OUTER HOUSE, COURT OF SESSION

[2024] CSOH 100

A99/21

OPINION OF LORD SANDISON

In the cause

HAYLEY DARKNELL-KING

Pursuer

against

(FIRST) SLATER AND GORDON UK LIMITED; (SECOND) GRAEME MIDDLETON; (THIRD) SLATER & GORDON (UK) 2 LLP; (FOURTH) SLATER AND GORDON SCOTLAND LIMITED, and (FIFTH) ALASDAIR STUART COCHRAN

Defenders

Pursuer: Bowen, KC; Lindsays LLP
Second Defender: No appearance
Third, Fourth and Fifth Defenders: J Brown; Kennedys Law LLP

8 November 2024

Introduction

[1] In this action for professional negligence, the pursuer sues senior counsel and various solicitors for loss she says that she suffered in consequence of their alleged failure to deal properly with a personal injury claim she maintains that she had against her former employers. The case against one of those sets of solicitors, the first defender, was abandoned at a previous point in the course of the action. The remaining solicitor defenders (who are jointly represented) now seek dismissal of the action against them on a variety of grounds, and the action called before me for a discussion on the procedure roll of their plea to the

relevancy and specification of the pursuer's case. The second defender (counsel who advised the pursuer in connection with her personal injury claim) did not seek to insist on any preliminary plea at debate, and with the leave of the court did not participate in the discussion.

Background

[2] It will be helpful to begin by setting out the pursuer's case in general terms. She was formerly a police constable serving with South Wales Police. She claims to have suffered serious personal injuries on 14 June 2013 after having been sent, in the course of her police service, to undertake a diving course at Dunoon run by Professional Diving Academy Limited ("PDAL"). She also claims that another diving course run by PDAL and on which she was similarly sent in January 2014 further contributed to her injuries, and that as a result of those injuries she retired from police service in February 2017. The pursuer maintains that her diving training had originally been scheduled to take place at a police diving school in Newcastle, but that that school closed shortly beforehand and that South Wales Police sourced PDAL as an alternative on the internet, without checking its suitability and operating practices.

[3] In consequence of a referral of the pursuer by the Police Federation of England and Wales, in circumstances later to be examined, on 2 July 2015 a letter was sent to her at her home in Wales. It was sent by "Stuart Cochran, Practice Group Leader, Slater and Gordon" and called itself a "Personal Injury Letter of Engagement". It began:

> "Welcome to Slater and Gordon. Thank you for your instructions to act on your behalf. This letter, together with the enclosed Terms of Business, sets out the basis on which we propose to work with you and forms the legal basis of our agreement with you … Our website contains lots of information about bringing a personal injury claim which you may find useful."

The relative website address was stated as www.slatergordon.co.uk. Both first person plural and first person singular pronouns were used, apparently indiscriminately, to refer to the sender of the letter. The pursuer was asked to read the letter and enclosed Terms of Business carefully.

[4] The Terms of Business document was headed "Slater + Gordon Lawyers" and stated that it, along with the engagement letter, constituted the contract between the pursuer and Slater and Gordon Lawyers (referred to as "SandG"). It provided that "In these Terms 'SandG' or 'we' shall mean Stuart Cochran associated with the law firm of Slater and Gordon Lawyers OC371153" and that the terms might be updated from time to time on "our website", the address of which was again stated as www.slatergordon.co.uk. The first person plural was used throughout to refer to the proponent of the document. At the foot of each of its eight pages there appeared the legend:

> "A. Stuart Cochran (regulated by the Law Saw [sic] Society in Scotland) associated with Slater & Gordon (UK) LLP a Limited Liability Partnership registered in England and Wales (OC371153). Slater & Gordon (UK) LLP is authorised and regulated by the Solicitors Regulation Authority. Slater & Gordon (UK) LLP is authorised and regulated by the Financial Conduct Authority (FCA) for insurance mediation activity. These terms of business are correct at the time of issue 9 February 2015."

