FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH53
A906/15

Lord President
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

BRIAN PHILP

Pursuer and Reclaimer

against

THE HIGHLAND COUNCIL

Defenders and Respondents

Pursuer and Reclaimer: Party
Defenders and Respondents: Manson; Harper Macleod LLP

7 August 2018

Introduction

[1] This is a reclaiming motion from an interlocutor of the Lord Ordinary, dated 15 November 2017, dismissing the action as irrelevant. Although not focused either in the debate before the Lord Ordinary or in her Opinion, the issue concerns the liability of public authorities or officials, acting in the course of their duties, to third parties whose economic interests have been adversely affected by their actings.

The pursuer's case

[2] The defenders own the harbour at Kyle of Lochalsh. The pursuer is the tenant of property known as Fishery Pier at the harbour. The defenders manage the harbour; the general harbours' manager being Tony Usher and the harbour master at Kyle being Robert Thomson.

Dealings with EWOS

[3] According to the pursuer, in the Autumn 2010, he was approached by EWOS Ltd, who are suppliers of feed to fish farms. They required to establish a storage and distribution depot from which to load feed into landing craft and the MV Fame for distribution to fish farms on the west coast. EWOS contemplated entering into a contract with the pursuer, whereby they would establish their depot on his property at Kyle. The pursuer would be responsible for the loading, unloading and storage of cargos and related matters.

[4] There were two possible locations for EWOS's depot. The first was Kyle and the second was Mallaig. However, Mallaig had no warehouse suitable for EWOS's purposes. It had no suitable dock. It would have to build both a warehouse and a dock. The Mallaig Harbour Trust would need to secure both planning consent and grant funding to do this. Grant funding could only be secured if no suitable facility existed elsewhere and the project would not adversely affect facilities elsewhere. In contrast, the pursuer had a warehouse ready and suitable for use. His premises were adjacent to four suitable docks. The pursuer had the appropriate managerial, logistical and practical skills with which to carry out the works. The pursuer was told by EWOS's managing director that Kyle was a "shoo-in".

[5] The pursuer and EWOS arranged to carry out trial operations in order to gauge both the suitability of Kyle as a location and the ability of the pursuer to carry out the work. The

trials commenced in September 2010. The pursuer hired forklift trucks, designed to assist in transportation and storage. When the pursuer began loading EWOS's landing craft using a forklift, Mr Usher:

> "instructed the pursuer to stop. He telephoned to notify him that he must not use forklifts on what he described as the public highway. He stated that the pursuer had no forklift driving licence."

According to the pursuer, he did have such a licence and suitable insurance. He had operated forklifts at Kyle over many years. Mr Usher's instructions "had no basis in law or practice". The pursuer ignored his instructions. Mr Thomson then intervened. He too asked the pursuer to stop using the forklift, but this met with a similar response. This trial was completed satisfactorily.

[6] The pursuer makes the standard averment that the defenders are liable for the actings of Mr Usher and Mr Thomson in the course of their employment. He avers specifically that Mr Thomson acted under instructions from Mr Usher. The area of ground on which the pursuer was operating was not a harbour under any "Harbour Act" and was not subject to the authority of Mr Thomson or Mr Usher. Neither Mr Thomson nor Mr Usher had previously raised any issue about the pursuer's use of forklifts or otherwise interfered with his operations. The pursuer avers that the actings of the defenders' employees were indicative of "wrongful conduct and bad faith".

[7] Between 15 September and 3 December 2010, whilst further trials were taking place, Mr Usher:

> "put unreasonable and unnecessary obstacles in the way of the pursuer in carrying out said trials. He contacted EWOS and the shipping company which operated MV Fame without reference to the pursuer. He informed them that the pursuer did not have appropriate licences or insurance in place to operate the forklifts necessary for the said trial operations. That information was not correct and Mr Usher must have known that it was not correct. He notified EWOS and EWOS's shipping company that they would not be permitted to use the pursuer to unload or load

> cargoes until such insurance was in place and he, Mr Usher, had granted permission. He contacted the pursuer. He unreasonably rejected the pursuer's plant operator insurance policy and insisted that forklifts hired by the pursuer ... should be covered by [road traffic accident] insurance ...
>
> He insisted on being notified of the identity, qualifications, experience and certification of [forklift drivers] ... before he would allow the trials to proceed further. It was not necessary for Mr Usher to be advised of this information."

