FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 26
A91/13

Lord President
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the reclaiming motion

in the cause

LAURA McCLUSKEY

Pursuer and Respondent

against

SCOTT WILSON SCOTLAND LTD

Defenders and Reclaimers

_____

Pursuer and Respondent: R Sutherland; Allan McDougall
Defenders and Reclaimers: Barne KC; Reid KC; CMS Cameron McKenna Nabarro Olswang LLP

28 August 2024

Introduction

[1] This reclaiming motion (appeal) concerns a plea of *res judicata*. The pursuer is one of a cohort of persons who have raised actions against the defenders for personal injuries arising from the same, or substantially the same, negligence. A previous lead action from amongst the

cohort has already been decided (*McManus* v *Scott Wilson Scotland* [2020] CSOH 47; and in the Inner House 2021 SLT 985). The defenders contend that the issues which the pursuer now wishes to raise are *res judicata*; they have already been judicially determined. The appeal concerns the effect of a lead action in which generic issues have already been litigated.

The Practice Direction and Procedure

[2] Before the advent of group proceedings, the Rules of Court provided that, if the Lord President was of the opinion that an aspect of procedure was unsuitable for the efficient disposal of proceedings, he could direct that the unsuitable aspect be disapplied, and an alternative procedure substituted (RCS 2.2(1) and (2)). The Lord President required to consult with the relevant parties before making such a direction (RCS 2.2(3)).

[3] The pursuer was one of a large number of litigants whose homes had been built on contaminated land. Practice Direction No 1 of 2013, *Personal Injury Actions relating to alleged ground contamination at the Watling Street Development in Motherwell*, was issued under RCS 2.2. It applied to actions raised by the residents, or former residents, of properties in that development. This included the present action and that brought by Angela and Robert McManus. The Direction allowed for the nomination of a Lord Ordinary to manage the actions. It gave the judge extensive case management powers (para 10) to facilitate the speedy determination of the actions (para 10 (p)). It required (para 13) the nominated judge to:

> "give early consideration to whether in order to determine … any generic issues in the actions, the lead actions which the parties have identified are appropriate to be progressed at an advanced rate."

[4] The pursuer's action was raised in September 2012. It was sisted initially in January 2013 and periodically thereafter pending "investigations" in terms of the Direction and then, in May 2016, to await the resolution of the McManuses' action in the Outer, and then the Inner,

House.

[5] The McManuses' action had been brought against the main developers (City Link Development Co), their landlords (North Lanarkshire Council) and the defenders, who were sub-contractors for the investigation of the ground conditions. On 13 January 2016 the cases against the developers and the landlords were dismissed (*McManus* v *City Link Development Co* [2016] Env LR D1). The dismissals were reclaimed, but that against City Link was abandoned and, on 14 February 2017, the appeal against the landlords was refused (2017 Hous LR 84). The case then proceeded, slowly, against the defenders.

[6] On 10 July 2018, parties were appointed to lodge a joint statement of issues by 25 September 2018. On 12 February 2019 the scope of the proof (which had not yet been allowed) was limited initially to four issues ((a) to (d)) on the defenders' Statement of Issues (No 107 of process). These were, in summary: (a) were the defenders negligent in the course of the remediation of the Watling Street site; (b) if so, in what respect were they negligent; (c) if there was a breach of duty, did that cause there to be contamination at or around the houses in which the pursuers lived; and (d) if it has resulted in contamination at or around the houses what substances were present in the pursuers' houses and in what quantity? The McManuses' Statement of Issues was longer, but paragraphs (a) to (h) were said by them to reflect the defenders' issues (a) to (d).

[7] On 18 March 2019 the court indicated that all of the items on the defenders' Statement (ie paras (a) to (d)) were to be determined after proof. However, when proof was allowed by interlocutor dated 25 June 2019, the scope was limited to the first two issues on that Statement. These were, as later described by the court on a reclaiming motion (2021 SLT 985 at para [6]):

> "1. What duties (whether contractual or delictual) did the defender owe in relation to the work it undertook at the Watling Street site, to whom did it owe those duties, and what was the scope of those duties?

2. Did the defender breach any of those duties in the course of the remediation of the Watling Street site?"

Issues of causation were taken out of the equation. The interlocutor of 25 June, which set the parameters for the lead action, was not reclaimed.