[5] In relation to professional charges, the document stated that various factors affecting the amount to be charged might be taken into account "in accordance with Solicitors' Regulation Authority (SRA) or Law Society of Scotland requirements", and referred to "costs" and "bills of costs" in circumstances where a Scottish solicitor would be likely to refer to "expenses" and an "account of expenses". In addition to referring to certain UK-wide legislation, it mentioned rights that it stated the pursuer as a client had under the Solicitors' (Non-Contentious Business) Remuneration Order 2009 and certain sections of the Solicitors Act 1974, neither of which enactments applies to control the rights of the clients of

a Scottish-regulated solicitor acting as such. A similar reference was made to the Contracts (Rights of Third Parties) Act 1999, which does not apply in Scotland. Mr Cochran was referred to as the "Client Relations and Complaints Partner". The document provided that:

> "We maintain professional indemnity insurance in accordance with the requirements of the Law Society of Scotland. Details of the insurers and territorial coverage are available for inspection at our registered office."

It did not state in terms where that registered office was to be found. Under the heading "Regulation", it stated that "Stuart Cochran associated with Slater and Gordon Lawyers is authorised and regulated by the Law Society of Scotland." Finally, it was stipulated under the heading "Governing Law and Jurisdiction" that:

> "These Terms and any dispute between us shall be governed by, and construed in accordance with, the laws of Scotland and shall be subject to the exclusive jurisdiction of the Scottish courts."

[6] The LLP with the registered number OC371153 is the third defender (known in 2015 as Slater & Gordon (UK) LLP). The pursuer maintains that the fifth defender, Mr Cochran, was the sole principal in an entity known as Russell Jones & Walker and then as Slater & Gordon Lawyers from March 2005 to February 2019. She claims that, on a proper construction of the documentation sent to her in July 2015, she contracted with both of the third and fifth defenders acting together.

[7] The case against the fourth defender as stated by the pursuer rests on the fact that in April 2019 it sent a cheque for about £13,000 to English solicitors who had advised her at an earlier stage in respect of a bill of costs incurred by that firm while it was acting for her. The pursuer claims that as a result of that payment on the pursuer's behalf the fourth defender assumed responsibility for, and thus became (seemingly an additional) party to, the existing retainer between her and the third and fifth defenders.

[8] The pursuer avers that at a telephone consultation with counsel and her solicitors (in practical terms, Mr Cochran) which took place on 20 April 2016, counsel advised that the proposed action would best be directed against PDAL, and that a claim against South Wales Police would be difficult and would have prospects of success of less than 50%. Her solicitors are said to have advised that no recommendation could be made to the Police Federation that it should fund a claim against South Wales Police. The pursuer maintains that she stated in consultation that she wanted to pursue a claim against South Wales Police but that, having been told that she would in all probability have to fund any such case herself, she had no choice but to accept that PDAL would be the only entity to be sued in connection with her injuries, even though she did not understand why.

[9] On 10 May 2016 an action was duly raised in this court on behalf of the pursuer against PDAL, seeking damages of £500,000 plus interest in respect of loss, injury and damage said to have been caused by PDAL's negligence at common law and its breach of the Diving at Work Regulations 1997. The action was defended. The pursuer claims that in late 2017 she was advised that her solicitors had been informed that PDAL's liability insurers had declined to indemnify it in respect of her claim. She claims that on 4 June 2018 she was advised that PDAL was effectively insolvent and that an offer of £5,000 had been made in full and final settlement of her claim, which offer she rejected. A subsequent improved offer of £50,000 was made on 7 June 2018, which the pursuer was advised to, and did, accept. Any cause of action which she might have had against South Wales Police had prescribed, by her reckoning, at the earliest on or about 16 June 2016 or at the latest on or about 30 January 2017.

[10] The pursuer maintains that she did in fact have a viable cause of action against South Wales Police, which she claims owed her a non-delegable duty to take reasonable care for

her safety in the course of her employment, and to avoid exposing her to a foreseeable risk of injury by ensuring both the provision and operation of a safe system of work. She condescends in detail on the claimed content of such duties and maintains that, had they been complied with, she would not have been sent on either of the PDAL courses and would not have sustained the injury which she did.

[11] The pursuer then maintains that, in the exercise of the skill and care to be expected of ordinarily competent solicitors practicing in personal injury litigation arising out of accidents at work, her solicitors ought to have advised her to intimate a pre-action letter of claim against South Wales Police in order to establish whether it would admit liability or enter into settlement negotiations without the need to raise court proceedings. She avers that, because they did not do so, she lost the opportunity that might have arisen to obtain an advantageous settlement of her claim from South Wales Police.

