OUTER HOUSE, COURT OF SESSION

[2025] CSOH 32

CA9/23

OPINION OF LORD BRAID

In the cause

MARK ELLISON COULTER

Pursuer

against

ANDERSON, ANDERSON & BROWN LLP

Defenders

Pursuer: Smith, KC; Lefevres
Defenders: Manson; Brodies LLP

28 March 2025

Introduction

[1] Coulter Property Ltd (CPL) provides support services to Coulters Legal LLP (the LLP) which in turn operates a residential estate agency and conveyancing business, conform to a Management and Services Agreement (MSA). The purpose of the arrangement is to afford CPL access to the Edinburgh Solicitors Property Centre, which it would not otherwise enjoy. In February 2018 the eponymous pursuer was summarily dismissed as a director of CPL, of which he was also a shareholder. In terms of CPL's Articles of Association (the Articles), that triggered a mandatory sale of his shares to the remaining shareholders. In the event of the leaving shareholder and the remaining shareholders being unable to agree

a price (as turned out to be the case), the Articles provided a mechanism for the assessment of the value of the company. In accordance with that mechanism the defenders, as CPL's auditors, were appointed by CPL to carry out the valuation. They valued the pursuer's shares at £74,949.

[2] In this commercial action, the pursuer contends that, valued properly, his shares were worth considerably more than that sum. The heart of his grievance is that the company was valued on a net asset value (NAV) basis as if it were to be broken up, when it ought to have been valued on an earnings basis (EB). He further complains that the defenders were fed misleading information by the directors of CPL about the viability of the business following an ostensible (and, the pursuer maintains, spurious) termination of the MSA, which they did not query or investigate because (he alleges) they were acting in collusion with CPL. His position is that the MSA was not terminable and had not been validly terminated. In a previous sheriff court action at the instance of CPL, the present pursuer asserted, by way of counterclaim, that the certificate of value issued by the defenders was incorrect, but his counterclaim was dismissed as irrelevant on the basis that, in terms of the Articles, the certificate was final and binding except in the case of fraud or manifest error, neither of which had been relevantly averred.

[3] The pursuer has now set his sights on the defenders, seeking to recover his (alleged) loss of £506,800 from them. (As an aside, that figure is in fact the sum at which the pursuer maintains his shares ought to have been valued, giving an actual loss of only £431,851, which is perhaps symptomatic of the pursuer's somewhat cavalier approach to quantum). The gravamen of the pursuer's complaint is that the defenders met with a clear conflict in carrying out their instructions; that they did not apply the assumptions that they were required to apply in expressing a view on valuation; and that they were under a duty of

care to the pursuer to carry their instructions into effect without breaching their professional obligations. In particular, he avers that the defenders carried out the valuation exercise negligently and in collusion with CPL, contrary both to their instructions and to their professional obligations.

[4] The defenders deny that they acted unethically or negligently or, for that matter, that they owed any duty of care to the pursuer. Additionally, they rely upon a limitation of liability clause in the letter of engagement issued by them to CPL, the effect of which is that their liability to CPL cannot exceed £45,000.

[5] The case called before me for debate. The following issues fall to be decided:

i. Whether the pursuer has relevantly averred the basis for the existence of a duty of care owed by the defenders to the pursuer;

ii. Whether, if a duty did exist, it could be greater in scope than the scope created by the contract between the defenders and CPL, that is, whether the defenders' liability to the pursuer could ever be greater than £45,000; or whether the defenders' averments about the limitation of liability clause are irrelevant. This issue potentially brings into play certain provisions of the Unfair Contract Terms Act 1977.

iii. Whether the pursuer's averments that the manner in which the defenders were negligent are relevant;

iv. Whether there is a proper basis for the pursuer's averments of collusion on the part of the defenders; and

v. Whether the pursuer's pleadings give fair notice of the methodology by which the pursuer avers his shares ought to have been valued.

[6] The defenders argue that each of the foregoing issues should be determined in their favour, and that the action should be dismissed. The pursuer argues that the defenders' averments about limitation of liability, being irrelevant, should be excluded from probation, but that otherwise a proof before answer should be allowed.

[7] I will deal with each of these issues in turn, but first it is necessary to consider the pleadings and certain other matters in a little detail, to set the context for the arguments which follow.

The pursuer's pleadings

[8] In Article 4 of condescendence the pursuer avers that CPL instructed the defenders to value the shares under reference to the Articles, which prescribed the method of valuation; that the defenders were aware of the purpose of the valuation (namely to reach a valuation of the pursuer's shares); and that they knew that the valuation would form the basis for the enforced sale of the pursuer's shares. Those averments are admitted by the defenders.

[9] At this juncture, it is convenient to take note of what the Articles say insofar as they bear upon the task which the defenders were carrying out. The mechanism which was activated is set out in Article 5.2.2 as follows:

> "...the Directors shall instruct the Auditors to determine and certify the Fair Value of the Sale Shares. The decision of the Auditors (who shall be deemed to act as an expert and not as an arbiter) shall be final and binding on the Members, save in the event of fraud or manifest error..."

"Fair Value" is earlier defined as:

> "the price which the Auditors state in writing to be their opinion of the fair value of the Shares concerned, calculated on the basis that:
> (a) the Fair Value is the sum which a willing buyer would agree with a willing seller to be the purchase price for the Shares concerned on a Share Sale;

(b) no account shall be taken of the size of the holding which the relevant Shares comprise or whether those Shares represent a majority or minority interest;
(c) no account shall be taken of the fact that the transferability of the relevant Shares is restricted under these Articles;
(d) if the Company is then carrying on business as a going concern, it will continue to do so; and
(e) any difficulty in applying any of the bases set out above shall be resolved by the Auditors as they, in their absolute discretion, think fit."

