It was uncontroversial that the focus of the court in a case alleging negligence of this sort was the particularised facts and duties averred by a pursuer – *Morrisons Associated Companies Ltd* v *James Rome and Sons Ltd* 1964 SC 160. It was also trite law that fair notice must be given to a defender in cases of this sort – *Hayward* v *The Board of Management for the Royal Infirmary of Edinburgh and others* 1954 SC 453, per Lord President (Cooper) at 465. In the specific context of professional negligence, the summary provided by the Extra Division in *Kyle* v *P & J Stormonth Darling WS* 1993 SC 57 at 67 was instructive. It was there made clear that a pursuer requires to aver and establish the three elements of the negligent act, loss, injury and damage and that the act caused that loss, injury and damage and that each must be averred with:

> "…a degree of specification of detail that gives the alleged wrongdoer fair notice of the facts which the pursuer intends to prove relating to each element."

[8] Applying those uncontroversial propositions to the present case, the first of the three duties pled referred to the averred instruction to invest for which there was no clear timing. There were no averments at all to support the second duty or even any that would explain what it means. It was simply incoherent as a duty as it was devoid of any meaning or content. Thirdly, a continuing duty to advise was plainly contradictory with the case of duty to invest on the pursuers behalf. A combination of the averments of contradictory duties, duties unsupported by any averment of fact and the lack of specification of detail acknowledged as a requirement in *Kyle* v *P & J Stormonth Darling*, rendered it plain that the pursuers' position on causation could not be predicated upon there being anything more than a duty to advise. While accepting the degree of latitude given to written pleadings the defenders in this case simply did not know what case they faced. It was not clear when

instructions were said to have been given by the pursuers, and there were contradictory duties pled some of which had no foundation in averments of fact. Accordingly, the defenders were in a situation where they could not prepare for proof let alone conduct a proper analysis of the operation of prescription. If the case is of a failure to invest on the pursuers' behalf and not on providing investment advice, then that would alter the defenders' analysis of when the concurrence of iniuria and damnum took place. Finally, Mr Paterson submitted that the pursuers' averments on quantum in article 9 and the tables contained within the pleadings there appeared to allow for capital growth in 2008. Those averments were accordingly inconsistent with the pursuers' pled position in articles 7 and 9 that investment and capital growth ought to have been achieved between 2009 and 2013. For these reasons the case was wholly irrelevant and lacking in specification on the fundamental issue said to be in dispute.

[9] So far as the fees case was concerned, the relevant averments appear firstly at article 5 of condescendence at page 15 of the closed record. The following is there averred:

> "They also agreed that the defenders would be paid an annual fee from their @SIPP personal pension bank accounts, said to have been '0.8% of Fund'. The term 'Fund' was not defined in the application forms and the meaning thereof was not explained to the pursuers by Debbie Mitchell. The pursuers had understood that they would pay 0.8% of the amount by which the capital value of their pensions had increased by investment over the preceding year. At no time was it explained by Debbie Mitchell that 0.8% of the value of the whole @SIPP fund would be charged in fees. Had that been explained, it would have been obvious that the actual rate of growth of the @SIPP, less 0.8% was uncompetitive. It would have been obvious that level of charge was unreasonable in respect of an increase in value of heritable property held by the @SIPP which effectively required no management by the defenders. As it was explained to the first pursuer by Debbie Mitchell on 15 June 2006, the defenders would charge between 0.5% and 0.8% in respect of discretionary investment management."

It appeared from these averments that the pursuers accept and acknowledge that the defenders would be paid 0.8% of the fund, but claim that they understood "Fund" to mean

the increase in capital value of their pensions rather than the fund itself. In article 7 of condescendence (page 26 of the closed record as amended) the duty in respect of fees is articulated as follows:

> "Further, in the exercise of such care, it was their duty to explain, at the inception of the pensions in 2006, the basis upon which their annual fees would be charged and, thereafter, how each annual fee had in fact been charged. It was also a requirement of the COB rules to explain the basis of fees."