[12] A peculiar feature of the pursuer's pleadings is that they fail entirely to engage with the content of the defenders' answers, with the result (as counsel for the pursuer conceded) that I require to proceed on the basis that she should be taken to have admitted, at the very least, such factual elements of those answers as are not inconsistent with her own positive position. So far as potentially material for present purposes, the averments of the third, fourth and fifth defenders which fall to be treated as having been accepted in that way by the pursuer may be set out as follows.

[13] The business which was trading under the style of "Slater and Gordon" in Scotland in July 2015 was carried on by the fifth defender as an individual sole trader using that style. The business carried on in England and Wales at that time and under the same style was carried on by the third defender. The fifth defender used the style with the agreement of the third defender and thereby benefited from certain goodwill attached to it, from advertising

and promotional material funded by the third defender, and from referrals of business from the third defender. The third and fifth defenders were at all material times different legal entities and carried on separate businesses, owned and operated independently of each other. The fifth defender held the necessary regulatory permissions from the Law Society of Scotland to carry on business here. The third defender held the necessary permissions to carry on business in England and Wales. The fourth defender was incorporated on 3 August 2017. Thereafter it remained dormant for a period. With effect from 1 March 2019 it acquired the business previously carried on by the fifth defender, and commenced trading at that point. In April 2019 it remitted to the English firm of solicitors, Pattinson & Brewer of Bristol, sums due to it for the work it had previously done for the pursuer. It did that as a matter of administrative convenience since it was by then carrying on the business formerly carried on by the fifth defender.

[14] The pursuer had initially been referred by the Police Federation of England and Wales to Pattinson & Brewer. That firm carried out initial investigations and instructed counsel, Mr Richard Shepherd, who had been called to the bar of England and Wales in 2001, as well as a diving instruction expert, Mr Brian Porter. On 4 March 2015 Ms Abbigail Stell of Pattinson & Brewer discussed the pursuer's case with Mr Shepherd in the light of an initial report from Mr Porter. Mr Shepherd's view was that South Wales Police, having engaged an apparently competent contractor in the form of PDAL, could not be held responsible for the pursuer's injuries. Ms Stell advised the pursuer of that in writing on the same day, and told her that the same advice had been passed on to the Police Federation, and the matter would be referred to Scottish solicitors. On 6 March 2015 the Police Federation instructed the fifth defender to prosecute the pursuer's claim in Scotland.

[15] The fifth defender was sent Pattinson & Brewer's file. He reviewed it and analysed the possible causes of action. His own provisional view was in agreement with that expressed by Mr Shepherd, but he nonetheless sent the papers to the second defender for another view. The second defender reviewed the papers. The pursuer was advised by each of the second and fifth defenders at the telephone consultation on 20 April 2016 that they did not consider the prospects of success against the Chief Constable to be sufficient to justify litigation and that in any event it was almost certain that the Police Federation would not fund such litigation. The pursuer accepted that advice and gave instructions to proceed against PDAL alone.

Submissions for the third, fourth and fifth defenders

[16] On behalf of the third, fourth and fifth defenders, counsel submitted that the action against those defenders ought to be dismissed as irrelevant or lacking in essential specification. The pursuer's case proceeded on the basis that counsel's advice was to sue PDAL only, and that that advice had been accepted by her solicitors, but that the latter were nevertheless under a duty to intimate the claim to the Chief Constable of South Wales Police with a view to seeking a negotiated settlement. That not having been done, the pursuer asserted that she had been caused damage in the form of the loss of a chance of obtaining a settlement from the Chief Constable without the requirement for litigation.

[17] There was no relevant averment sufficient to fix liability on any solicitor defender other than the fifth defender. The relevant terms of engagement were issued and accepted, and their content was a matter of agreement. The solicitor defenders took the common position that those terms instructed a contract between the pursuer and the fifth defender, who was in fact the individual solicitor with conduct of the pursuer's case. The question fell