[10] Reverting to the pursuer's pleadings, in Article 5 he avers that the defenders were regulated by the Institute of Chartered Accountants of Scotland (ICAS) and thus had an obligation to comply with the ethical guidance issued by ICAS, referring specifically to the need to be aware of their independence being compromised by a conflict of interest; that the defenders' letter of engagement stated that the valuation would be carried out based upon information provided by CPL and also upon investigations carried out by the defenders in the relevant market; that solicitors acting for the pursuer offered to meet the defenders to discuss what they considered was the correct approach to valuation of the shares but that CPL directed the defenders that they should not meet with either the pursuer or his solicitors; that at the material time CPL continued to be (as it always was) a successful and growing property agent and that in terms of the Articles the company ought to have been valued as a going concern.

[11] In Article 6 of condescendence the pursuer avers that the defenders valued the company on a net asset valuation basis and not, as the pursuer avers it should have been, on an earning basis. This, avers the pursuer was manifestly incorrect and not in conformity with the methodology dictated by the Articles. He avers:

> "The NAV method is one which is appropriate when a business is either non trading or is to be 'broken up' and seeks to evaluate the remaining assets of the business. However, a business which continue[s] to trade or is anticipated to continue to trade is generally valued on the projected earning into the future. That is so irrespective of the injunction in the Articles to adopt an ongoing trading basis as an assumption... The defenders knew or ought to have known that the

> valuation method was not conform to the Articles. They knew (as they had been told) that the pursuer would be adversely affected by their valuation if it was too low and disconform to the methodology that he had agreed to in the Articles. Furthermore, the defenders had been presented by CPL with directions (*viz* not to meet with the pursuer or his representatives) which meant that they were likely to be influenced by only CPL's position without taking account of the representations of the pursuer as to value. The very act of that direction being given was such that a real risk arose of the defenders being unable to produce an independent valuation which was uninfluenced by the CPL. It was one-sided. Having been presented with such circumstances, having regard to the obligations incumbent upon them in terms of the ethical code, the correct conduct would have been to manage that risk. Either that could have been done by rejecting CPL's direction on the matter; and if that was not agreed to by CPL, to decline to act further. … what the defenders could not do, and no such accountant could have done, is to continue to accept instructions in those circumstances and produce a valuation which was manifestly at risk of being based on one-sided and incomplete information... The defenders did not have any discretion to value the business on the NAV basis if the business was trading. It ought only to have been valued as a going concern, as dictated by the Articles."

[12] In Article 7 the pursuer avers that in their report the defenders sought to justify the use of the NAV method on the grounds that they had been advised by CPL that the company was on the verge of insolvency, which was untrue as would have been evident from the management accounts; further, that it should have been clear to the defenders that Mr Jackson, a director of CPL, was seeking to unduly influence the valuation of the company by them and that any competent valuer would have inquired into the veracity of the representations by CPL via Mr Jackson. The averments go on:

> "A meeting took place … on 11 April 2018 between the defenders and the pursuer at which it was stated that the defenders were acting as agents for CPL and not as independent assessors. No reasonably competent valuer would have said so or done so, as it denudes them of the independence to be expected of a valuer carrying out a valuation in the circumstances averred. The defenders were told by Mr Jackson not to disclose any information to the pursuer regarding how they were approaching valuation. The draft of the valuation was sent to CPL for comment, but not the pursuer."

There then follow averments about the MSA about which, it is averred, the directors of CPL provided the defenders with inaccurate and misleading information resulting in their valuing CPL on the basis that they did. The averments continue:

> "At the meeting of 18 April 2018 between the defenders and Fraser Jackson of behalf of CPL, it was noted that 'Fraser noted that the available remedies to [the pursuer] are very few if he or [his legal advisers] do not agree with our prepared evaluation. To disagree he would need to demonstrate that we were either negligent or that our valuation contained a manifest error'. Mr Jackson also provided advice to the defenders that 'given our decision is binding and there are limited remedies available under the Articles, it is at our discretion how much detail we (sic) provide in [the valuation].' CPL and the defenders colluded together to not only to prepare a valuation of the pursuer's share that was impermissible in terms of the Articles, but to deprive the pursuer of the ability to make representations on the information that was being utilised. The conduct of the defenders was such that it was calculated to produce a valuation that grossly undervalued the pursuer's shares. The conduct of the defenders was such that by their producing a valuation of the kind that they did, they acted as no reasonable accountant regulated by ICAS would have acted. Their failures were: (i) that the valuation was contrary to the method directed in the Articles; (ii) CPL were imposing conditions upon them which pointed directly to attempts to influence the valuation in their favour; (iii) that it was clear that the conduct of CPL was such that compliance with their direction would make it impossible to reach a proper valuation based upon their own independent investigations; (iv) that the production of the valuation in such circumstances was one which ought not to have been produced... [T]he defenders' collusion is evidenced by the fact that they were told by Mr Jackson that they intended to restrict information provided to the pursuer, to restrict the remedies that were available to him and challenging the certificate of value. The defenders were thus appraised that CPL were aware that a challenge to the certificate was likely to be made by the pursuer, and they wished to take steps to avoid that challenge being successful."

[13] In Article 8 of condescendence the pursuer avers that following the preparation of the valuation, CPL issued a notice in accordance with the Articles, based upon the (incorrect) valuation, resulting in his shares being allocated to others for a price of £74,949, an under valuation. Reference is made to the terms of a report by Grant Thornton dated 2 August 2018 which valued his shares at £506,800 (although that averment should no longer appear in the summons, since, as long ago as the preliminary hearing, counsel for the pursuer disavowed reliance on the Grant Thornton report, a stance which is maintained).