In the averments of loss the following appears (article 9 at page 33 of the record):

> "Further, the defenders took annual fees, not having explained the basis thereof or carried out any substantive work therefor. Said fees totalled £48,393.91 between 2007 and 2012."

[10] Mr Paterson submitted that the pursuers' case relative to the defenders fees was irrelevant. There was no averment in relation to causation. The pursuers did not explain how any loss would have been avoided had the desiderated duty been obtempered. That was sufficient to demonstrate the irrelevance of the averments on fees. However, the pursuers' analysis was also flawed as a matter of law. It was clear from the well-established principle of *restitutio in integrum* that the pursuers could not claim damages for failure to invest and try to recoup the whole of the defenders' fees. Reference was made to the general principle of *restitutio in integrum* summarised in MacBryde, *The Law of Contract in Scotland* (3rd edition) at page 653. It was submitted that the averments involved a clear case of double counting. In a relatively recent case that came before the Court of Appeal, *Gartell & Son (A firm)* v *Yeovil Town Football and Athletic Club Ltd* [2016] EWCA Civ 62, the court analysed the extent of an obligation in damages. The Club in that case had contended that *Gartell & Son*, a firm it had sought to instruct to carry out groundworks, could only be obliged to pay damages resulting from non-performance of the contract and not the whole cost of instructing another provider to carry out the work in question. That submission was

accepted and the court held that a purchaser who has been let down by someone with whom he has contracted is not liable for the price to that contractor and is able to recover damage in the additional amount he reasonably has to pay from another supplier, but does not get the substitute goods (or services) for nothing – per Floyd LJ at paragraphs 32 and 33. Similarly in the present case, counsel submitted that the pursuers could not claim from the defenders all fees they had paid together with the growth in the fund that someone else investing could have secured for them. In seeking to recover both sums, the pursuers seek to be put in a better position than they would have been but for the alleged negligence. For that reason, the fees chapter of the pursuers' case was also irrelevant. Had the pursuers limited the fees chapter to the extent to which there had been overpayment of fees it might have been different but there were no averments in relation to what would have happened had the pursuers received the advice they now say was lacking. If the defenders' submissions on the first two matters of the investment issue and the fee issue were accepted then the case fell to be dismissed.

[11] As a separate issue, the defenders raise two separate points in relation to the averments in the pursuers' pleadings based on the FSA's conduct of business rules and the averred failure to take instructions from the second and third pursuers. The first of these averments appears in article 4 of condescendence and is in the following terms:

> "Mrs Mitchell was under a duty to provide detailed advice individually to each of the pursuers regarding the proposed SIPP. As hereinafter condescended upon, Mrs Mitchell's failure to meet the second and third pursuer to advise on the SIPP was in breach of the COB rules."

At article 5 the following further averment appears:

> "At no time did Mrs Mitchell give advice to the second and third pursuers on the SIPP. Further, Mrs Mitchell recommended the @SIPP product when she did not have sufficient information about their circumstances, as required by COB rules."

[12] Mr Paterson submitted that these averments were irrelevant for two reasons. First, the pursuers admit that they received advice from Mrs Mitchell relative to the SIPPs. Secondly, without any link pled between a failure to provide advice to the second and third pursuers and any loss sustained, those particular averments were fundamentally irrelevant – *Kyle* v *P & J Stormonth Darling*, cited above, at page 67F-G. In the absence of the necessary "connecting tissue" between any failure to provide advice to the second and third pursuers personally and any loss sustained by them these averments should not be allowed to proceed to probation.

Submissions for the pursuer in response

[13] Mr Howie QC invited refusal of the defenders' motions and moved for the case to be sent for a proof before answer. He confirmed his understanding that the issue of prescription would require to be dealt with separately. As a general point, he accepted that there were certain standards of written pleadings that require to be met in all cases before the court. However, in addition to the oft cited rule in *Jamieson* v *Jamieson* 1952 SC (HL) 44 the point arising from *Hayward* v *The Board of Management for the Royal Infirmary of Edinburgh & others* 1954 SC 453 at 465 was that the test is that a defender must know the case against him and be able to meet it at proof. Mr Howie submitted that that test was met in the present case. While specification points had been made, it should be noted that not every lack of detail can be challenged. The alleged deficiency has to relate to something essential that prejudices the defenders' ability to prepare.