to be determined as a matter of construction of the terms of engagement. There was a single correct construction, which the court could decide without evidence. The pursuer did not offer to prove any fact that might bear on that construction which was in dispute. Reference was made to the summary of the relevant principles of contractual construction set out in *Network Rail Infrastructure Limited* v *Fern Trustee 1 Limited* [2022] CSIH 32, 2022 SLT 997 at [28]. The text of the terms of engagement yielded a clear meaning. The contracting party other than the pursuer was said to be "SandG", defined as "Stuart Cochran associated with the law firm of Slater and Gordon lawyers OC371153", a definition further picked up at the foot of each page. Whatever else, it was clear that the fifth defender was a contracting party. It was equally clear that he was a Scottish qualified solicitor, and a principal in private practice. He was carrying on business as a solicitor in Scotland at the material time under the trading style of "Slater and Gordon". He did the work and gave the advice. There was no averment that anyone else did any work or that there was any requirement for anyone else to do any work. The words "in association with" could not alter that. Only parties with legal personality could enter contracts in their own name and be sued in their own name. The fifth defender was clearly a natural person and was clearly identified. The words "in association with" did not connote any other form of business relationship such as a partnership or company or a relationship of agency.

[18] In isolation the description of the English LLP could only mean the third defender. It was the only LLP with that name and the OC371153 number was its unique identifier. The proposition that it too was a contracting party appeared to rest entirely on the phrase "in association with". By textual analysis alone, the conclusion could be reached that those words were insufficient to instruct a tripartite contract between the pursuer, the fifth defender and the third defender. If that was the intention it would have been simple to say

so, and in the context of a solicitors' terms of business it might reasonably be expected that such a highly unusual arrangement would have been set out expressly. The solicitor defenders did, however, acknowledge that the drafting of the terms was not as clear as might reasonably be expected.

[19] A contextual analysis pointed even more strongly to the same conclusion. The third defender was an English LLP which carried on the business of Slater and Gordon in England and Wales. It was authorised to carry on that business in that jurisdiction, but more importantly that it was not authorised to carry on the business of solicitors in Scotland. That was regulated activity and the carrying on of such activity without the requisite authorisation was a criminal offence - Solicitors (Scotland) Act 1980, section 32. The pursuer did not aver what any officer or employee of the third defender was obliged by the contract to do, nor anything that any such person did in fact do. It was not suggested that the third defender received any payment or had any entitlement to payment. It was not averred that the fifth defender held any position with the third defender. The court was entitled to ask what possible commercial objective could be furthered by such a curious contract. A contract of retainer between solicitor and client to pursue a Scottish personal injury claim was a very commonly encountered contract and it was within judicial knowledge that such retainers were generally entered into between the Scottish solicitor pursing the claim and the client. There was no practice of English firms being joined to the retainer, and no identifiable commercial purpose for them being so joined. Even if the textual analysis suggested that such a construction was theoretically open, the context would make very clear that that could not have been intended. In the final analysis, the exercise of construing the contract was one of ascertaining the mutual intention of the parties to it. There were cases where a party entered into a bargain it did not mean to because it conveyed its

intention to do so sufficiently clearly, even if the objectively conveyed intention was not its actual subjective one. The court could readily be satisfied that this was not such a case. There was no basis to impute such an intention to any of the parties, never mind to impute such a common intention to all of them.

[20] The pursuer's averments in respect of the fourth defender were based on it having sent a cheque to Pattinson & Brewer. The fourth defender was incorporated on 3 August 2017. It could not have been an original contracting party to a contract that was formed in 2015. The maintenance of the action against it appeared to proceed on the basis of an assertion that it assumed liability for events that occurred before its incorporation. The single averred action of the fourth defender - the sending of the cheque - did not on its face found any inference of assumption of responsibility for alleged failures occurring before it was incorporated. There was no other relevant averment. It was a separate legal entity from the third defender, with separate ownership structures and insurance interests. The action should be dismissed so far as directed against each of the third and fourth defenders.

[21] Turning to the relevancy or propriety of the asserted duty, the written note of argument for the solicitor defenders originally asserted (under reference to *Tods Murray WS* v *Arakin Ltd* [2010] CSOH 90, 2011 SCLR 37 at [92], *Chisholm* v *Grampian Health Board* [2022] CSOH 39, 2022 SCLR 253 at [24] and *Ronnie O'Neill Freight Solutions Limited* v *MacRoberts* [2023] CSOH 75, 2023 SLT 1196 at [44]) that the court could and should dismiss a claim asserting professional negligence insisted on without supportive expert evidence addressing the standard described *Hunter* v *Hanley* 1955 SC 200, 1955 SLT 213. However, shortly after that note of argument was lodged, my opinion in *Cockburn* v *Cockburn's Judicial Factor* [2024] CSOH 69, 2024 SLT 1089 criticising the supposed legal basis for that assertion was published. The other difficulty which the proposed argument faced was that the