[14] In Article 9 of condescendence, the pursuer avers:

> "The defenders knew that their valuation would form the basis of the evaluation of the shares of the pursuer. That was expressly stated in their valuation. They knew, from the circumstances previously averred, that CPL and its directors were

> seeking to influence their valuation and that they had a vested interest in so doing. They colluded with CPL and its directors to reach a position where their valuation would, they considered, be unchallengeable by the pursuer (as proved to be the case). They adopted a method of valuation which was impermissible by the articles as CPL was trading at the material time. In any event, the NAV method is only appropriate when a company is either not trading or is intended to be broken up and the net assets distributed."

[15] In Article 10, the pursuer avers:

> "The defenders owed to the pursuer the duty to carry out the valuation exercise in terms of the methods outlined in the Articles of Association and to show to the pursuer the skill and care to be expected of an accountant of ordinary skill who was regulated by ICAS. In that regard, they were under a duty (i) to carry out the valuation in accordance with the Articles of Association; (ii) to effect the valuation of an EV basis; (iii) to carry out such investigation as was reasonably required to assess the proper valuation of the shares; and (iv) to act neutrally and in a manner uninfluenced by one party or the other. Had they considered it was appropriate to take into account the representations of CPL that the company was 'teetering' on account of the proposed termination of the contract with the LLP, their investigations would have led them to the conclusion that the contract could not be terminated; and that any suggestion it would be was provoked by not only a conflict of interest but was in fact an attempt to justify an incorrect basis for valuation and calculated to deprive the pursuer of the true value of his shares. The valuation failed to observe proper bases of and standards of valuation for those reasons, and a duty existed as between the defenders and the pursuer, to observe those standards. Had the duties been fulfilled, the value that would have been assessed would have been on an EV, would have rejected the contention that the company's finances were precarious, and resulted in the pursuer's shares being valued at the sum of £506,800 more than the valuation carried out by the defenders."

At the end of Article 10, in response to the defenders' averments about the limitation of liability clause, quoted below, the pursuer avers (in what is the only reference in his pleadings to that clause):

> "The averments in answer anent limitation of liability are irrelevant. The pursuer had no contract with the defenders and his rights cannot be affected by any contract extant between the defenders and CPO (entered into subsequent to termination of the pursuer's employment as a director."

The defenders' pleadings

[16] As just noted, the pursuer attacks the relevancy of the defenders' averments about the limitation of liability clause, which appear in Answer 10 (referring to the defenders in the singular) as follows:

> "*Separatim* and in any event, the defender was engaged to conduct the determination by CPL pursuant to the requirements of Article 5 of the Articles. The defender agreed to act subject to certain terms and conditions which were recorded in its letter of engagement dated 13 April 2018... One of the terms upon which the defender agreed to act was a limitation of its liability. By virtue of the limitation of liability adopted in terms of the letter of engagement the aggregate of any liability in 'damage' ... was not to exceed ten times the fees for the determination exercise. The fee for the determination exercise was £4,500. Accordingly, the liability of the defender in respect of any 'damage' ... cannot exceed £45,000. This state of affairs fell within the reasonable contemplation of the parties to the Articles (including the pursuer) and was a reasonably foreseeable consequence of a scheme which involved the engagement of a professional person such as the defender. *Esto* a duty of care was owed by the defender to the pursuer in relation to the determination exercise (which is denied), any such duty must fall to be assessed so that it is consistent and concomitant with and does not enlarge the scope or bestow any greater rights than those which were established by the contract under which the defender was appointed. It would not be fair, just or reasonable to impose a duty upon the defender greater than that which it contracted to accept. Accordingly, any liability in damages on the part of the defender in relation to the pursuer should not exceed £45,000."

The defenders' letter of engagement

[17] The defenders' letter of engagement, dated 13 April 2018, states:

> "You have requested us to provide the valuation required under the Articles of Association of [CPL] for the purposes of determining and certifying the fair value of the shares held by Mark Coulter.
> We understand that the Articles of Association require an independent value to determine the price at which the shares concerned are to be offered to the other shareholders."

Under the heading "Limitation of our liability", the letter goes on to provide:

> "The aggregate liability of this firm for damage shall be limited to 10 times the fees for this assignment. For the purposes of this engagement letter 'damage' shall mean the aggregate of all losses or damages (including interest thereon if any) and costs suffered or incurred, directly or indirectly, by the addressees of

> this letter (together with such other parties whom the Firm and such original addressees have agreed may have the benefit of and rely upon our work on the terms hereof) (together Addressees) under or in connection with this engagement or its subject matter (as the same may be amended or varied) and any report prepared pursuant to it, including as a result of breach of contract, breach of statutory duty, tort (including negligence), or other act or omission by the Firm but excluding any such losses, damages or costs arising from the fraud or dishonesty of the Firm or in respect of liabilities which cannot lawfully be limited or excluded."

The disputed valuation

[18] All that it is necessary to say about the valuation is that the defenders noted that the MSA had been terminated, that CPL and the LLP had begun a process to renegotiate it and that this created uncertainty over CPL's future earnings potential and cast doubt over its ability to trade as an on-going concern. In light of this, the defenders concluded that an EB valuation was not appropriate, and they proceeded to value the company on an NAV basis.

[19] I will now revert to the five issues identified above.

Existence of a duty of care

[20] By way of introduction, the three different tests which have been approved for the imposition of a duty of care in respect of economic loss were neatly summarised by Cooke J in *Barclays Bank plc* v *Grant Thornton UK LLP* [2015] 1 CLC 180 at para [47], as follows:

(i) The threefold test of foreseeability of damage, proximity of relationship and the question whether it is fair, just and reasonable to impose a duty.