[14] On the first issue raised about the time at which instructions were given by the pursuers, senior counsel acknowledged that there were references both to late 2005 and a lack of direct conversations between Debbie Mitchell and the second and third pursuers

between 2005 and 2012. However the important point was that it was clear that the defenders were given instructions on the material issue in dispute in late 2005 or early 2006. Standing the passage of time, that was as accurate as it could be. Having pinpointed that period, all of the other averments in relation to instructions given flow from that. This was a matter that would be within the knowledge of the defenders who must know what instructions they received and when. If the defenders' records differ slightly from the averment that it was in late 2005, it did not matter. The dispute between the parties was what specific instructions were given not on which date that occurred. The objection taken was not a proper challenge to specification. The rules on which must be applied with proportionality in accordance with the dicta in *Hayward*. While different views were possible on the issue of what was or was not fair notice, the case should be read as a whole rather than dissecting small items of discrepancy within the averments. The material point is what the pursuers were told about investment and risk. The pursuers' case is that the defenders were supposed to be operating as discretionary fund managers. That was clear from the averments at page 20 of the closed record as amended where there is a reference to the purchase of 39 Rosemount Viaduct in 2008 and that:

> "Thereafter, the defenders were to revert to investing excess capital and residual income to the pension in investments which would provide a reasonable return."

It was clear from this averment that what the defenders were to "revert to" was the discretionary investment management that they had been instructed to undertake save for an exception for the purchase of the property in Rosemount Viaduct. Accordingly there was no inconsistency in the pursuers' case on record.

[15] Senior counsel contended that the defenders' argument ignored the relationship between investment management and advice that was clear from the pleadings. In article 4

of condescendence (pages 8 – 10) it is clear that the pursuers offer to prove that the initial advice that was given was to enter into the SIPP and that the defenders would thereafter conduct discretionary investment management. It was clear from the averments towards the end of article 4 (page 17) where the defenders are called upon to specify what investment advice was given to the pursuers that the pursuers are dealing with the defenders contention that they were only advisors. On that hypothesis the defenders are called upon to say what advice was in fact given. It is the defenders case, not that of the pursuers, that the defenders acted only as advisors. The pursuers make clear (at page 20) that the defenders did nothing by way of providing investment advice between June 2006 and December 2011 with one particular exception in December 2011 which is specifically averred. Reading all these averments together it is clear that the pursuers' case is that the defenders were instructed as discretionary investment managers but that if the defenders are correct in stating that they were only advisors then they also failed to carry out any such work. In essence, the defenders' failure, upon which the pursuers rely, is to do anything with the fund, which was simply left to sit. If the defenders' case was that they had been advising the pursuers throughout then they require to answer the point that they did nothing (with the one averred exception).

[16] Turning to the duties averred in article 7 that had been criticised by counsel for the defenders, it was agreed these were three in number. The first duty, to have regard to and implement the pursuers' instructions as to their financial objectives and their cautious approach to investment risk, this is clearly directed at the principal case of discretionary investment management. The second duty is a specific one arising from the first duty to act properly as investment managers. There is a factual averment that the defenders did nothing and that they failed to manage the investments. That is the factual averment

relative to the second averred duty. It flows from the first duty in that it was part of implementing the pursuers' instructions to invest in accordance with their stated approach. So far as the third duty relating to advising the pursuers in relation to suitable investment vehicles, Mr Howie accepted that the way in which this duty was drafted was unhelpful as it looked as if it is pled as a direct duty when in fact it relates back to the hypothesis contended for by the defenders that they were solely advisers. It is in essence an *esto* position on the part of the pursuers in relation to that. It was not difficult to see how this might arise. For example if a firm such as the defenders are instructed over a period of time as discretionary investment managers and during that period changes in tax or similar legislation render it unwise for the defenders to continue with the investments they were in they would have a duty to consult the pursuers and advise them about what to do. Alternatively, if the defenders in the exercise of their duties wanted to make a particular investment but were short of funds they would have to seek instructions from the pursuers. If the defenders were correct that they were advisors then these were the sorts of matters on which they had a duty to advise. While the distinction between the two rules could have been clearer, the central point was that the defenders are able to tell what the case against them is.