pursuer did in fact have an expert report from an experienced solicitor, Mr David Bell, which was indeed supplemented by a further report from him before the diet of debate occurred. In those circumstances, counsel accepted the force of the criticism set out in *Cockburn* and modified the argument so that it became one which turned on the adequacy of the expert reports and whether the pursuer offered to prove the factual foundation for them. In essence, the criticism was that Mr Bell's first report appeared to proceed on the basis that the fifth defender had been told that English counsel had expressed a provisional view that the claim against the Chief Constable had better than 50% prospects of success, and that the prospect of such a claim was under active consideration at the point the papers came to the fifth defender, whereas that could not be reconciled with the defenders' averments about the advice in fact given by English counsel, noted above, and that the second report - which appeared to clarify and exclude any such deficiency - did not in terms state that Mr Bell's view proceeded on the application of the *Hunter* v *Hanley* test. The factual foundations on which the opinions were predicated required to be the subject of averment. Without such averments, the pursuer's pleadings were irrelevant.

[22] Finally, counsel turned to criticise the pursuer's averments as to the causation of her loss. Her claim was now only for the loss of the chance of securing a negotiated settlement. There were well-known and settled pleading requirements in a case concerning loss of a chance. The chance in question required to cross a threshold of materiality. That required pleading. Such a case also required specific averment of what the contingencies were. Different approaches were taken to issues which depended on what the pursuer would have done compared to issues which depended on what a third party would have done: *Centenary 6 Limited* v *TLT LLP* [2024] CSIH 29, 2024 SLT 1106 at [68] and [69] and the further authorities there cited. The pursuer made no attempt to set out the counterfactual scenario

she maintained would have been the consequence of the advice she claimed the solicitor defenders should have given. The case could not succeed without proof of these matters and there could be no proof without averment.

[23] The action should be dismissed so far as directed against the third, fourth and fifth defenders, which failing so far as directed against the third and fourth defenders.

Submissions for the pursuer

[24] On behalf of the pursuer, senior counsel submitted that the court should repel the preliminary plea for the remaining solicitor defenders and allow the case to proceed to a proof at large against them.

[25] So far as the case directed against the third defender was concerned, no issue was taken with the approach to contractual construction suggested on its behalf. The terms of business were far from clear, and the words "in association with" could not be treated as superfluous. Some meaning ought to be ascribed to them, and the most natural meaning was that they created a contractual nexus amongst the third defender, the fifth defender and the pursuer.

[26] In relation to the fourth defender, it was averred by the solicitor defenders that it had taken over the business of the fifth defender. It was a reasonable inference in those circumstances that its issue of the cheque to Pattinson & Brewer was a matter of contractual obligation rather than administrative convenience, and was sufficient to infer an assumption of responsibility by the fourth defender for the acts or omissions of the fifth defender.

[27] The expert reports by Mr Bell, read together and fairly, met the *Hunter* v *Hanley* test and provided any necessary support for the claim of breach of duty advanced by the pursuer.

[28] As to causation, the pursuer had given the defenders adequate notice that the lost chance upon which she founded was that, following intimation of a claim, South Wales Police would have admitted liability or entered into settlement negotiations without the need for court proceedings. Those averments were sufficient for proof. Reference was made to *Kyle* v *P & J Stormonth Darling WS* 1993 SC 57, 1994 SLT 191.

Decision

Relevancy of case against third defender

[29] The question of the relevancy of the pursuer's case so far as it proceeds on the basis that she had a contractual relationship with the third defender falls to be answered by reference to the proper construction of the communication sent to her on 2 July 2015. The salient features of both the letter of engagement and terms of business elements of that communication have already been noted. I have no doubt that the third defender did not subjectively intend to contract with the pursuer for the provision of legal services to her in connection with proposed Scottish litigation, not least because of the regulatory issues canvassed by its counsel. What appears to have happened is that someone made an attempt at adapting the third defender's standard terms of business document to make it suitable for use with clients of the fifth defender in Scotland. To describe that attempt as wholly inadequate risks only being overly kind. It was, however, accepted that it the communications which were sent to the pursuer by the fifth defender were sent with at least the tacit concurrence of the third defender. No negotiation of the proffered terms was expected or took place. In these circumstances the appropriate approach to construction is to ask what a reasonable person in the position of the pursuer - that is to say, a non-lawyer seeking to have a personal injury claim pursued on her behalf - would have made of the