Once the pursuer had provided Mr Usher with an "All Risks" insurance policy, Mr Usher communicated directly with the pursuer's insurers and insisted "for no good reason" that the policy be modified. Mr Usher had no right to make the various demands. They delayed the trials by months, thereby enabling the rival Mallaig Harbour Trust to demonstrate to grant funders that: (a) no other operation or premises existed, that could supply EWOS's needs; and (b) no existing operation would be adversely affected, were the Trust to be given public funds. Early in 2011 EWOS contacted the pursuer and told him that there would be no further trials, as EWOS had elected to establish a depot at Mallaig, rather than at Kyle.

[8] The pursuer maintains that, if the defenders' employees had not interfered with, and stopped the loading of, the consignments and frustrated attempts prior to the year end, he would have demonstrated the capability of his premises, himself and his staff to carry out the work without the necessity for grant aid at Mallaig harbour. In a passage, which came to be a focus in the reclaiming motion, the pursuer avers:

> "... Mr Allan Henderson is a Highland Council Councillor representing a Lochaber constituency which includes Mallaig. Mr Henderson was chairman at the time of the Highland Council Harbours Board which employs and instructs Mr Usher and to whom Mr Usher reports. Mr Henderson is also a Member of the Board of Mallaig Harbour Trust. ... [T]hese overlapping functions constitute a conflict of interest which operated to the pursuer's disadvantage, particularly when taken in context and in the knowledge that Mr Henderson also sits on the FLAG committee that selects and approves projects for grant assistance, which function is delegated by the Scottish Office to Highland Council."

[9] The pursuer avers that the obstruction of the trials by the defenders' employees was not made for any good reason. It was outwith the scope of their responsibilities and was "capricious and arbitrary in nature". Their attempts to obstruct the trials created an unfavourable impression of Kyle harbour as a site for the EWOS depot and of the pursuer as a potential contractor. They deterred EWOS from selecting Kyle harbour. As a result of the obstruction by these employees and the delay caused thereby, EWOS were both persuaded and enabled to locate their depot at Mallaig rather than Kyle. The pursuer was thus deprived of the chance of securing a valuable contract. But for the interference, EWOS would have selected Kyle and would have had to have done so because of the absence of facilities at Mallaig. In due course, when the pursuer did carry out work for EWOS in 2011, pending construction of the new facilities at Mallaig, no interference took place.

[10] The pursuer maintains that the defenders' employees obstructed the trials knowing that, by doing so, they would be likely to deter EWOS from entering into a contract with him. There is a general averment about the defenders breaching "a duty to the pursuer not to obstruct his business without a due basis". In answer to a plea of prescription, the pursuer returns to the involvement of Mr Henderson, as chairman of the defenders' Harbours and Fisheries Committee, "to whom Mr Usher answers", and both the councillor for Mallaig and a member of the Mallaig Harbour Trust and the FLAG; being the Group which approved projects for grant aid. The Trust and the Committee knew that grant aid should not have been provided to Mallaig, standing the pursuer's capacity at Kyle.

[11] The pursuer's relative plea-in-law is in the following, somewhat uncertain, terms:

> "1. The pursuer having been deprived of the opportunity of entering into the contract ... by the wrongful actings and fault of the defender as condescended upon, is entitled to reparation therefor".

Sale of the business

[12] The pursuer avers, and pleads as an alternative, that in about September 2012 he entered into negotiations for the sale of his business, including his interest in the lease of the property at Kyle, with a "consortium of persons", including David Booth. He had agreed a sale price of £175,000. The purchasers were to pay arrears of a secured loan, totalling £108,000. The consortium sought permission to speak to Mr Usher about the lease. The pursuer was content with this. Mr Usher, however, misrepresented the provisions of the pursuer's lease to the consortium; notably by stating that an application would have to be made to the defenders, rather than the pursuer, for an assignation. The misrepresentation was that, in effect, the defenders would require to be persuaded to grant a new lease. The lease provided that consent to any assignation could not be withheld unreasonably. The defenders were bound to consent to an assignation, other than in exceptional circumstances. Mr Usher misinformed the consortium about the uses which might be made of the property. He asserted that the defenders were in the process of bringing the lease to an end, when no such process was underway. He contradicted the pursuer, who had told the consortium that an application for change of use for their purposes (storage of animal feed) was not necessary, by stating that the buildings on the property could not be used by any person other than the pursuer and for any purpose other than that described in the lease; *viz.* shell fish processing. This was inaccurate.

