OUTER HOUSE, COURT OF SESSION

[2020] CSOH 3

PD2787/14 & PD836/14

OPINION OF LORD TYRE

In the cause

AB

Pursuer

against

TRANSFORM MEDICAL GROUP (CS) LIMITED

Defender

and

TRAVELERS INSURANCE COMPANY LIMITED

Minuter

and in the cause

CD

Pursuer

against

TRANSFORM MEDICAL GROUP (CS) LIMITED

Defender

and

TRAVELERS INSURANCE COMPANY LIMITED

Minuter

Pursuer: Smith QC; Thompsons
Defender: No appearance
Minuter: Dunlop QC, Welsh; Clyde & Co (Scotland) LLP

9 January 2020

Introduction

[1] These are two of a large number of actions for damages in which the pursuers are women who underwent breast augmentation surgery carried out by surgeons engaged by the defender ("Transform"), a cosmetic surgery business. The implant devices used were PIP implants manufactured by a French manufacturer which is now insolvent. The pursuers' claim is for loss, injury and damage said to have been sustained as a consequence of the implants having proved to be defective. The actions are based on breach of contract and breach of statutory duty in terms of the Sale of Goods Act 1979. The same product has been the subject of litigation under a Group Litigation Order ("GLO") in the High Court in London.

[2] Transform went into administration on 30 June 2015. It has not entered appearance in the present action. Between 31 March 2007 and 30 March 2011, Transform carried insurance against third party liability under policies issued by the minuter ("Travelers"). In terms of the Third Parties (Rights against Insurers) Act 1930 ("the 1930 Act", which because of the dates when these claims arose is the applicable legislation), Transform's rights against Travelers under its contract of insurance are transferred to the pursuers as third parties to whom liability has been incurred. Relying on the 1930 Act, the pursuers seek payment of damages by Travelers, which has entered the processes to defend the claims.

[3] Prior to Transform entering administration, a dispute had arisen between it and Travelers regarding the extent to which claims by breast implant patients, especially those in England where the group litigation was under way, were covered by Travelers' policies. Transform had instituted a claim, known in England as a Part 20 claim, under what in Scotland would be third party notice procedure, for indemnity by Travelers in respect of its liability to claimants. That dispute was due to go to trial on 21 April 2015, but on

15 April 2015 it was settled by a Settlement Agreement between Transform and Travelers. The Settlement Agreement bore to resolve the coverage dispute not only in relation to the GLO claimants but also in relation to claims made against Transform in Scotland by women who were not in the English group litigation. In summary, the agreement divided claimants into categories: in respect of one category Transform would be indemnified in full; in respect of another category it would be indemnified to the extent of 52% of its liability; in respect of other categories no indemnity would be provided.

[4] The pursuers in the present actions contend that the Settlement Agreement is not applicable to their claims because it was not entered into in good faith. They aver that, having regard in particular to the fact that it was entered into at a time when it was likely that Transform would enter administration, the Settlement Agreement was reached with the intention of defeating the pursuers' claims in whole or in part. A preliminary proof was held to address this issue.

[5] Evidence in the form of a witness statement and oral testimony was given at the preliminary proof by Mr Douglas Keating, a senior technical claims specialist for Travelers who had been involved in the day to day handling of the PIP product liability claims against Transform, the coverage dispute between Transform and Travelers, and the negotiations to settle the coverage dispute which led to the Settlement Agreement. I accept Mr Keating's evidence as credible and reliable.

Background: the English litigation

[6] The English GLO was made in April 2012. From October 2012 the cases were managed by Thirlwall J (as she then was). About 1,000 claimants joined the GLO; of those, 623 had claims against Transform. In August 2013, Thirlwall J gave directions for trial

of certain preliminary issues in four sample cases, which were expected to (and eventually did) lead to resolution of the whole litigation. Of the 623 claims against Transform, 197 were settled in June 2015 by Travelers, in the light of expert evidence received in April 2014 which was described by Thirlwall LJ, as she had by then become, in a judgment at [2017] EWHC 287 (QB) as "overwhelmingly likely to lead to a finding that the implants were not of satisfactory quality".