(ii) Assumption of responsibility: did the defenders objectively assume responsibility to the claimant for a given task with a view to protecting the claimant from the type of loss suffered?

(iii) The incremental approach: is the alleged duty consistent with other duties which have been accepted by the courts in previous cases and a logical extension of them?

[21] Counsel for the defenders did not submit that it would be impossible for the pursuer to fashion an argument that the defenders owed him a duty of care by application of one or other of the above tests. Rather, he argued that the pursuer did not relevantly aver any case that such a duty arose in Scots law, under reference to any of the tests. Counsel devoted some time, both in his note of argument and in oral submissions, under reference to *Robinson* v *Chief Constable of West Yorkshire Police* [2018] AC 736, as explained by Lord Clark in *Hughes* v *Turning Point Scotland* 2019 SLT 651, to the lack of any established precedent in Scots law that a professional expert valuer engaged contractually by a company owes a duty of care to avoid economic loss being suffered by a third party, and to the pursuer's failure to aver that it would be fair, just and reasonable for such a duty to be imposed as a matter of law. However, that line of argument was rendered largely sterile by the fact that in the course of his submission, senior counsel for the pursuer clarified that the pursuer's position was that a duty arose because the defenders had assumed responsibility to the pursuer. I will therefore focus on the respective submissions insofar as they bore upon that issue.

[22] Counsel for the defenders very properly drew the court's attention to an English first instance decision, *Killick and another* v *PriceWaterhouseCoopers* [2001] P.N.L.R 1 in which Neuberger J (as he then was) held that a duty of care was owed by an expert valuer of shares to a third party shareholder, notwithstanding that the valuer had been appointed by the company; the facts of that case being as close as one could hope to find to the facts in the present case. The analysis in *Killick* was based upon assumption of responsibility. While assumption of responsibility was a sound basis for imposing a duty under Scots law, it was a

requirement both that there be reliance by the pursuer upon the words and/or conduct of the defenders, and that such reliance was reasonable in all the circumstances and foreseeable by the defenders: *NRAM* v *Steel* 2018 SC (UKSC) 141, Lord Wilson of Culworth JSC at [23] and [35]; *Midland Bank Plc* v *Cameron, Thom, Peterkin and Duncans* 1988 SLT 611, Lord Jauncey at 616 E to F. The claimant in *Killick* had pled reliance in his pleadings, whereas here the pursuer had not, nor did the pleadings mention assumption of responsibility. In any event, the pursuer having agreed to accept a scheme which gave him no choice in the matter, could not be said to have relied upon the defenders.

[23] Senior counsel for the pursuer submitted that it was plain from the pleadings that the pursuer's position was that the defenders had assumed responsibility. He referred to the admitted averments in Article 4 of condescendence that the defenders knew the purpose of the valuation and that it would form the basis for the enforced sale of the pursuer's shares. As for reliance, it was difficult for the pursuer to aver that he had relied on the defenders' valuation, when he had no choice in the matter. The court should adopt the same approach as in *Killick.*

Decision on duty

[24] The submission for the defenders was that two separate ingredients must always be pled when assumption of responsibility is founded on as the basis of imposition of a duty of care, namely, an assumption of responsibility by the person said to owe the duty (A), and reliance by the person on whom it is owed (B). However, the better view is, I think, that reliance is an essential ingredient of liability in delict for a negligent misrepresentation only in the sense that there can be no assumption of responsibility in relation to a representation of fact unless two conditions regarding reliance are met, these being that it was reasonable

for B to have relied on the misrepresentation, and that B should reasonably have foreseen that A would rely upon it: see *NRAM* v *Steel*, above, Lord Wilson at para [32], where he said that a solicitor will not assume responsibility unless those two elements were present. However, we are not, in the present case, concerned with a negligent misrepresentation, but with an allegedly negligently-prepared certificate of value which conclusively fixed the price at which the pursuer's shares were to be sold, in circumstances where he had no choice other than to sell his shares at that price, all of which the defenders admittedly knew, and where they nonetheless agreed to value the shares. It is at least arguable that the person who is known to have no choice other than to sell his shares at the value certified is, for the purposes of assumption of responsibility, to be treated as *a fortiori* of the person who does have a choice but who foreseeably relies upon the certificate in choosing to sell his shares at that value. The former may not rely upon the certificate in the sense of choosing a course of action he would not otherwise have chosen, but he is nonetheless reliant upon its accuracy, (and is known to be so reliant) and will inevitably suffer loss should the certificate under-value his shares. Accordingly, if there is a requirement for reliance, it is satisfied.

[25] The foregoing approach chimes with that taken in *Killick* by Neuberger J, at paras [47] and [48] where he had no difficulty in rejecting an argument by the defendants that there was no reliance by the claimants, an argument by which he was "unimpressed", stating that:

> "It could be said that there was reliance in a somewhat indirect way when Mr Harding acquired the 16 million shares and became bound by the Articles or, if Mr Harding was involved in agreeing the Articles, when the Articles were agreed. The shareholders agreed that they would be bound in certain circumstances to sell their shares at the market price and were clearly relying on a qualified independent professional person, prima facie the auditor but possibly another accountant, to carry out the valuation properly.

> Quite apart from this, Sir Sidney is, to my mind, right in saying that the defendants' argument involves treating the concept of reliance in the same way as in the context of a negligent or fraudulent misstatement, which is not correct. Accordingly, I do not think there is anything in the defendants' first point."

The same reasoning is equally applicable in the present case. Reliance, if it be needed, could be found in the pursuer's acceptance of the Articles, although the better view is that reliance should not be treated in the same way as in the context of a negligent misstatement, since we are simply not in that territory.