McManus* v *The Defenders

Pleadings

[8] In order to consider the *res judicata* plea, a comparison has to be carried out between what was decided in *McManus* and what the pursuer seeks to prove in this action. In their averments, the McManuses said that, prior to the development, the site had been in various uses, including an iron and steel works and a manufacturer of aircraft instruments and x-rays. Electroplating had been carried out by previous occupants. These uses left contaminated waste on site, including solvents in the form of volatile organic and semi-volatile organic compounds (VOCs and SVOCs). These released vapours which could harm the central nervous system and increase the risk of cancer.

[9] The pleadings provide a detailed history of the development project. Put short, the McManuses' case against the defenders was that they were acting as environmental consultants on the project, and that it was their responsibility to: (i) investigate the extent of contamination on the site; (ii) advise on remediation which would make the site suitable for residential development; (iii) prepare a scheme of remediation; and (iv) administer and supervise the remediation contract. That included providing advice on the potential groups at risk from the contaminants on site, including future occupants, how harm could arise from those contaminants, and how to prevent such harm from occurring. Specific criticisms included that the investigation did not take proper account of the known previous uses of the site. Soil

sampling undertaken at the outset of the development did not comply with established practice for site investigation. Despite the results of the soil sample testing indicating the presence of VOCs and SVOCs, no further investigation was carried out as to the extent of contamination by solvents. During remediation works, contrary to the agreed course of action, contaminated land was not removed and replaced with clean material, but was levelled instead, resulting in further distribution of contaminants around the site. The defenders issued a Certificate of Substantial Completion for the remediation work. The defenders knew of, and provided advice in relation to, the use of waste material to form a landscape bund onsite. They failed to investigate and advise on the nature, concentration and distribution of the contamination of the site by solvents, as a reasonably competent environmental consultant would have done. They failed to do this in 1990, and missed further opportunities to do so in 1992, 1993, 1994, 1995 and 1997. Reference was made to the defenders having recommended, during remediation works, that a "suitable thickness" of topsoil and subsoil be provided in garden areas. Subsequent investigation had found that less than the recommended depth of clean topsoil was in place in the gardens on part of the site.

[10] In 2010 and 2011, an environmental assessment was carried out by North Lanarkshire Council. This demonstrated the presence of a variety of contaminants, including VOCs and SVOC.

The Proof and Answer

[11] The McManuses led evidence from Elizabeth Copland, a geologist. She testified that the defenders had failed to prepare an initial competent contamination desktop study. This had led to data gaps regarding the layout of the buildings which had formerly occupied the site and the processes which had been carried on within those buildings. Potential sources of contamination

had never been identified. This was the McManuses' central criticism of the defenders. The failure to carry out a competent desktop study was contrary to ordinary and accepted practice. No consideration was given to VOCs due to the defective investigation at the outset.

[12] The defenders adduced Philip Crowcroft, a specialist in "land condition". He testified that the defenders had acted in accordance with the common, accepted practice at the time. The defenders had been entitled to rely on the Regional Chemist's testing. The defenders' reports had been clear on what they had done and had cautioned that problems might still exist between the test bores. This too accorded with the practice at the time. The developers would be expected to pick up any undiscovered contaminants by sight and smell when digging drainage ditches and foundations.

[13] The Lord Ordinary found ([2020] CSOH 47) that the defenders had owed a duty of care to any future residents of the site. He held that they had not breached that duty. He preferred the evidence of Mr Crowcroft to Ms Copland on the basis of their relative experiences and qualifications. Contrary to the pursuers' submissions, he found that the defenders had carried out a desktop analysis and had done so using the appropriate level of skill and care (see Lord Ordinary's Opinion at para [56]). They had investigated the site in accordance with normal practice at the time. They had been entitled to rely on the expertise of the Regional Chemist (*ibid* paras [57] and [59]). The defenders had made it clear that there might be undetected areas of contamination. The Lord Ordinary repelled the McManuses' pleas that they were entitled to reparation because they had suffered loss, injury and damage through the fault of the defenders. He sustained the defenders' fourth plea that the McManuses' averments were unfounded in fact and, on that basis, granted decree of absolvitor.