[7] The remaining 426 claims were not met by Travelers. Some arose during the period of cover but were not covered by the policy terms: those were cases, referred to by the parties to the English proceedings as the "worried well", where claimants were concerned about their implants but where there had been no rupture. Other claims fell outside the period of cover. Judgment was entered in all claims by March 2016, by which time Transform was in administration.

[8] In the course of the English proceedings, the claimants' advisers began to have concerns that Transform was in financial difficulty and might not be able to meet the claims. They asked repeatedly for confirmation that Transform had adequate insurance to cover the claims, but received no substantive response. By a judgment issued on 22 November 2013 ([2013] EWHC 3643 (QB)), Thirlwall J made an order, in exercise of her case management powers, directing Transform to provide a witness statement setting out whether it had insurance adequate to fund its participation in the litigation. In December 2013, Transform's chief executive provided a witness statement which satisfied Thirlwall J that Transform had confirmed that it had insurance adequate to fund its participation in the litigation. That did not, however, mean that it was insured in respect of all the claims. Only in April 2014, after the expert evidence referred to above had been obtained, did Transform and Travelers reveal to the claimants' solicitors that Transform had no insurance for claims outside the

period between March 2007 and March 2011, and that they were agreed that cover did not extend to claims by the "worried well". On 24 February 2017, in the judgment to which I have already referred, Thirlwall LJ made an order that Travelers pay the costs of the uninsured claimants in their successful claims against Transform. That order was upheld on appeal ([2018] EWCA Civ 1099), but was reversed by the Supreme Court ([2019] UKSC 48).

The dispute between Transform and Travelers regarding cover

[9] Mr Keating explained that it had been appreciated from the outset of his involvement in the PIP litigation in 2012 that there could be a large number of uninsured claims. The policies were written on an occurrence basis, ie the trigger for cover was when a claimant suffered injury caused by the product. It was also apparent to both Transform and Travelers that there might be questions in individual cases as to whether a claimant had suffered an "injury" such that her claim was covered. By May 2013, Travelers had sufficient information from the claimants to allow them to embark on a process of analysis. At this time, although a single firm of solicitors (BLM) were acting on a joint retainer for Transform and Travelers in relation to the GLO proceedings, Travelers were separately represented, by DWF Solicitors, and by specialist counsel, in the coverage dispute.

[10] DWF produced a schedule dividing claimants into the following categories:

- Category 1: claimants who appeared arguably to have suffered injury within the policy period. These were subdivided into three categories reflecting the perceived strength of the claim: Category 1A (probably covered), Category 1B (possibly covered), and Category 1C (unlikely to be covered);
- Category 2: claimants who appeared not to have suffered injury (not covered); and

- Category 3: claimants who had suffered any injury outside the policy period (not covered).

[11] One of the contentious issues as between Transform and Travelers was whether claimants whose implants had ruptured but who had not suffered physical injury as a consequence were covered. This issue was resolved in 2015 following receipt of an expert report by a consultant pathologist, and a small number of claims were reallocated to Categories 1A and 1B. Parties then sought to move forward to resolution of the insurance dispute. A document entitled "Parameters for Settlement" drafted by Transform's senior counsel was sent to Travelers in late March/early April 2015. The main issue remaining at this point was the "latency" issue, ie how many months to count back from the development of symptoms in order to determine when the claimant suffered injury. A compromise figure was eventually agreed. A three day settlement meeting was arranged which led to an agreement that was embodied in a revised schedule of claimants. A draft settlement agreement was prepared by Travelers' counsel and circulated on 9 April, some 12 days before the dispute was due to go to trial. Settlement was achieved on 15 April 2015. A finalised version of the Settlement Agreement was agreed, as was a draft court order and a letter to the judge.

[12] By way of comparison with the schedule produced by DWF in 2013, claimants were categorised for the purposes of the Settlement Agreement as follows:

Category	**DWF**	**Settlement**
1A	51	133
1B	178	106
1C	64	26
2	173	194
3	208	214

The 52% payable in respect of claimants in Category 1B was a compromise figure arrived at after negotiation.

The Settlement Agreement

[13] The Settlement Agreement began with a number of recitals. Recital 3, which applied directly to the Scottish claims, is narrated below.