[17] Mr Howie pointed out that an averment is only irrelevant if it is necessarily contradictory. If it is not, for example in this case because advice can be given on an investment management issue, then it is not irrelevant. Further, in the circumstances of the present case, the averments can be read as an answer to the defenders' case that they were advisors. There was no prejudice to the defenders arising from the way in which the pursuers' case has been pled. The third duty is covered by the chapter on implementation of the pursuers' investment management instructions. The necessary link between the factual averments and the pursuers' loss was clear. If at the material time they were available

investments that the defenders failed to act on, the pursuers lost an additional return that could have been made. There was no defence in this case that it was astute on the part of the defenders to make no further investments as a result of market difficulties.

[18] The defenders had raised an issue about the pursuers' averments on quantum in article 9 of condescendence. It was said that these were inconsistent with the pursuers' pled position that both investment and capital growth ought to have been achieved between 2009 and 2013. Mr Howie pointed out that the tables incorporated into the pleadings at pages 30 - 32 made clear that there was no allowance for capital growth.

[19] Turning to the fees issue, this was really a quantum issue and so should be dealt with after proof. Senior counsel accepted that in principle claiming both capital growth and repayment of the whole fees incurred would be double counting in that the pursuers could not expect to achieve growth without making payment for it. It was conceded that ultimately the pursuers could not be awarded the whole of each of the sums concluded for. The precise sums to be awarded could properly be determined only after proof. There were sufficient averments on quantum. For example, there is an averment that a reasonable fee would have been 0.5 - 0.8%. Further, if after proof before answer the pursuers are unsuccessful in their discretionary investment management case but it is shown that the defenders were instructed only to provide advice, then the pursuers fall-back position was that the fees should be reimbursed standing the defenders' failure to provide that advice. Similarly, if the pursuers were successful on liability but lost on causation, then there would still be a claim in respect of the fees to the extent that they were wasted expenditure. In those circumstances the pursuers would still be awarded a sum representing that wasted expenditure and so the claim for fees would never be wholly irrelevant. While a number of

possibilities, including no award at all, were possible, all of these issues could only be resolved after a proof before answer.

[20] Mr Howie submitted that the miscellaneous challenge to the specific averments about the Conduct of Business ("COB") rules misunderstood the position. There is no self-standing case for breach of the COB rules. The averment designed to allow the pursuers to lead evidence about the defenders having failed to fulfil professional standards. The COB rules are an incidental issue to the case of the defenders' failures to act. There could be no complaint of a lack of causal link because these averments were not part of the cause of action but part of the background of professional rules against which the defenders were operating. In those circumstances there was no basis on which the averments could be deleted.

Discussion

[21] The first complaint of the defenders in relation to the pursuers' pleadings relates to whether there is fair notice of when, on the pursuers' pleadings, they state that the defenders began to be under a duty to invest the pursuers' pension assets with a cautious approach to risk in accordance with their instructions. The pleadings are said to be confused and contradictory on this. However, it seems to me that, giving the pursuers some latitude standing the length of time that has passed since the allegedly negligent acts, the pleadings are tolerably clear on what the pursuers offer to prove occurred. Reading article 4 of condescendence, it is averred that the first engagement and instruction of the defenders by all three pursuers was in about 2004 and it was to act as independent financial and tax advisors. Then there are the averments about discussions between the first pursuer, the pursuers' firm bookkeeper (Mrs Murchie) and Debbie Mitchell of the defenders in about late