material sent to her. Such a person cannot be assumed to be familiar with the nature of the regulation of the legal profession in the United Kingdom, with private international law and jurisdiction rules, or with the normal practices of the providers of legal services in the conduct of litigation on either side of the Anglo-Scottish border. She would have assumed that the lawyers proposing to deal with her claim on her behalf would know about those things and do whatever was appropriate in the circumstances. She would have been aware from the terms of the documents sent to her that a good deal was being said in them, not only about the fifth defender, but also about "Slater and Gordon", who were said to be in association with him. She was told exactly who "Slater and Gordon" or "SandG" were - namely, Slater and Gordon (UK) LLP, a limited liability partnership registered in England and Wales with the registered number OC371153, regulated by the Solicitors Regulation Authority; in other words, the third defender. Counsel for the defenders was unable to explain the relevance of this information to the recipient of the documentation if the proper construction of the documentation was that the only parties to the contract were the pursuer and the fifth defender. Looking at the material presented to the pursuer as a whole and objectively through the eyes of the reasonable person in her position, I conclude that its proper construction is that both the third and fifth defenders were offering to act for her, in whatever capacities might prove necessary or appropriate, in the prosecution of her claim, and that her acceptance of (or at least acquiescence in) that offer created the tripartite contract for which her counsel contended. Her case that she had a contractual relationship with the third defender is accordingly relevantly stated in point of law, although questions of quite what duties were incumbent on it (as opposed to the fifth defender) in terms of that contract, or the extent to which it might be responsible for any breach of contract by the fifth defender, were unexplored in the debate before me and remain for future determination.

[30] I raised with the pursuer's counsel the question of why it was thought necessary to seek to convene the third (and fourth) defenders in addition to the fifth when the latter explicitly accepted that he was the solicitor acting for the pursuer in the matter and, as a practising Scottish solicitor regulated by the Law Society of Scotland, would have had to have been covered by professional indemnity insurance adequate to pay out on the pursuer's claim in terms of the Society's master policy. I am not sure that I received a readily comprehensible response, but it may be that the previous adverse experience of the pursuer with PDAL's apparent insurers furnishes in practical terms much if not all of the rationale for the abundance of caution which appears to be being deployed in this regard on her behalf. I observe simply that, while I have held that the pursuer is in point of law entitled to convene the third defender in addition to the fifth, the question of whether it was or has remained reasonable to do so is a separate one which as yet is unanswered, and from which certain consequences may ultimately flow.

Relevancy of case against fourth defender

[31] The averments made by the pursuer herself as to the basis of her case against the fourth defender - in essence, that it paid a bill which one would in ordinary course have expected another person (whether the third or fifth defender) to pay - are hopelessly irrelevant. If she proved them, her case against the fourth defender would be bound to fail, since they could not on their own properly instruct any conclusion that it had voluntarily undertaken a responsibility to meet whatever liabilities, owed to whomsoever by the third or fifth defenders, which might flow from the contract between them and the pursuer.

[32] However, the matter is complicated by the fact that the solicitor defenders state, in averments uncontradicted by the pursuer, that the fourth defender acquired the business

previously carried on by the fifth defender with effect from 1 March 2019. That wagon having been started rolling, the pursuer's argument gratefully attached itself to it.

[33] The law on the implicit assumption of the liabilities of a business by an entity which takes it over was stated in *OCRA (Isle of Man) Ltd* v *Anite Scotland Ltd* 2003 SLT 1232. After a review of the appropriate authorities, Lord Eassie held at [14] that:

> "any presumption in favour of an assumption of liability for the debts of the 'transferred' business (as applied in *Heddle's Exrx* [(1888) 15 R 698] and its predecessors) arises only where the original trading entity passes its business to a technically new trading entity gratuitously and without any outward change in the form or way in which the business is carried on."

I agree with that conclusion (acknowledging with all due candour that I was counsel who advanced it). Although no party to these proceedings makes any averment about whether the fourth defender's acquisition of the business of the fifth defender was gratuitous or not, it is plain that the business under its new ownership was not carried on without any outward change in form - the previous business of the fifth defender as a sole practitioner was thenceforth carried on by a limited liability company. There is, accordingly, no basis for any presumption of an assumption by the fourth defender of the liabilities of the fifth, and no other basis upon which any such assumption could be inferred. The pursuer's case against the fourth defender is thus irrelevant and falls to be dismissed.