[14] Recital 4 stated as follows:

> "4. The settlement reached between Transform and Travelers has been reached after lengthy and detailed negotiations. It is a settlement reached in good faith and is a commercial settlement that takes into account the various risks (including legal, factual and commercial risks) inherent in the Transform Claim. For the purposes of this settlement, therefore, agreement has been reached as to how the Policies respond to Transform's potential liabilities to the various claimants."

[15] Recital 5 recorded the position agreed between Transform and Travelers in relation to three particular categories of claims, referred to as "Rupture Alone and No Symptoms"; "Claims outside Period of Insurance"; and "The 'count back'/'count forward' period". At the beginning of this recital, a footnote stated that

> "What is put forward below is a compromise position in which phrases such as 'It is accepted that' signify that such acceptance is not unconditional, but merely a position adopted for the purposes of achieving the best possible overall settlement".

[16] Recital 6 narrated the agreement of categorisation of claimants' claims as Category 1A, 1B, 1C, 2 and 3. Assessment of whether a claim fell within Category 1A, 1B or 1C was based upon the symptoms reported by that particular claimant. Lists of GLO claimants falling into each category were annexed to the Settlement Agreement.

[17] Clauses 1 and 2 of the Settlement Agreement itself provided as follows:

> "1. In full and final settlement of the Transform Claim, and in consideration of the compromise thereof, Transform and Travelers agree that Transform shall discontinue the Transform claim (with no order as to costs) and agree to the following terms:
>
> 2. In relation to the above categories of claimants' claims:

(1) Category 1A: Travelers shall…
   a. indemnify Transform in respect of all sums Transform is held liable to pay in respect of damages and interest to the claimants in this category, if such liability is established;
   b. indemnify Transform in respect of its legal liability for each claimant's costs in the GLO insofar as such claimant is listed in this category and such liability for costs is established;

(2) Category 1B: Travelers shall…
   a. indemnify Transform in respect of 52% of all sums Transform is held liable to pay in respect of damages and interest to the claimants in this category, if such liability is established;
   b. indemnify Transform in respect of 52% of its legal liability for each claimant's costs in the GLO insofar as such claimant is listed in this category and such liability for costs is established;

(3) Category 1C: no indemnity shall be provided in respect of Transform's liability to the claimants listed in this category, whether in respect of damages, interest or such Claimants' costs;

(4) Category 2: no indemnity shall be provided in respect of Transform's liability to the claimants listed in this category, whether in respect of damages, interest or such Claimants' costs;

(5) Category 3: no indemnity shall be provided in respect of Transform's liability to the claimants listed in this category, whether in respect of damages, interest or such Claimants' costs."

The Scottish claims

[18] Although the action in London did not include the claims by Scottish claimants, there was a desire by both parties that these be covered by the Settlement Agreement. On 11 April 2015, Travelers' counsel sent an email to Transform's counsel stating that Mr Keating had completed his review of *inter alia* "the Scottish claims", and asking that these be reviewed over the weekend. On 13 April 2015, Transform's company secretary, Mr Jeremy Rouch, asked Mr Keating whether it was possible to agree a categorisation of the Scottish claimants, on the same basis as the English claimants. Thereafter the Scottish schedules went back and forward between Mr Keating and Mr Rouch until 16 June 2015,

when Mr Rouch agreed the final classification. There were however some errors and one claimant had been missed off the list. The schedule was finally agreed on 26 June 2015. In terms thereof, the pursuer AB is classified as Category 1A, and the pursuer CD is classified as Category 1B. Among the claims currently before this court, there are other pursuers falling within Category 1A or 1B, and also some who would not be indemnified at all by Travelers under the categorisation agreed between Transform and Travelers.

[19] Recital 3 to the Settlement Agreement stated as follows:

> "Various claims are also made against Transform by claimants in Scotland, who are not part of the GLO, and possibly by further claimants… The settlement between Transform and Travelers is intended to and does (to the extent set out below) address all claims against Transform made by all claimants in relation to PIP breast implants."