[14] The McManuses reclaimed, largely on the basis that the Lord Ordinary had erred in his approach to the evidence and had reached erroneous decisions of fact. On 7 July 2021 the

reclaiming motion was refused (2021 SLT 985). The Court did not consider that the Lord Ordinary had erred in preferring the evidence of the defenders' expert. The Lord Ordinary had not strayed beyond the permitted scope of the proof.

[15] The McManuses applied for permission to appeal to the Supreme Court of the United Kingdom. Their grounds of complaint in the application are not easy to follow. They appear to be that the McManuses were disadvantaged because of the Lord Ordinary's decision not to allow causation to enter the scope of the proof. The defenders had in some way engineered a conflict of interest on the part of one of the McManuses' experts which meant that he was not available at the proof. The Lord Ordinary then asked the defenders' expert about causation, when the pursuers had no witness to counter this. In the application for permission, the McManuses stated:

> "Point (iv) – Class Action Rights
>
> The rights of numerous other litigants who form, with the Appellants, an effective 'class' and whose health and safety is currently compromised may be adversely impacted by the decision in the instant case which is the lead action in what is effectively a Class Action."

The pursuer's pleadings

[16] Following the refusal of permission to appeal by the UK Supreme Court in *McManus*, the pursuer revived the current action. Like the McManuses, the pursuer sought damages based on the defenders' breach of duty in relation to her home on the Watling Street site. Her averments are broadly the same as those of the McManuses. She makes the same averments regarding the historic use of the site, the history of the development project and the defenders' involvement in it at each stage (arts 3 – 16).

[17] The pursuer makes additional averments concerning air sampling carried out in 2011, when vapours containing harmful levels of SVOCs and VOCs were said to have been found

(art 18). The defenders' remediation strategy had been based on the search for heavy metals. Remediation had focussed on the removal of these contaminants or capping the affected areas with clean soil. There had been no investigation of whether the ground was contaminated with VOCs. Capping risked leaving VOCs on site (art 19). A covering of topsoil was intrinsic to the remediation strategy. Though the defenders had recommended, at numerous times during development, that a "suitable" depth of topsoil was needed in garden areas, they had not specified what "suitable" meant. No consideration had been given to front gardens. Soil sampling, which had been undertaken in 2011, had demonstrated no subsoil or topsoil in several sampled locations. The defenders' failure to test for VOCs and to provide proper topsoil capping had led to the continued presence of contaminants (art 20).

The Lord Ordinary's decision

[18] At the Procedure Roll, the defenders argued that the pursuer was bound by *McManus*. The pursuer was attempting to re-litigate the issues which had already been determined in that action. Her claim was therefore *res judicata* and ought to be dismissed. On broadly the same grounds, the defenders argued that the pursuer's action was irrelevant and amounted to an abuse of process. The Lord Ordinary did not agree.

[19] The Watling Street actions were covered by the Direction which had been made after consultation with the parties. The Direction did not state that the outcome of the lead action, which was *McManus*, would be binding on the others. However, the issues which had been considered in *McManus* were generic. Those were the nature and scope of any contractual and delictual duties owed by the defenders, to whom they were owed, and whether there had been any breach of those duties. The generic nature of those issues could readily be inferred from the

submissions made by the *McManus* pursuers in support of their application for permission to appeal to the UK Supreme Court.

[20] A plea of *res judicata* was based on considerations of public policy, equity and common sense. These would not tolerate repeated litigation of the same issue between the same parties. The key questions were what was litigated and what was decided (*Grahame* v *Secretary of State for Scotland* 1951 JC 368 at 387). Reference to the "same parties" could include parties whose interests were sufficiently similar (*RG* v *Glasgow City Council* 2020 SC 1 at para [27]). All the pursuers had the same interests in the generic issues, which had been determined in *McManus*. Applying *RG* v *Glasgow City Council*, the interests of the pursuer were sufficiently similar to the interests of the pursuers in *McManus* to meet that part of the test for *res judicata*.

[21] The *media concludendi* were not the same. The pursuer made averments of an additional breach of duty by the defenders. These were that there were investigations which the defenders ought to have carried out which would have had implications for their remediation strategy. Even if these matters had been wrongly omitted from the pleadings in *McManus*, it could still not be said that the *media concludendi* were the same (*Primary Health Care Centres (Broadford)* v *Ravangave* 2009 SLT 673, at para [23]). That part of the test for *res judicata* was not met and the defenders' plea fell to be repelled.