[26] Turning to consider the adequacy of the pursuer's averments in light of the foregoing analysis, the pursuer has in my view pled sufficient facts, in Articles 4 and 6 of condescendence, from which, looked at objectively it could be found that the defenders, given their knowledge as to the purpose of the valuation, did accept responsibility towards him in producing a fair valuation of his shares, on the basis of which the court would be entitled to find that a duty of care existed. While it might have been helpful (and saved some time) if the pursuer's pleadings had more clearly signposted that it was assumption of responsibility which was said to give rise to a duty of care, it is unnecessary for a pursuer to plead law, and so the absence of any explicit reference to assumption of responsibility or to reliance is immaterial.

[27] I therefore refuse the defenders' motion to dismiss the action as irrelevant on the basis that the pursuer has not relevantly pled a case of duty.

Scope of duty

[28] This issue arises out of the limitation of liability clause in the defenders' letter of engagement, quoted above. Several discrete questions arise. First, does the clause have any relevance at all to a delictual claim by the pursuer, who was not party to the contract

in which the clause appeared; and, if it does, can the defenders' liability to the pursuer ever exceed the maximum liability which it could have had to CPL, being £45,000? Second, assuming that the clause is relevant, do the provisions of the Unfair Contract Terms Act 1977 (UCTA) have any applicability, in particular, section 16, which provides for an exclusion or limitation clause to have no effect in certain circumstances? Third, what consequences flow from the fact that neither party has chosen to invoke section 16 in their pleadings?

[29] Counsel for the defenders submitted that if the pursuer was able to establish the existence of a duty of care, the law should not impose upon a professional a duty to avoid economic loss to a third party which was greater than the duties owed under the appointment which engaged the professional in the first place. Thus any liability to the pursuer must be limited in the same way as the defenders' liability to CPL would have been limited, that is, (in the absence of any challenge to the reasonableness of the limited liability clause), capped at £45,000. To do otherwise would be unfair, unjust and unreasonable. Reference was made to *White* v *Jones* [1995] 2 AC 207, *Pacific Associates Inc* v *Baxter and others* [1991] 1 QB 993 and *Gorham* v *British Telecommunications plc* [2001] P.N.L.R 2 per Schiemann LJ at [56], all discussed more fully below. To the extent that the pursuer sought damages in excess of £45,000, his action was irrelevant.

[30] Not only did senior counsel for the pursuer take issue with that latter submission, he submitted that the limitation of liability clause had no relevance whatsoever, and that the defenders' averments about the clause should not be admitted to probation. It was not the law that when a delictual duty is owed by D to P, a contractual term as between D and a third party could be binding on P where P was not party to the contract. The defenders had failed to identify any circumstances under which a duty of care can be moderated where there is no notice to the beneficiary of that duty of a limitation of liability. Had there been a

contractual relationship, the pursuer would have had powerful arguments under UCTA that the clause was unfair and unreasonable including that the parties did not enjoy equal bargaining power and that the limitation was not reasonably drawn to his attention. I observe in parenthesis that the pursuer's note of argument raised, for the first time, the spectre of UCTA: there is no mention of it in the pursuer's pleadings. In oral submissions senior counsel frankly acknowledged that he had grappled with the question of whether UCTA could apply to the present circumstances, but he had concluded that it did not.

Decision on scope of duty

The relevance of the limitation of liability clause

[31] The question of whether an exclusion of liability clause in a contract to which the claimant was not a party could bear upon the existence or scope of any duty owed was considered, but reserved for later determination, in *Killick* (paras [24] to [39]). In *White* v *Jones*, above, Lord Goff of Chieveley at 268 G to H, in the context of a duty of care owed by a solicitor to a beneficiary under a will, said that assumption of responsibility would be subject to any term of the contract between the solicitor and the testator which may exclude or restrict the solicitor's liability to the testator. That approach was endorsed by Shiemann LJ in *Gorham & Ors* v *BT Plc & Ors*, above, at para [56]. Other judicial comment has been more guarded however. In *Whyte* v *Jones*, Lord Nolan, at 294 F to G, left open the question whether a defendant who (reading short) caused economic loss could exclude or limit liability to a third party, preferring to say that the existence and terms of the contract may be relevant in determining what the law of tort may reasonably require of the defendant in all the circumstances. In *Pacific Associates Inc* v *Baxter and others*, above, Purchas LJ at G to H said that:

> "the absence of a direct contractual nexus between A and B does not necessarily exclude the recognition of a clause limiting liability to be imposed on A in a contract between B and C, when the existence of that contract is the basis of the creation of a duty of care asserted to be owed by A to B. The presence of such an exclusion clause whilst not being directly binding between the parties, cannot be excluded from a general consideration of the contractual structure against which the contractor demonstrates reliance on, and the engineer accepts responsibility for, a duty in tort, if any, arising out of the proximity established between then by the existence of that very contract".

[32] The weight of these authorities is that where a duty of care has its genesis in a contract between the person by whom the duty is owed and a third party, the existence in that contract of a clause excluding or limiting liability is, at the very least, a relevant factor in determining the scope of the duty of care.

[33] The question remains whether, on his pleadings, the pursuer is entitled in this case to seek to recover a loss in excess of the limitation sum of £45,000. On the Lord Goff approach, of course, the clause (absent challenge) would be an absolute bar to his seeking more than that sum. For my part, I prefer the more cautious approach whereby the clause is a relevant, but not necessarily conclusive, factor to take into account in determining the scope of the duty: if there were a vast disparity between the likely value of the shares and the sum to which liability was to be limited, in circumstances where the person contracting could not conceivably suffer a loss on their own account (and here, it is difficult to see how CPL could ever have sustained a loss, when its shares were being valued for the benefit of others), then there may well be circumstances where it would not be fair and reasonable to restrict the scope of the duty to the limitation sum. Whichever approach is taken, the defenders' averments about the exclusion of liability clause are relevant, and I would refuse the pursuer's motion to exclude those averments from probation (should probation be allowed).