[20] Clauses 16 and 17 of the Settlement Agreement provided:

> "16. To the following extent, the terms of this Settlement Agreement shall also apply to Transform's liability (if any) to all claimants who bring claims outside the GLO. These 'non-GLO' claims may be categorised as: (1) the Scottish claims; (2) the credit card claims; (3) and as-yet unknown and un-notified claims which may be brought by other as-yet unknown claimants.
>
> 17. Travelers' liability to provide indemnity in respect of Transform's liability (if any) to these non-GLO claimants is to be settled on the following terms:
>
> (1) Transform and Travelers will make all reasonable efforts to categorise the non-GLO claims within the categories 1A, 1B, 1C, 2 and/or 3 above.
>
> (2) Such categorisation shall be concluded (in relation to known claims where there is sufficient information) within 14 working days of the date of this Settlement Agreement.
>
> (3) The terms of this Settlement Agreement shall then be applicable to those non-GLO claims, according to their categorisation, and mutatis mutandis in relation to assignments of Transform's rights to such non-GLO claimants and to Travelers."

[21] The categorisation of the Scottish claims was not in fact completed within 14 working days after the date of the Settlement Agreement, but nothing turns on this. Categorisation was completed and agreement reached before Transform went into administration. It is a

matter of agreement that those representing the pursuers in the Scottish actions were not party to any discussions or negotiations between Transform and Travelers.

Transform's financial position

[22] At the time of the 2013 hearing in relation to Transform's insurance cover, the claimants lodged a report by a forensic accountant which concluded that the consolidated balance sheet of Transform's parent company showed that it was technically insolvent; that Transform had guaranteed a loan to the parent in respect of which £8 million was due for repayment in May 2015; and that Transform in isolation currently had net assets of £8 million but was making annual trading losses. Mr Keating accepted that Travelers had been aware of the terms of this report, which was described by Thirlwall LJ in 2017 as having made plain that Transform's financial position was "precarious".

[23] Mr Keating denied, however, that he was aware during the settlement negotiations that Transform was on the verge of administration. He had been advised by Mr Rouch that the company was profitable and basically stable. He understood that Transform wished to deal with its responsibilities to its patients, and recalled seeing a news item at some point concerning a possible takeover of Transform. He was aware of the risk that Transform would cease to trade, but his personal expectation was that its business would be restructured. Although there were indications during June 2015 that administration was on the cards, Mr Keating did not know for sure until after it happened. He denied that Travelers had taken advantage of Transform's financial position to obtain a more favourable settlement of the coverage dispute.

[24] Immediately following its entry into administration, Transform's business and assets were sold by the administrator via a "pre-pack" sale to a subsidiary of the company's

secured creditor. The purchaser agreed to honour all existing arrangements with patients to ensure a seamless transition of care in line with Transform's practice. It was, however, noted in the administrator's statement of proposals that Transform did not have sufficient resources to continue to meet ongoing legal costs of the GLO, or to meet awards made against it in so far as not covered by its Travelers policy.

The pursuers' rights under the 1930 Act

[25] Section 1(1) of the 1930 Act, read short, provides as follows:

> "Where, under any contract of insurance a person… is insured against liabilities to third parties which he may incur, then –
> …
> (b) in the case of the insured being a company, in the event of… the company entering administration;
> …
> if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall… be transferred to and vest in the third party to whom the liability was so incurred."

Section 1(3) states that any provision in a contract of insurance that purports to avoid the contract or alter the parties' rights on the occurrence of *inter alia* the company's administration is of no effect.

[26] Section 3 of the 1930 Act, again read short, provides

> "Where… in the case of the insured being a company, …an administration order has been made… with respect to the company, no agreement made between the insurer and the insured after liability has been incurred to a third party and after… the day of the making of the administration order,… shall be effective to defeat or affect the rights transferred to the third party under this Act, but those rights shall be the same as if no such agreement… had been made."

The Act has nothing to say, however, about an agreement made between the insurer and the insured after liability has been incurred to a third party but *before* the day of the making of the administration order.

Argument for the pursuers

[27] On behalf of the pursuers it was submitted that the Settlement Agreement had been entered into by Transform and Travelers in bad faith, for the purpose of defeating or reducing claims that Travelers would otherwise have had to meet. Bearing in mind its impending insolvency, Transform had entered into the agreement in circumstances in which there was no benefit to it in so doing. It must have been apparent to Transform at the time of the Settlement Agreement that it was on the verge of insolvency: the pre-pack sale to the secured creditor must have been under negotiation at the same time as the Settlement Agreement. The Settlement Agreement contained no consideration in exchange for reducing the level of indemnity provided by Travelers. Only Travelers gained from it, to the prejudice of the pursuers. The parties knew that Transform was entering into a transaction for no consideration which the GLO claimants might challenge under section 423 of the Insolvency Act 1986, but which Scottish pursuers could not challenge because that section does not apply to Scotland.