[22] For the purposes of relevancy, some of the same considerations, namely public policy, equity and common sense, applied (*Friel* v *Brown* 2020 SC 273, at para [19]; *Greig* v *Magistrates of Kirkcaldy* (1851) 13 D 975 at 981). A decision reached in a first instance civil case, which had been appealed and affirmed, ought to be treated as sound. It was not equitable, and did not accord with common sense, to have the defenders face the same issues in a large number of cases, when there had already been a lead action. The decision in *McManus* was a precedent. The decision in *McManus* on breach of duty could not be re-litigated. To the extent that the

pursuer's case contained the same averments as in *McManus* regarding breach of duty it was irrelevant. However, due to the further averments of breach of duty, which could affect the outcome, the action could not be dismissed in its entirety.

[23] To dismiss a case on the basis of an abuse of process was draconian, and ought only to be done as a last resort (*Friel* v *Brown* at para [17]). Given the further averments and the additional alleged breach of duty, the case was not entirely ruled by *McManus*. The action should not be summarily dismissed on the basis that it was an abuse of process.

[24] The Lord Ordinary considered that the action could proceed to a proof before answer in restricted scope. He did not determine that scope; ie by stipulating what matters of fact, different from those found in the previous proof, required inquiry. Instead, he fixed a By Order hearing at which he would require to be addressed on: (i) whether any of the new averments had already been dealt with in *McManus*; (ii) whether any of the new averments could support any of the breaches which had been alleged in *McManus*; and (iii) whether the averments determined in *McManus* had any bearing on the breaches now alleged. After hearing parties, he would identify the limited number of issues to be dealt with at proof, and exclude other averments from probation. The By Order hearing did not happen because, in the meantime, the Lord Ordinary granted leave for the defenders to reclaim his decision.

Submissions

Defenders

[25] The plea of *res judicata* was based upon public policy, equity and common sense (*Grahame* v *Secretary of State for Scotland* at 387). It was available to support the good administration of justice by limiting duplicative litigation (*Virgin Atlantic Airways* v *Zodiac Seats UK* [2014] AC 160 at para 25). The court had to look at the reality of what had been decided (*RG*

v *Glasgow City Council* at para [27]; see generally the requirements in *Primary Health Care Centres (Broadford)* v *Ravangave* at para [21]). The only issue upon which the defenders had failed was *media concludendi*, yet these were clearly the same as those in *McManus*.

[26] The Lord Ordinary in *McManus* had found that the defenders owed a duty of care to all future residents, but that they had fulfilled that duty. His findings were adhered to on appeal. The other actions had been put on hold pending resolution of *McManus*. A cohort of similar cases should be managed efficiently and expeditiously and in a manner which was fair and proportionate to the interests of all involved (*Depuy International* v *Gilchrist* 2024 SCLR 141 at paras 43 and 46). Those interests included the right of the defenders under Article 6 of the European Convention to have their civil obligations determined within a reasonable time. To allow the pursuer's case to proceed on a limited, and insignificant, difference in pleadings, would be in conflict with that right.

[27] There were three routes by which the pursuer's claim could be barred from proceeding: *res judicata*; abuse of process; or relevance. The Lord Ordinary erred in refusing to sustain the defenders' plea of *res judicata*. A plea of *res judicata* could only succeed if: (i) there had been a prior determination pronounced by a court of competent jurisdiction; (ii) there was a decree in the prior action *in foro contentioso* without fraud or collusion; (iii) the subject matter of the two actions was the same; (iv) the *media concludendi* in the two actions were the same; and (v) except where the earlier decree was *in rem*, the parties to the second action were the same as, or representative of, the parties to the earlier action, or had the same interest as those parties. Only (iv) and (v) were in dispute.