[34] That all said, the pursuer's pleadings do not put in issue any other factor which ought to be taken into account along with the limitation clause in assessing the scope of the

defenders' duty. His sole averments about the clause are quoted above in para [15] to the effect that the defenders' averments are irrelevant and that the pursuer "cannot" be affected by any contract between the defenders and CPL which, as a matter of law, as seen from the discussion above, is simply wrong. It follows that on the pleadings there are no other factors which the pursuer is offering to prove which could have any bearing on the scope of the duty. The only factor which the court could take into account after proof would therefore be the limitation of liability clause. It follows that any liability to the pursuer would inevitably be capped at £45,000, unless the pursuer is able to challenge the clause under reference to UCTA, to which I now turn.

Does UCTA apply?

[35] Section 16 of UCTA (which applies to Scotland, the corresponding provision for England and Wales being section 2), reading short, provides that a term of a contract, or a provision of a notice given to persons generally or to particular persons, which purports to restrict liability for negligence arising in the course of any business, shall have no effect if it was not fair and reasonable to incorporate the term in the contract, or if it is not fair and reasonable to allow reliance on the provision.

[36] Although counsel for the pursuer was correct to say that the clause in question is not a contractual term as between the pursuer and the defenders - it certainly makes no sense to inquire whether it was fair and reasonable to incorporate it into a contract between them, when there was no such contract - I have formed the provisional view (although I did not hear submissions on the point) that it could be regarded as a notice. In *Smith* v *Bush* [1990] 1 AC 831 a disclaimer of liability in a contract between a building society and a firm of surveyors instructed to carry out a valuation for mortgage purpose was held to be a notice

to a purchaser buying in reliance on the valuation, to whom a duty of care was owed. On the assumption that UCTA did apply, senior counsel for the pursuer listed a litany of reasons as to why it would not be fair and reasonable to have regard to the limitation clause. However, since none of those reasons found their way into the pleadings, the pursuer would not be able to lead any evidence in support of them at any proof to follow hereon.

[37] In summary, on this question, I find that section 16 could potentially have applicability to the circumstances of this case, but since neither party has made reference to it in their pleadings, that brings us to the third question, namely, which party must bear the consequences of that.

Which party must put UCTA in issue?

[38] Both parties agree that (as section 24 of UCTA expressly provides) the onus of proving that it was fair and reasonable to incorporate a term in a contract or that it is fair and reasonable to allow reliance on a provision of a notice lies on the party so contending, that is, in the present action, on the defenders. Where they part company is on whether, even in the absence of fairness and reasonableness having been put in issue by the pursuer, the defenders must nonetheless offer in their pleadings to discharge that onus with the consequence that, if they do not do so, they are necessarily precluded from relying upon the clause. Counsel for the defenders drew my attention to *W M Teacher & Sons Ltd* v *Bell Lines Ltd* 1991 SLT 876 in which the same issue arose in relation not to section 16 of UCTA, but to the similarly worded section 17, which applies to standard form contracts. Lord Marnoch held that it was for the party wishing to found on the substantive statutory provision to raise the issue, which he considered was in accordance with the spirit if not the letter of the

maxim *omnia rite acta praesumuntur*: in English, a presumption of regularity. That approach was consistent with the view expressed by Lord Davidson in *Landcatch Ltd* v *Marine Harvest Ltd* 1985 SLT 478, (where the provision of UCTA under consideration was section 20(2)) that *where the issue was raised* (emphasis added), it was for the party relying on the clause to aver the facts and circumstances upon which they relied. Senior counsel for the pursuer sought to distinguish those cases on the basis that neither of them was dealing with section 16; but all three statutory provisions (and others in the Act) are in broadly similar terms, and provide that, in a variety of situations, a contractual term (or a notice) shall have effect only if it was fair and reasonable to incorporate it into the particular contract, or to rely upon it. Section 24, which as pointed out above provides that the onus is to be on the party seeking to uphold the terms and which contains the reasonableness test, applies to all of those provisions. It makes no sense that it should be for the other party to raise the issue in respect of some of the sections of the Act but not others. The presumption of regularity means that, absent any challenge, the defenders are entitled to rely upon the limitation of liability clause. Should the pursuer have wished to invoke the statutory protection potentially afforded him by section 16, it was for him to raise the issue by making an averment about it. Then, and only then, would it be incumbent upon the defenders to make averments about reasonableness.

Conclusion on scope of duty

[39] The net result of all of this is that the defenders are entitled to rely on the exclusion of liability clause, to which there is no challenge, as a factor bearing upon the scope of their duty. In the absence of any other factors founded upon by the pursuer pointing to a greater

scope of duty, there is no prospect of his establishing at proof that the defenders are liable to him for a sum greater than £45,000. To that extent his action is irrelevant.

The pursuer's averments of negligence

[40] The starting point here is to acknowledge that the defenders were acting as an expert, not as an arbitrator and not as part of some judicial process. It is for an expert to arrive at a view regardless of any submissions made and based upon such investigations or lack of investigation as the expert deems fit: *MacDonald Estates Plc* v *National Car Parks Ltd* 2010 SC 250, Lord Reed at 260 to 261.