[28] In these circumstances, the court was invited to infer collusion between Transform and Travelers in entering into the Settlement Agreement with the purpose of prejudicing claims by the pursuers. Reference was made to dicta of Slade LJ in *Normid Housing Association Ltd* v *Ralphs* [1989] 1 Lloyds Rep 265, suggesting that an agreement entered into by an insurer and an insured might be challengeable if entered into in bad faith or collusively, with the intention of injuring a third party. Although the 1930 Act provided no statutory basis for such a challenge, it was founded in common law. The court in Scotland had power, in exercise of its supervisory role, to decline to give effect to an agreement which, had English law been applicable, would have been set aside under section 423 as a transaction defrauding creditors. Reference was made by way of analogy to *The Farmers'*

Mart Ltd v *Milne* 1914 SC(HL) 84, Lord Dunedin at 86, and also to *Shaw* v *Groom* [1970] 2 QB 504, Harman LJ at 516-517.

[29] There was obvious prejudice arising from the Settlement Agreement to the Scottish pursuers as a category. Those who were not allocated to Category 1A were deprived by the agreement of any entitlement to rank as ordinary creditors of Transform, and also of any opportunity to exercise their rights under the 1930 Act against Travelers. Any benefit to Transform's creditors was not equivalent to benefit to Transform. It could not be right that a claimant's rights could be negotiated away in this manner. In all the circumstances the court should hold that the Settlement Agreement was not binding upon and did not affect the statutory assignation rights of any of the Scottish pursuers.

Argument for Travelers

[30] On behalf of Travelers it was submitted that the pursuers had failed to establish any basis upon which the Settlement Agreement could be challenged. So far as bad faith or collusion was concerned, nothing had been either pled or proved in evidence to justify an inference of fraudulent conduct. The obiter dictum of Slade LJ in the *Normid* case went no further than suggesting that relief might be available in certain circumstances; the context in any event was an application for interlocutory relief, not the setting aside of a contract. In any event the hurdle was a high one: the conduct complained of would have to amount to corrupt or fraudulent conduct before the court might intervene. Nothing of that kind had been pled or proved here. No authority had been produced to vouch the existence of a common law power to set aside agreements entered into before the date of entering administration.

[31] The principle of *assignatus utitur jure auctoris* applied: the pursuers' position was no better than that of their statutory assignee, ie Transform. No legal basis had been identified which would have allowed Transform, having entered into the Settlement Agreement, to set it aside on the basis that it was collusive. Bad faith was not *per se* a relevant ground of challenge.

[32] It was not the case that Transform had obtained no benefit from the Settlement Agreement. The agreement had been negotiated by parties at arm's length, separately represented by independent and competent advisers. Transform was relieved of the need to go to trial in hundreds of cases on the coverage issue. It had real concerns about the extent of its cover, and obtained the benefit of certainty. In the course of the negotiations a significant number of claims were moved into Category 1A, and the aggregate number of claims in Category 1A and 1B also increased.

[33] Nor did the fact that Transform had entered administration shortly thereafter make the Settlement Agreement collusive or in bad faith. The agreement was effectively arrived at in April 2015; Transform did not enter administration until late June. There was subsisting value in the Transform brand which made it desirable to achieve a settlement of the coverage dispute. The supervening administration did not convert what was plainly a good commercial deal into one that no reasonable company in Transform's situation would have acceded to.

Decision

[34] As the pursuers' argument is founded to a large extent upon the judgments of the Court of Appeal in *Normid*, it is appropriate to begin with a discussion of that case. The plaintiffs were a housing association which had made claims amounting to

around £5.7 million against a firm of architects for alleged professional negligence. The defendants informed the plaintiffs that their insurers (Generali) had offered to pay £250,000 in full and final settlement of Generali's liability under an insurance policy, and that the defendants were minded to accept this offer. The plaintiffs sought and obtained an injunction to restrain the defendants from entering into the proposed settlement agreement with Generali. On appeal, the Court of Appeal discharged the injunction. Delivering the leading judgment, Slade LJ noted that the plaintiff's claim depended on contract and not on tort. But he found that there was no evidence that the architects had been under any contractual obligation, or any statutory or professional duty, to effect professional liability insurance. It was a matter for them to decide whether or not to take out insurance and, if so, in what form and for how much cover. Likewise, they were under no duty to the plaintiffs to deal with the policies in any particular way, and were free to deal with their rights under them as they saw fit. There was accordingly no arguable cause of action.