2005 when it was agreed that the pursuers would transfer their own existing individual pension assets into an @SIPP personal pension plan along with the capital value of their business premises. It is at that point that the dispute about whether there was an instruction to Debbie Mitchell for the defenders to act as discretionary investment managers arises. Further, it is clear from article 4 of condescendence that the pursuers offer to prove that between late 2005 and December 2012 Mrs Mitchell was content to receive instructions from the first pursuer on behalf of the second and third pursuers and it is in that context that there is an offer to prove that the second and third pursuers met socially with Debbie Mitchell during the relevant period but that no aspect of the pursuers financial arrangements was discussed. There is an admission on behalf of the pursuers in relation to a discussion in early 2006 but that is in answer to a specific averment made on behalf of the defenders. Accordingly, the pursuers offer to prove the time at which the defenders undertook to act as discretionary investment managers, if not by reference to a specific date then at least by reference to certain meetings and discussions that took place between the first pursuer on behalf of all three pursuers and Debbie Mitchell of the defenders. I conclude on this point that there is sufficient for the defenders to know what the case against them is in terms of the timing of events. There is sufficient for them to investigate, having regard to their own records, and to challenge the pursuers' case at proof before answer on the point.

[22] The more substantial argument for the defenders in relation to the investment case relates to the way in which the duties of care are pled. The first duty averred in article 7, namely to have regard to and implement the pursuers' instructions as to their financial objectives and their cautious approach to investment risk relates directly to the averments that the defenders had agreed to act as discretionary investment managers and is accepted as relevantly pled Counsel for the defenders contended that the second duty, that of

monitoring funds to be required and retained for repair and improvement and then determining what funds were reasonably available for investment and when, was devoid of meaning or content. I disagree with that characterisation. In my view Mr Howie was correct in identifying this second listed duty as one rising naturally from the first duty to act properly as investment managers. The pursuers' pleadings make clear that their principal complaint is that the defenders did not take action in relation to the pension fund such that capital growth would ensue. I regard the second duty as an elaboration of the more general first duty. It specifies the particular aspect of discretionary investment management that the pursuers claim that an organisation that had agreed to take on that role would perform. Having made a complaint that the defenders did nothing, it gives notice of what particular duties any discretionary investment manager such as the defenders ought to have fulfilled. It is inextricably linked with the first specified duty about which there is no argument.

[23] The position in relation to the third specified duty, namely to advise the pursuers in relation to suitable investment vehicles, is less clear. On the face of it this duty does contradict the pursuers' basic premise in fact, which is that the defenders were instructed to invest. That said, the averment does have to be seen in the context of the case pled by the pursuers as a whole. As I have already indicated, it is clear enough from the pleadings that the pursuers are complaining about the failure of the defenders to take action as investment managers having agreed to do so. The averments in article 5 of condescendence in relation to investment advice which appeared to be the basis for the third averred duty in article 7 are in the following terms:

> "On the hypothesis of fact averred by the defenders (which is denied), they were not instructed by the pursuers as discretionary investment managers, but rather as investment managers. The defenders are called upon to specify what investment advice was given to the pursuers between January 2006 and November 2011. … They are called upon to explain why, if their service was one of advice, no written advice

> on investments or the accumulation of cash was given to the pursuers over a period of nearly six years."

Ignoring the obvious punctuation error that separates the first two sentences of that passage, it is clear that the pursuers seek in their pleadings to answer the defenders' case by relying on an alleged absence of advice of the form that would be provided had that been the arrangement. Properly understood, it seems that this third duty appears to relate to the fall-back position on the part of the pursuers that, *esto* the defenders' characterisation of the nature of the agreed relationship was correct, then they had also failed in the duty arising from a role as adviser by failing to provide any advice. Senior counsel for the pursuers pointed out that in any event there could be circumstances in which discretionary investment managers would require to consult their clients and advise them what to do in relation to a particular investment. I am not convinced that the pursuers' case as currently pled gives any proper notice that the third duty relates to that context. That said, I accept the submission that unless the averments on the third duty are necessarily contradictory of the principal case they should remain and the examples given by Mr Howie serve to illustrate that the contradiction between the first and third duties is not inevitable. It is sufficient, for the purposes of the present discussion, however, to understand the third duty as relating primarily to the pursuers' answer to the defenders' position that they were advisors only. Had the pursuers made clear in relation to this third duty that it was an *esto* position no argument could properly have been raised in relation to it. I conclude, however, that the absence of an expression that highlights to the reader the context in which the duty is pled does not result in any real prejudice to the defenders standing the earlier averments that make clear that the advice case is a fall-back position that would come into play only if the defenders' averments of fact in that respect were accepted after proof. For the reasons given,

I consider that the requisite fair notice of the investment case that the pursuers offer to prove has been given to the defenders. The duties are relevantly stated and the required degree of specification of detail necessary for a case of this type referred to in *Kyle* v *P & J Stormonth Darling WS* 1993 SC 57 at 67 is present.