Expert reports issue

[34] The issue of my opinion in *Cockburn* and the provision of a supplementary report from Mr Bell addressing the perceived defects in his first report severely undermined the basis upon which the solicitor defenders proposed to advance their argument in this connection and it might in hindsight have been better to abandon it rather than to continue to press it in a necessarily attenuated fashion. Having carefully considered the terms of both

Mr Bell's reports, I have without difficulty reached the view that he clarifies any uncertainty as the factual hypothesis or hypotheses upon which he proceeds in his second opinion, and any possible deficiency in his application of the appropriate test for professional negligence set out in *Hunter* v *Hanley* appears to be at least capable of being regarded as a matter of expression rather than of substance. Given that Mr Bell's views and the basis for them may now have to be explored in evidence and be made the subject of judicial assessment, I consider that it would be inappropriate at this stage to comment further on the matter. It is equally unnecessary to examine the extent to which it is desirable or even possible to subject an expert report or reports to any very detailed scrutiny with a view to determining abstractly whether and to what degree an expert's expressed views do indeed support a pursuer's pleaded case, particularly given the potentially dynamic nature of the proof process. Nor is it necessary to decide whether any conclusion that Mr Bell's reports plainly did not support the pursuer's pleaded case would, in the circumstances of this litigation, have justified the dismissal of the action. These are the type of questions which will, no doubt, have to be decided in suitable future cases.

Causation

[35] The abstract relevancy of the pursuer's claim to have suffered loss in consequence of a lost opportunity to negotiate a settlement with the Chief Constable of South Wales Police is not disputed; the complaint is essentially one of a lack of specification as to what the pursuer proposes to prove about the incidents and timing of the hypothetical negotiation in question. Although this case is not entirely on all fours with *Kyle* v *P & J Stormonth Darling WS*, where the pursuer claimed the loss of a chance in litigation as opposed to the loss of

chance in negotiation, at least some of the observations made by the court in that case comfortably read over into the present context.

[36] In particular, in passages at 1993 SC 69G - 70B, 1994 SLT 195F - H the court (Lord McCluskey, Lord Brand and Lord Weir) observed that:

> "The criticisms of the specifications were, in the particular circumstances of this case, misconceived … counsel for the reclaimers suggested that the pursuer should also have condescended upon (a) the mechanics of how a compromise might have been reached and (b) the terms on which the opposing party in the original litigation would have been prepared to settle. In our view, the first is unnecessary and the second is virtually impossible. It cannot be suggested that it would be necessary for those acting for the present pursuer to precognosce his original opponent, the solicitors and counsel for the original opponent, and endeavour to obtain their current views as to the terms that might have tempted them to decide that a compromise settlement would have been in Mr Harvey's best interests. That would be an absurd exercise, yet, without it, the averments desiderated as to the potentially acceptable terms could not properly be made. The responsibility will rest upon the court in the light of all the facts established before it … to determine if a compromise could have been achieved and, if so, upon what terms. In our view, the pleadings are adequate to enable the parties to lay before the court material upon which the court can properly be invited to make that judgment. Of course, if insufficient material is laid before the judge who hears the proof, then the person on whom the onus lies in relation to the matter at issue will fail in relation to that matter …"

The court's observations about what it considered respectively to be unnecessary and virtually impossible apply to the demands for further specification made in the present case. The solicitor defenders' pleadings set out at length - and their counsel repeated orally in argument - the difficulties, which they estimate as likely and formidable, which may attend the pursuer's attempt to establish that she lost, by way of the defenders' claimed negligence, something of tangible and ascertainable value. The last sentence in the passage just quoted from *Kyle* deals with how the court will require to approach any such difficulties as manifest themselves in the course of the proof. The pursuer's pleadings are, for the reasons set out in *Kyle*, adequate to justify the allowance of such a proof.

Disposal

[37] I shall sustain the solicitor defenders' first plea-in-law to the extent of refusing probation to such of the pursuer's averments as are directed against the fourth defender, and shall dismiss the case against it. *Quoad ultra* I shall, given that there remain potential legal issues concerning the *inter alia* allegations of negligence and causation, reserve that plea for determination at the conclusion of the proof before answer which I shall now allow.