[35] In the course of his judgment, Slade LJ made the following observations (page 272):

> "The plaintiffs' claim cannot be based on the 1930 Act. While the statement of claim suggests that the threatened acceptance of Generali's offer would 'deprive the plaintiffs of their rights under [the 1930 Act] to claim directly against [Generali]' , the plaintiffs at present have no rights whatever under the 1930 Act. As the title to the Act itself indicates, and as section 1 provides, the event of the insured becoming insolvent has first to occur before the Act confers on third parties any rights against insurers of third party risks. Nor is the plaintiffs' claim based on tort. We say nothing about the position if it had been alleged that the proposed settlement would be entered into in bad faith or collusively, with the intention of injuring the plaintiffs. No such allegation is made."

Those observations are clearly obiter, and do not go so far as a positive statement as to what *would* be the position in law if a proposed settlement were to be entered into between insured and insurer in bad faith or collusively, with the intention of injuring a third party.

[36] In a sequel to the above decision, the plaintiffs took up a suggestion from the court that the only procedural relief available to them might be a *Mareva* injunction, ie an

injunction preventing dissipation of assets by a defendant, arguing that the architects' claim against their insurer was an asset which, in terms of the proposed settlement, would be dissipated to the detriment of the plaintiffs. Such an injunction having been granted, the case went back to the Court of Appeal, which again discharged the injunction, on the ground that the plaintiffs had failed to demonstrate that settlement of the claim had not been effected by the architects in the ordinary course of business. Slade LJ, who was again a member of the court, observed (page 278):

> "If in the present case the evidence had shown that the proposed settlement was so disadvantageous to the architects that no reasonable person could have believed that it represented the fair value of their claim, the position would have been quite different. This might well have been evidence of bad faith. It might well have constituted evidence of a concerted plan to cheat the plaintiffs. On this basis I think that the court might well have been entitled to intervene by way of *Mareva* relief…"

[37] In the present case, as I understand it, the pursuers rightly accept that no case can be made based upon breach of contract. The difficulty is the same as described by Slade LJ in the first of his judgments in *Normid*: Transform was under no contractual duty to the pursuers to insure against liability for damage caused by the supply of a defective product. The pursuers accordingly had no contractual rights that were capable of being enforced or, alternatively, defeated by the terms of a settlement agreement entered into between Transform and its insurers. As was the case in *Normid*, Transform was free, so far as contractual obligations were concerned, to deal with its rights against its insurers as it saw fit, and in particular was free to enter into a negotiated settlement agreement in terms of which the insurers accepted liability to pay some claims in full or in part, but declined liability for others. No doubt in recognition of this, a submission contained in the pursuers' written note of argument that it was an implied term of Transform's contracts with the pursuers that it would procure effective insurance cover against risks arising from the PIP implant surgery was not insisted upon.

[38] Instead, the pursuers relied on the passages quoted above from *Normid*, contending, firstly, that the Settlement Agreement was entered into collusively and in bad faith with the intention of injuring the pursuers and, secondly, that it was so disadvantageous to Transform that no reasonable person could have believed that it represented the fair value of its claim against Travelers. The legal basis upon which it was asserted that this court could make a finding that the agreement is not binding on the pursuers was not entirely clear. It appeared to be an application of a general principle that the court should not lend itself to the enforcement of a fraudulent transaction. Senior counsel for the pursuers referred at one point to it being a matter of public policy that the court should not lend itself to a circumvention of the pursuers' rights under the 1930 Act.

[39] I do not find it necessary to go so far as to hold that a compromise agreement between an insured person and its insurer could never be challenged by a third party on the ground that it constituted a collusive attempt to defraud the third party of rights under the 1930 Act (or its successor). That would, however, be quite an extreme situation. It is sufficient for the purposes of the present case to say that I am clearly of the view that the facts established by the evidence do not come close to entitling me to draw an inference that Transform and Travelers colluded with one another with a view to defrauding claimants such as the pursuers of rights that they would otherwise have had as statutory assignees under the 1930 Act. My reasons for reaching this conclusion are as follows.