[41] Against that starting point, there were four strands to the defenders' criticism of the pursuer's pleadings about negligence. The first was that insofar as the pursuer complained about the manner in which the defenders had conducted the valuation exercise, his averments of negligence were misconceived and irrelevant. It was entirely a matter for the defenders as to how to set about their task. Second, insofar as the pursuer relied upon anything said on the face of the valuation determination itself, it had already been determined in the sheriff court action that there was no manifest error: *Coulter's Property Limited* v *Coulter* [2022] SAC (Civ) 8 at [11]. Third, the pursuer's case was irrelevant to the extent that it proceeded on the basis that a vested interest or lack of independence on the part of CPL somehow extended automatically to and tainted the defenders. The scheme to which the pursuer agreed in terms of the Articles would always have required a party to act as expert valuer who had CPL as a client. It was always going to be the case that the expert valuer would not have total independence from the company. Fourth, there was no support in the report founded on by the pursuer for the *Hunter* v *Hanley* test and the pursuer had no relevant basis for the averments of negligence which he had made. Ultimately the pursuer's

complaint was that the company ought not to have been valued on an NAV basis because it was to be valued as a going concern, but on the pursuer's own averments in Article 6 of condescendence, a business which continues to trade is *generally* valued on the projected earnings into the future, meaning that some businesses would not be so valued.

[42] Senior counsel for the pursuer submitted that the pursuer's averments were adequate for inquiry at a proof before answer. The reference in Article 6 to the manner in which companies were generally valued was an unfortunate use of loose language, but later in the same article it was averred that the Articles required that the company be valued as a going concern and that valuation as a going concern requires valuation on an EB basis. The averments about the defenders having acted contrary to the ethical guidance issued by ICAS were relevant because a failure so to act would in itself constitute negligence and because had they acted in accordance with that guidance they would have either ceased to act as expert valuer, or they would have carried out independent inquiries into what they had been told which would have resulted in their valuing the company on an EB basis.

Decision on the pursuer's averments of negligence

[43] There are (at least) two problems with the pursuer's averments about negligence. The first is that to the extent that they focus on the manner in which the defenders set about their task, they fail to recognise that an expert is not acting in a judicial capacity. As soon as it is accepted, as it must be, that the defenders, as experts, were not acting judicially, and were entitled to make such investigations as they thought fit (bearing in mind that they were necessarily the auditors of CPL), it follows that no exception can be taken to their speaking to, or meeting, one "side" and not the other. Thus, the complaint of lack of independence from CPL (which is also the essence of the criticism made of the defenders by the pursuer's

expert) is misconceived. Lack of independence, or lack of impartiality, may well be a reason for impugning a decision reached in a judicial process, with the consequence that such decision would fall to be reduced (quashed). However, that is very different from saying that the decision reached was necessarily negligent or wrong, such as to cause loss to a party.

[44] The second problem, related to the first, is that even if the defenders did act contrary to ICAS guidance in some respects, then (contrary to the submission made by the pursuer's senior counsel) that would not of itself be sufficient to constitute a breach of their duty to take reasonable care in the preparation of the valuation. In other words, the pursuer still carries the burden of averring and proving that the certificate itself was prepared negligently, that is, in a manner which fell short of the requisite standard of care. Senior counsel for the pursuer accepted that had the defenders valued the company on an EB basis, they would not have been negligent notwithstanding any breach of ICAS guidance. However, the real question, which the pursuer's pleadings do not grapple with, is whether it would have been open to an expert, who did not breach ICAS guidance, to have valued the company on an NAV basis.

[45] At stages in the argument, senior counsel for the pursuer suggested that it was sufficient for the pursuer to show that the certificate was wrong, because it valued the company on an NAV basis instead of an EB one. It may be, without deciding the matter, that had the Articles expressly mandated valuation on an EB basis, there would have been some traction in that argument (although arguably then the valuation would have contained a manifest error). (As an aside, I do not accept the defenders' argument that it was decided in *Coulter's Property Limited* v *Coulter*, above, that the certificate did not contain an error of the sort upon which the pursuer could found in an action against the defenders; the Sheriff

Appeal Court simply found that the pursuer in this action had not relevantly averred manifest error in that action.) But that is not what the Articles say. The most the pursuer can point to is that the Articles require valuation of the business as a going concern. Although senior counsel for the pursuer tried to gloss over his use of the word, the fact is that in Article 6 of condescendence, the pursuer himself avers that a company which is trading is "generally" valued on an EB basis, which carries with it the implication that sometimes companies which are trading *are* valued on a different basis. Coupled with the fact that the definition of Fair Value in the Articles expressly allows the defenders, at their absolute discretion as they think fit, to resolve any difficulties in applying any of the bases of valuation, it must inevitably be the case that it is a question of accounting judgment, for the person valuing the shares, to determine how to go about that exercise, in the light of the known information, which in this case includes that the MSA had, at least ostensibly, been terminated. That necessarily brings into play the test in *Hunter* v *Hanley*, so that to succeed the pursuer must aver and prove that no accountant of ordinary competence, exercising reasonable skill and care, would have valued the shares on an NAV basis (and, by extension, that no such accountant would have formed the view that the MSA had been terminated). Although there are passages in the pursuer's pleadings where he avers that no accountant would have acted as the defenders did, (one example being in Article 6 of condescendence where he avers that no "such" accountant would have continued to accept instructions in the circumstances faced by the defenders, although even that averment is unclear, since "such" does not obviously refer back to any particular category of accountant), the pursuer singularly fails to make any averment that no ordinarily competent accountant would, having made enquiries, valued the company on an NAV basis.

[46] That this is fatal to the pursuer's case can be seen most clearly when one remembers that one branch, arguably the primary branch, of the pursuer's case is that the defenders ought simply not to have acted at all, when (as he would have it) pressure was put on them by CPL to act in a certain way. Following that through to its logical conclusion, the pursuer would then require to aver and prove what would have happened if the defenders had declined to act further. In particular, he would need to prove that no alternative expert valuer appointed to value the shares could have done so on an NAV basis, but one searches the pleadings in vain for any averments to that effect.