[28] The Lord Ordinary had been correct to conclude that the interests of the pursuers in *McManus* and in the present action were sufficiently similar to support the plea. The issue therefore came down to whether the *media concludendi* were the same. The question was what

was litigated and what was decided (*RG* v *Glasgow City Council*, at para [27]). In *McManus* what was litigated and decided was the nature of any duty that the defenders owed to future residents, and whether that duty had been fulfilled. Those issues were conclusively answered. The *media concludendi* were the same. *McManus* was based on failures in the investigation and remediation scheme as designed by the defenders. That was precisely what the pursuer's case was about. A plea of *res judicata* could not be defeated by introducing averments which simply bolstered a failed claim. This was particularly so when a cohort of similar actions were being managed as a group. The pursuer's new averments addressed the lack of testing for solvents and the risk of migration of VOCs, both of which had been addressed in the closed record in *McManus*. There was a new allegation about topsoil capping, but the issue of capping had been in the *McManus* pleadings too. These averments did not give rise to new *media concludendi*; they were merely an amplification of the case addressed in *McManus*. The key point was that, once there had been a decision that there was no breach of duty, that was the end of the matter. One could not get over that hurdle by salami slicing the issue of breach of duty by reference to different or new breaches.

[29] On relevancy, the Lord Ordinary erred in determining that he could not conclude that the case in its entirety would necessarily fail. *McManus* determined that the defenders had fulfilled the duties which they owed to future residents. That rendered the pursuer's case irrelevant. In any event, before deciding whether a proof was merited, the Lord Ordinary ought to have determined which of the pursuer's averments were irrelevant and whether what remained was a relevant case.

[30] A case which was obviously without merit could be categorised as an abuse of process (*Clarke* v *Fennoscandia (No.3)* 2005 SLT 511 at paras [17], [40] and [44]). It had been recognised in England and Wales that an action which was part of a group of related or associated actions

could be dismissed as an abuse of process (*Ashmore* v *British Coal Corp* [1990] 2 QB 338; *Allsop* v *Banner Jones* [2022] Ch 55). It was an abuse of process in a case within a scheme of marshalled litigation to seek to avoid the outcome of the lead cases (*Society of Lloyd's* v *Fraser* [1998] CLC 1630 at 1650). *McManus* had now been finally disposed of. Although dismissal as abuse of process was a measure of last resort, matters had to be viewed in the context of the procedural history of the group of actions, and the fact that the pursuers in that group had continuity of both solicitor and counsel throughout. The pursuer sought to relitigate the same issue, using substantially the same evidence in the hope of obtaining a different outcome. That fell squarely within the definition of an abuse of process given in *Clarke*.

Pursuer

[31] The Lord Ordinary did not err in refusing to sustain the defenders' plea of *res judicata*. The pursuer had not been heard fully on the merits of her claim. There was no contractual agreement with the defenders or between the pursuers that the outcome of *McManus* was to be binding. The pursuer was a different person to the pursuers in *McManus*. She was suing as the occupier of different premises. She had her own separate legal interest in the subject matter of the action. A common interest in a subject matter was different from identity of position in two separate claims for damages (*MacArthur* v *County Council of Argyll* (1898) 25 R 829). It could not be said that, because two persons litigated against the same defender on the same grounds but each for their own separate legal interest, those persons were the same parties in the sense necessary to support a plea of *res judicata*. A common factual background was a relevant starting point (*RG* v *Glasgow City Council* at para [31]) but, where an individual was suing for damages arising from personal injury, the two processes were not identical. The court would be entitled to give weight to some, if not all, of the facts determined in the *McManus* action.

However, the pursuer's case was not pled on the same basis as *McManus*. Her case did not involve a rehearsal of the same facts and expert evidence as in *McManus*. Dismissal of the pursuer's action on the basis of *res judicata* would amount to a significant interference with a fundamental right of access to justice.

[32] To sustain a plea to the relevancy of an action, the court required to be satisfied that the case could not succeed, even if the pursuer proved all that was averred. The onus was on the defenders to show that the pursuer must necessarily fail. It would cause injustice to deny the pursuer the opportunity to prove her averments. Until the Lord Ordinary heard parties on: (i) whether any of the new averments were, in effect, already advanced and dealt with in *McManus*; (ii) whether any of the new averments could support any of the breaches alleged in *McManus* which were also pled in the present case; and (iii) whether the averments determined in *McManus* had any bearing on the further breach of duty now alleged, and determined the scope of the restricted proof, he would not have given a final, reasoned conclusion on the question of relevancy. He had been entitled to decide that a restricted proof ought to be allowed.