[24] Turning to the fees case the point raised by the pursuers was one of double counting. Mr Howie did not dispute that the pursuers could not ultimately succeed in claiming both capital growth and repayment of the whole fees incurred over the relevant period. There is a relationship between achieving capital growth (for which payment to the defenders as investment managers was appropriate) and the fall-back position on investment advice which, even if the principal case failed, might form a basis for reimbursement of fees. I accept the submission made by senior counsel for the pursuers that the quantification of the pursuers claim in the event of success is a matter for submission after proof. There are a number of possible permutations on the case currently pled. The point raised by the defenders under reference to the Court of Appeal decision in *Gartell & Son (a firm)* v *Yeovil Town Football and Athletic Club Ltd* [2016] EWCA Civ 62 was conceded by Mr Howie. Again, it might have been clearer for the pursuers to clarify in the pleadings that the sums sought relate to the principal and fall back cases respectively. However, again I do not consider that the defenders are prejudiced by the way in which the pursuers' case is pled in this respect as they would always require to meet both arguments. The subsidiary point made by the defenders in relation to an alleged inconsistency between averments amounting to a complaint that both investment and capital growth ought to have been achieved between 2009 and 2013 is in my view satisfactorily answered by Mr Howie's point that the tables incorporated into the pleadings at pages 30-32 of the closed record as amended do not make allowance for capital growth.

[25] In relation to the arguments that, regardless of whether the case was to be sent for proof before answer, the pursuers' averments in relation to an alleged breach of the FSA's conduct of business rules were irrelevant and should be excised is concerned, the issue is whether there is any link between these averments and the loss sustained by the pursuers. The pursuers' case does not rely on breach of the FSA's COB rules as a matter that resulted in any loss sustained. There is no duty averred in article 7 in relation to any such breaches. It does appear that the averments in articles 4 and 5 complained about by the defenders in this respect constitute an aspect of the defenders' actings that the pursuers offer to prove not in a causative sense but simply as part of the relevant factual matrix. To put it another way, these averments appear simply to give notice that the defenders' witness Mrs Mitchell will be criticised for her actings in this respect as part of the narrative on which it will be contended on other grounds that the defenders' employee did not act with an appropriate standard of care. Absent any notice in the pleadings that the defenders' witness was to be asked about this matter, it may be objection could be taken at proof. Accordingly, I see no basis on which to excise these averments before sending the case for enquiry.

[26] In approaching the pleadings in this case I have started from the premise that, whatever criticisms can be made in relation to inelegance of expression, a degree of latitude should be afforded to the pursuers such that the matter should be sent for enquiry at proof before answer unless there is a real risk of prejudice to the defenders in being able to meet the case against them. Both sides were agreed that the position remains as expressed by the court in *Hayward* v *The Board of Management for the Royal Infirmary of Edinburgh* 254 SC 453 and 465 namely that it is only where a defender may genuinely be taken by surprise at proof that a plea of lack of specification can be maintained. There is sufficient specification on the primary case of investment management and the duties that accompany the factual

averments clearly relate to that primary case, other than the third duty, which on the face of it falls to be regarded as an *esto* case in answer to the defenders' position. I reject the contention that the defenders cannot prepare for proof in this case or that the pursuers' pleadings are irrelevant. The averments on the fees are clear enough standing the specific concession that the pursuers will not be in a position to effect double counting. For the reasons given I will refuse the defenders' motion and send the case for a proof before answer, the defenders' preliminary pleas, including that of prescription, being maintained. I will reserve meantime any question of expenses.