[47] Still further criticism can be made of the pursuer's pleadings. For example, he avers that the defenders were under a duty to carry out such investigation as was reasonably required to assess the proper value of the shares, and that had they done so, they would have reached the conclusion that the MSA could not be terminated (the termination of the MSA being the primary factor which led the defenders to adopt the NAV basis of valuation). However, that falls some way short of an averment along *Hunter* v *Hanley* lines that no competent valuer could have reached the conclusion that the MSA was terminable; and again fails to take cognisance of the fact that it is up to an expert to decide what investigations to carry out.

[48] Even according the pursuer's averments a due degree of latitude, recognising that this is a commercial action, I have concluded that the pursuer's pleadings read fairly and as a whole are irrelevant and that the action as pled is bound to fail. For this reason, I will dismiss the action.

Allegations of bad faith

[49] Counsel for the defenders submitted that the pursuer's averments of collusion in Article 7 were lacking in specification. No notice was given of what it was that the defenders did in colluding with the company or how that collusion manifested itself and affected the valuation exercise in a way which was impermissible standing the defenders' position as an expert valuer and not an arbitrator. As regard the need for specification when making such averments, reference was made to *Royal Bank of Scotland* v *Holmes* 1999 SLT 563 per Lord Macfadyen at page 569; *Politakis* v *Spencely* [2017] SAC (Civ) 19 at [12] to [13]; and *Marine & Offshore (Scotland) Limited* v *Hill* 2018 SLT 239 per the Lord President (Carloway) at [16].

[50] Senior counsel for the pursuer submitted that the pursuer's averments made clear the manner in which the defenders were said to have colluded with the directors of CPL, and that an accusation of collusion was not an accusation of fraud.

Decision on collusion

[51] Given the view I have taken on the relevance of the pursuer's averments of negligence this issue has assumed less significance than it might otherwise have had. However, I do consider that an allegation of collusion against a professional person is an allegation of bad faith, and does require a high degree of specification: *cf Politakis* v *Spencely* [2017] SAC (Civ) 19 at para [13], where malice, corruption fraud and collusion are all bracketed together as types of bad faith, in respect of which clear and concise averments are required. While the pursuer makes clear averments of bad faith on the part of CPL, and of a failure by the defenders properly to interrogate the information they were being fed by CPL, that falls some way short of what would be required to establish collusion; and had I

been allowing a proof before answer I would have refused to admit the pursuer's averments about collusion to probation.

Causation, loss and quantum

[52] Counsel for the defenders submitted that the pursuer did not aver that any step taken (or not taken) by the defenders was caused by or a product of any negligence on their part. His case in causation was therefore fundamentally irrelevant and could not succeed. Second, the pursuer gave insufficient notice as to how his loss of £506,800 had been calculated. The defenders did not have fair notice of the case it was required to meet. Even a commercial action, where abbreviated pleadings are encouraged, required that fair notice be given by each party of the facts relied upon and in respect of which evidence will be led: *Grier* v *Lord Advocate* 2021 SLT 371 per Lord Tyre at [39].

[53] Senior counsel for the pursuer explained that the report originally obtained by the pursuer was instructed by the pursuer himself, from an accountant who was a friend of the pursuer, and as such it could not be founded upon as an expert report. Mr Graham, who had prepared an expert report on the issue of liability had confirmed that he agreed with the methodology in that report (albeit what his report actually states is that he had not been instructed to effect a valuation). The defenders had therefore been given adequate notice of the manner in which the pursuer's claim had been quantified. If the pursuer's case survived the debate, no expert report would be due until the last date for productions in accordance with the proof timetable which would then be fixed.

Decision on causation/quantum

[54] The defenders' arguments about causation are well made, and in this regard I refer back to my previous criticism of the pursuer's averments. Stated briefly, the pursuer falls some way short of averring that any negligence on the part of the defenders caused him any loss. As regards the averments about quantum, I also accept the defenders' argument that the pursuer's averments are wholly lacking in specification. This is an action in the commercial court. The ethos of the court is that a pursuer should have all the expert reports required before an action is raised. Even if that is not always achieved, it really will not do for a pursuer to make what is in effect a bald averment about loss unsupported by any expert evidence upon which he can rely, as is the case here. For this reason, too, I find that the action is lacking in specification to the point of being irrelevant, such as to warrant dismissal. Separately, the pursuer has had more than sufficient time to get all of his proverbial ducks in a row. The summons was signeted on 2 February 2023, but not lodged for calling until nearly a year had elapsed. When the action called at a preliminary hearing on 8 February 2024, the pursuer sought, and was granted, a 12 week sist, to enable him to instruct an expert report on which he could rely. The debate was not heard until February 2025. Virtually all of that delay has been caused by the pursuer. The defenders have not had any fair opportunity to answer the averments of loss, and, for aught yet seen, would be prejudiced by the late production of an as-yet-unprepared report on quantum, which might say who-knows-what, which they would then require to answer, potentially resulting in delay. That is not how the commercial court is intended to operate; and so, even had I come to the view that the pursuer's averments might have survived a debate in an ordinary action, I would have been minded to exercise my case management powers by not allowing him any further time for an expert report in relation to quantum to be lodged,

given the length of time for which the action has already been in existence, and the latitude already afforded the pursuer.

Disposal

[55] For all of the foregoing reasons, I will sustain the defenders' first and second pleas-in-law and will dismiss the action. I was not addressed on expenses by the pursuer and so will reserve all questions of expenses meantime.