[33] The Lord Ordinary was correct to determine that the pursuer's action ought not to be summarily dismissed on the basis that it was an abuse of process. Whether a particular litigation amounted to an abuse of process depended upon the circumstances (*Green's Encyclopaedia*, vol 1, *Abuse of Civil Process*, paras 51 – 77). Every person had a right of access to the courts to settle disputes. Dismissal on grounds of abuse of process was a draconian power which ought to be regarded as an option of last resort (*Tonner* v *Reiach and Hall* 2008 SC 1). It was only exercisable in cases which might otherwise be considered manifestly unreasonable or inconsistent with the court's obligations in the administration of justice.

Decision

[34] In *Grahame* v *Secretary of State for Scotland* 1951 SC 368, it was said (LP (Cooper) at 387) that:

> "The plea [of *res judicata*] … is based upon considerations of public policy, equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis".

There are two questions to be answered. Is this action being litigated between the same parties? If so, does the issue proceed on substantially the same basis?

[35] On the first question, it is obvious that the pursuer is not the same as those in *McManus*. That is not the end of the matter. As was said in *RG* v *Glasgow City Council* 2020 SC 1 (LP (Carloway), delivering the Opinion of the Court, at para [27]):

> "The reference to the 'same parties' [in *Grahame*] should not be construed too strictly. It is sufficient if the interest of the parties in the first and second action is the same".

The cases cited gave examples of the members of the same association suing sequentially (*Gray* v *McHardy* (1862) 24 D 1043), those representing the same navigational interests (*Glasgow Shipowners' Association* v *Clyde Navigation Trs* (1885) 12 R 695) and beneficiaries under the same will (*Allen* v *McCombie's Trs* 1909 SC 710). In *Gray*, it was made clear (LJC (Inglis) at 1047) that, contrary to the Lord Ordinary's (Ardmillan) thinking, the answer was not that the previous decision would form a precedent, which would require to be followed in the later action, but rather that the plea of *res judicata* ought to be sustained (cf *Greig* v *Magistrates of Kirkcaldy* (1851) 13 D 975, Lord Cuninghame at 981).

[36] In the present situation, the pursuer, the McManuses and others were the subject of the Practice Direction No 1 of 2013. *McManus* became the lead action. There was no objection to that occurring; all parties being represented by the same counsel and agents. The McManuses' application for permission to appeal to the UK Supreme Court makes it clear that the cohort

were regarding *McManus* as if it were a lead in a class action. The whole purpose of having a lead action is that issues common (generic) to all the actions can be litigated in the one case. It is a corollary to that that the decision on these generic issues will apply (that is be binding) on all the litigants. The interests of the pursuer on the generic issues were identical to those of the McManuses. For the purposes of *res judicata*, the interests of the parties in all the cases are taken to be the same.

[37] The second question is whether the issue in *McManus* was litigated on substantially the same grounds as the pursuer's case. In *RG* v *Glasgow City Council* it was said (LP (Carloway) at para [27]) that:

> "… in relation to the *media concludendi*, excessive concentration on the precise nature of the remedies sought in each action should be avoided in favour of a simple inquiry into 'What was litigated and what was decided?' (*Grahame* v *Secretary of State for Scotland* at 387)."

The *media concludendi* are the grounds of action (Trayner: *Latin Maxims and Phrases*, cited in *Primary Health Care Centres (Broadford)* v *Ravangave* 2009 SLT 673, Lord Hodge at para [23]). The result in *McManus* was the repelling of the McManuses' pleas-in-law that they had suffered injury as a result of the defenders' fault and the sustaining of the defenders' plea that the McManuses' averments were unfounded in fact thus meriting decree of absolvitor from the conclusion for payment of damages. That is exactly the same as in this case. However, as was said in *Primary Health Care Centres* (Lord Hodge at para [23]), citing *Grahame*, there should be less focus on the conclusions and pleas and more on "the essence of the matter … What was litigated and what was decided".

[38] The essence of the McManuses' action was an allegation of professional negligence on the part of the defenders; that being their failure to detect contaminants in the ground upon which the development was to take place. The issues which were set down for proof were, as

specified above, first, what duties did the defenders owe to the occupiers and, secondly, did the defenders breach any of those duties. The Lord Ordinary determined that the defenders did owe certain duties to the occupiers, notably to use the appropriate skill and competence of environmental engineers, but that they had not breached their duty. They had acted in accordance with the common and accepted practice at the time. That was what was litigated and determined. The pursuer is trying to re-litigate that issue; that she cannot do as it is *res judicata*.