[40] In the first place, I am satisfied that the agreement between Transform and Travelers was one that was entered into between two parties to a commercial dispute who were separately advised and dealing with one another at arm's length, after a lengthy and detailed negotiation. There were undoubtedly genuine issues between them in relation to the matters I have already mentioned: in particular, the rupture without symptoms issue

and the count back/count forward period issue. I accept that there were sound commercial reasons why Transform would wish to achieve a negotiated settlement of such issues: the cost of a trial would be saved; uncertainty regarding the extent of its insurance cover would be removed; and any goodwill attaching to the brand name would be more likely to be preserved. It is readily apparent from the evidence of Mr Keating and from the contemporaneous correspondence to which he spoke in evidence that although Transform and Travelers had a common interest, and a single set of advisers, in relation to defending the GLO claims, they promoted their own individual interests, with the benefit of separate legal advice from solicitors and specialist counsel, in relation to the coverage dispute. The fact that a figure of 52% was agreed in relation to Category 1B cases which might or might not have been held after trial to fall within Travelers' policy cover is indicative of a genuine compromise.

[41] All of the above might have been uncontroversial were it not for the fact that Transform went into administration within a relatively short time after the Settlement Agreement had been concluded. In my opinion this does not demonstrate bad faith, let alone fraudulent conduct, on the part of either Transform or Travelers. By April 2015, negotiations had been ongoing for a considerable period of time. They were brought to a head not by Transform's impending insolvency but by the fact that trial of the coverage dispute in court was about to commence. From Travelers' perspective, Mr Keating was aware of Transform's financial difficulties but not specifically that administration was in imminent contemplation. There was no oral evidence to provide Transform's perspective, but the correspondence contains nothing to suggest that Transform's representatives had anything in mind other than the protection of the interests of Transform and indeed the third parties who were pursuing claims against it.

[42] Nor, in my view, is the position different in relation to the extension of the Settlement Agreement to, *inter alia*, the Scottish claimants. It was entirely understandable that both parties wished to use the vehicle of the Settlement Agreement to resolve the coverage dispute in relation to all extant and unknown claims. I accept that at the time when the agreement became binding upon Transform and Travelers, the exact number and categorisation of the Scottish claims had not been finalised, but the parameters for categorisation were agreed and the claims were, after all, much less numerous than those in the GLO. It does not appear to me to have been at all unreasonable for Transform and Travelers to incorporate those claims into an overall settlement of the coverage dispute, even though exact numbers remained uncertain.

[43] It is true that Scottish claimants whose claims were classified as Category 1C, 2 or 3 were thereby deprived of any opportunity to pursue Travelers as statutory assignees in terms of the 1930 Act, and that claimants whose claims were classified as Category 1B were deprived of the opportunity to pursue Travelers in respect of the whole of their claims. In my opinion, however, the relevant question is not whether individual claimants were deprived of opportunities to exercise rights which *might* otherwise have arisen when Transform entered administration (although it seems clear in respect of claimants in Categories 2 and 3 at least that there never were any rights that could have been the object of a statutory assignation). The question is rather whether the body of Scottish claimants as a whole were prejudiced by the Settlement Agreement. In my opinion they were not. As a body they were in no better position following Transform's entry into administration than Transform had been before then: their claims were a mixture of likely, less likely and very unlikely to succeed, which was after all the backdrop against which the Settlement Agreement was negotiated. It follows that not only am I unpersuaded that the pursuers

have either pled or proved a relevant case of collusion or fraudulent conduct on the part of Transform and/or Travelers, I am also unpersuaded that the entering into of the Settlement Agreement in fact caused any prejudice at all to the body of Scottish claimants.

Disposal

[44] For these reasons I reject the pursuers' submission that I should make an order finding that the Settlement Agreement is not binding in respect of their actions against Transform or any claims by them against Travelers under the 1930 Act. These being personal injuries actions, there are no pleas in law to sustain or repel, but it may be that it would be appropriate to give effect to my decision by excluding averments from probation. I shall put the cases out by order to discuss this in the context of further procedure. Questions of expenses are reserved.