FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 10
A473/13

Lord President
Lord Brodie
Lord Glennie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

SAJJAD SOOFI and RUMELLA SOOFI

Pursuers and Reclaimers

against

JEFFREY MARTIN DYKES

Defender and Respondent

Pursuers and Reclaimers: parties
Defender and Respondent: Richardson QC; CMS Cameron McKenna Nabarro Olswang LLP

28 February 2020

Introduction

[1] The pursuers, who are assignees of Bonafied Enterprises International Ltd (in administration), have reclaimed the Lord Ordinary's interlocutor of 2 August 2019 assoilzing the defender in respect of the pursuers' claim against him for professional negligence. The claim related to his role as solicitor to BEI, in which the first pursuer was a director and principal shareholder, in advising on BEI's purchase of a petrol station. The

reclaiming motion is a sequel to the previous decision of this court on the relevancy of that claim dated 22 June 2017 ([2017] CSIH 40).

[2] The pursuers averred that the defender was in breach of contract and/or duty to BEI in failing to advise BEI on the desirability of securing from the seller a warranty of the accuracy and completeness of the financial information provided by the seller. As a result, the value of the business had been overestimated by BEI to the extent of £385,000. If, it was said, the defender had exercised the requisite skill and care, he would have advised BEI to secure such a warranty. The seller would have agreed, in which case BEI would have been able to recover their loss from the seller because the warranty would have been breached; the information being inaccurate. Alternatively, if the warranty had not been forthcoming, BEI would not have proceeded with the purchase. The averment that the financial information, which had been annexed to a valuation report, was inaccurate was principally founded on the difference between the turnover figures in 1½ years of accounts which had been provided to BEI's valuer and the total annual output in the seller's VAT returns.

[3] On each issue of liability, causation and loss, the Lord Ordinary found for the defender. His reasoning was based principally on his preference for the testimony of the defender, contemporaneous documents generated by him, and the evidence of his expert solicitor, namely Donald Reid. In particular, at a meeting on 22 August 2008, concerning the terms of the missives, as variously adjusted, the Lord Ordinary held that the defender had properly advised the first pursuer as a director of BEI. The defender had been meticulous in explaining all of the changes introduced by the seller's proposed missive. One of these changes had been to delete a term that the seller was to make available all business records as were reasonably necessary to determine the value of goodwill and another was to incorporate a term that the missives constituted the entire agreement, superseded all

warranties and representations and that neither party had acted on the basis of any such warranties or representations. The Lord Ordinary held that, if BEI had asked the seller to warrant the financial information, she would not have agreed to do so, given the advice which her solicitor would have tendered. BEI would have proceeded with the transaction in any event. The financial information, which had been provided by the seller, had not been proved to be inaccurate. It was more likely that the VAT returns had been wrong.

[4] In this reclaiming motion, the pursuers contended in their grounds of appeal, first, that the Lord Ordinary had erred in failing to accept the evidence of their expert accountant that "the only plausible reason" for the discrepancy between the accounts produced by the sellers and the annual turnover in the VAT returns was "non-vatable" goods. It was said that the seller had accepted that her accounts had been "false". However, the Lord Ordinary was entitled to accept the seller's evidence that it was more likely that the figure in the VAT returns, which she had completed personally, was wrong since the accounts had been professionally prepared. It made no sense, in terms of payment of income tax, to overstate turnover and profit in the accounts.

[5] The second ground of appeal was that the Lord Ordinary erred in failing to attach appropriate weight to the view of the pursuers' expert valuer, who had said that false accounts would have a detrimental effect on goodwill. This view is obvious, but it had no bearing on the Lord Ordinary's decision, since he was not satisfied that the accounts were false.

[6] Thirdly, the pursuers founded upon an error by the defender's counsel in asserting wrongly to the Lord Ordinary in his closing submission that a particular part of the missives had been ticked by the defender when it had not been. This had no impact on the Lord Ordinary, whose reasoning on what the defender had explained to the first pursuer at the

meeting of 22 August 2008 is clear, convincing and based upon a full assessment of all the evidence of what occurred at that meeting, including the contemporaneous documents, such as the defender's file notes and annotations on the minutes.

[7] The fourth ground complained that the Lord Ordinary failed to give appropriate weight to the testimony of their expert on solicitors' practice, namely Prof Leo Martin, who had said in his report that the defender had been negligent. The defender's expert, Mr Reid, had not even produced a report. The Lord Ordinary considered the testimony of both experts carefully and explained why he concluded that professional negligence had not been made out. Prof Martin accepted that, if the import of the contractual changes had been explained to the first pursuer, the claim effectively disappeared. Mr Reid was preferred, where necessary, on account of his greater familiarity with the defender's files.

[8] Although it was not raised in the grounds of appeal, and therefore technically does not require to be determined, in their Note of Argument the pursuers raised an issue concerning whether an email from the defender to the first pursuer, possibly dated 29 August and stating that he had been advised of the meaning of the entire agreement clause, had been put to him in cross-examination. The suggestion was that this email had been fabricated in order to assist the defender's case. The basis for that allegation was that the first pursuer had never communicated with the defender by email and that therefore a true email to that effect could never have existed.

[9] The existence of such an email is not referred to anywhere in the opinion of the Lord Ordinary, as might have been expected if, as is alleged, it had some significance to the case. The pursuers have not produced any transcript of the audio recording of the cross-examination, which would have revealed whether or not such an email had been put to the first pursuer in cross-examination. The principal copy of the defender's file, which

presumably contained the email and which formed 7/7 of process, each page of which was, it was said, numbered for court purposes, was not produced in the reclaiming motion. This was despite the file having been borrowed out of process by the pursuers' original solicitors, who had withdrawn from acting prior to the proof, a few days after the proof and had not been returned to court. The existence of such an email would have been reasonably easily verifiable, but it has not been. Even if this matter had been in the grounds of appeal, the court is not satisfied that the email alleged to have been put to the first pursuer ever existed.

[10] The Lord Ordinary's findings in fact in relation to the meeting on 22 August, particularly on the credibility and reliability of the first pursuer and the defender about what had occurred, and Mr Reid's assessment of the defender's files, cannot reasonably be challenged. The Lord Ordinary found that the contemporaneous documents supported the defender whereby, in a meeting which lasted 1 hour and 40 minutes, he had explained the seller's proposed changes to the missives, paragraph by paragraph. The pursuers' own expert witness's view had fallen short of the test for a successful claim for professional negligence. That expert conceded that if, as the defender had suggested, he had discussed the relevant clauses with the first pursuer, the issue came to be one of what had then been instructed. That is sufficient to dispose of the question of liability and the reclaiming motion must accordingly fail.

[11] The court has not heard any submissions which would persuade it that the Lord Ordinary was plainly wrong in finding in fact that: including a warranty in these circumstances was not a course which any solicitor of ordinary skill would have taken; the seller would not have agreed to the warranty and that BEI would have gone ahead without one in any event. Even if that were wrong, there is no basis for concluding that the Lord

Ordinary erred in finding that the pursuers had failed to prove the necessary facts to establish either causation or loss.