[39] The manner in which the pursuer seeks to circumvent the plea is to make additional averments about particular solvents which should have been looked for and how they might have been dealt with. These issues were all canvassed in *McManus* and dealt with by the Lord Ordinary. Adding additional detail to the pursuer's pleadings does not change the essence of what was litigated; the grounds of action remain the same, *viz*. whether the defenders were professionally negligent when carrying out their investigations and making appropriate recommendations.

[40] For these reasons, the defenders' plea of *res judicata* ought to have been sustained. The consequence of this is absolvitor since the plea is a peremptory one (see *McPhee* v *Heatherwick* 1977 SLT (Sh Ct) 46, Sheriff Macphail at 48, citing, *inter alia*, *Forrest* v *Dunlop* (1875) 3 R 15). The reclaiming motion will be allowed accordingly and the Lord Ordinary's interlocutor of 23 January 2024 recalled.

[41] The court is concerned about the Lord Ordinary's decision to put the case out By Order for the purpose of being addressed on, *inter alia*, whether the averments which were unique to this action had already been dealt with in *McManus*. That was an issue which must have been central to any consideration of the *res judicata* plea. The Lord Ordinary ought to have been addressed upon this in the submissions on the Procedure Roll. He ought to have been able to

determine it without the need for a further hearing. It ought simply to have been a question of comparing the closed records. By Orders following a debate or proof ought to be relatively rare events; they have the potential to add further unnecessary procedure and expense. Parties ought to have addressed all reasonably likely outcomes following the evidence and/or submissions. The Lord Ordinary ought to have dealt with all the issues arising; if necessary having sought further submissions, preferably in writing, in the event of an issue unexpectedly arising at *avizandum*.

[42] In light of this decision, it is not necessary to address any issues of relevancy.

Abuse of Process

[43] The sudden advent of "abuse of process" as a stand-alone concept in Court of Session procedure, as distinct from being a ground of action, was described in *Friel* v *Brown* 2020 SC 273 (LP (Carloway), delivering the Opinion of the Court, at [17]) under reference to *Tonner* v *Reiach and Hall* 2008 SC 1. It is not now disputed that the court does have a power to dismiss an action summarily, but it is a draconian one which should be regarded as a last resort (*Grubb* v *Finlay* 2018 SLT 463 LP (Carloway), delivering the Opinion of the Court, at para [34] citing *Tonner*, Lord Abernethy, delivering the Opinion of the Court, at para [123]). In *Grubb* it was said that its use as a last resort applied particularly in a situation where decree is not sought under reference to a particular plea. In this case, the bases for arguing "abuse of process" were broadly the same as for the plea of *res judicata*. The system allows for the proper tabling and determination of such a plea, usually at the Procedure Roll stage, without a last resort. Abuse of process is much more of a term of art under English striking out procedure. It is certainly used in situations in which a claimant seeks to avoid the consequences of generic issue determinations

(eg *Ashmore* v *British Coal Corp* [1990] 2 QB 338). This procedure differs from that in the Court of Session.

[44] It is at least interesting that in Greens Encyclopaedia the title *Abuse of Civil Process*, (Blades (later Lord Blades)) is a reference to a cause of action. It begins (Vol I para 51) by quoting from *McGregor* v *McLaughlin* (1905) 8 F 70 (LP (Dunedin) at 74) whereby:

> "Everyone is perfectly entitled to have recourse to the forms of process, and the mere fact that in the end his action turns out to be wrong will not subject him to a claim for damages without the averment of something further".

[45] In this case, the pursuer had sued the defenders, but she lost on the generic issues in *McManus*. The defenders sought to categorise her attempt to revive her action as an abuse of process, but they did not advance any basis for this other than that they maintained (successfully as it turns out) that they have a good plea of *res judicata*. It is not necessary to determine this issue, since the plea has been disposed of in the defenders' favour. Suffice it to say that an action, which fails because a plea of *res judicata* is sustained, is not, *per se*, an abuse of process.

Disposal

[46] The court will allow the reclaiming motion, recall the interlocutor of 23 January 2024, sustain the defenders' plea of *res judicata* and grant decree of absolivitor.