[13] Mr Usher's actings had led to the loss of the sale. His actings had also included assertions that another party had previously sought to obtain the tenancy, but had not proceeded because of a flaw in the warrants for the buildings. He had suggested to the consortium that the pursuer's bankers were on the point of calling up the security. These assertions were also inaccurate. There is a reference to Mr Usher disclosing confidential

financial information concerning the pursuer (possibly payments of rent) to the consortium, but the nature of this is unclear. As the result of "inaccurate and misleading representations" made by Mr Usher, the consortium did not agree to purchase the business and interest in the lease. Mr Usher was a senior officer of the defenders and the consortium would be expected to believe what he stated to be accurate.

[14] Although there is no express repetition of the averment of bad faith in this part of the claim, the pursuer does aver that Mr Usher's "modus operandi" was to "tell lies, twist facts, mislead and misdirect ... in order to achieve his ends and protect his position". Again, it is said that the defenders are liable for Mr Usher's actings in the course of his employment. Mr Usher knew that, by making inaccurate and misleading representations, he would deter the consortium from buying the business and the pursuer's interest in the lease. This is said to amount to some form of breach of duty, on the part of the defenders, not to make such representations. The plea-in-law again refers vaguely to "wrongful actings and fault" of the defenders.

Rates

[15] The third element of the pursuer's claim is that, apart from the duration of the trials in May to July 2011, he had been held liable for and charged rates by the defenders, when he had not been in occupation of the premises, since his company, Kyle Sea Foods Ltd, had gone into liquidation in March 2009. This had been "unreasonable". This had caused the pursuer to sustain "significant costs and to suffer great hardship". The pursuer was either not liable to pay rates (Valuation and Rating (Scotland) Act 1956, s 16(1)) or the defenders ought to have remitted the charge on the grounds of hardship (Local Government (Scotland) Act 1994, s 156 – inserting s 25A into the Local Government (Scotland) Act 1966). The

defenders had ignored information provided by the pursuer to contradict that supplied by Mr Usher. At a Valuation Appeal Committee hearing on 26 November 2015, Mr Usher, and an unnamed solicitor for the defenders, had presented a "blatantly false" case, including false photographic evidence. The hearing was, in some unspecified manner, "rigged". The effect of the charges and warrants recorded against him had made it impossible for the pursuer to obtain any funding to enable him to conduct business of any kind, thereby depriving the pursuer of the opportunity to earn from that property. Once more the plea-in-law is that the charge for rates had been a consequence of "the wrongful actings and fault of the defendant" (*sic*).

The Lord Ordinary's decision

[16] In the second paragraph of her Opinion, the Lord Ordinary made reference to the defenders "helpfully" lodging a note of argument "well in advance of" the debate. In the fourth paragraph she referred to the pursuer's pleadings as prolix. In the sixth paragraph she referred to the defenders' counsel's submissions as being presented with "commendable economy". Subject to certain limited comments, she stated that she accepted "all of the defenders' legal propositions as well founded in law" before proceeding to apply them. She later referred to the defenders' criticisms of the pursuer's case as well made or well founded and often referred to agreeing with what the defenders' counsel had said.

[17] On the first (EWOS) chapter of the pursuer's claim, the Lord Ordinary found that there was no relevant duty averred by the defenders to the pursuer. The claim was one of pure economic loss. There was no averment of an assumption of duty not to cause such loss. There was no case fixing the defenders with any form of liability in the performance of their statutory duties. The Lord Ordinary accepted that, as the defenders had submitted, the

features required in respect of "intentional delicts" had not been met. It was necessary to demonstrate either: (i) the induction of a breach of contract; (ii) an intention to cause economic loss by unlawful means; or (iii) conspiracy. Causing loss by unlawful means required an intention to cause loss to the pursuer, and the use of unlawful means to do so in relation to a third party and in a way which affected the third party's freedom to deal with or honour a contract (*Global Resources Group* v *Mackay* 2009 SLT 104, at para 17; *OBG* v *Allan* [2008] 1 AC 1). There were no averments of any contract which could have been breached and none that demonstrated any interference with EWOS's rights to enter into a contract.

[18] The Lord Ordinary held that no vicarious liability could arise. The pursuer had relied upon a high degree of personal enmity on the part of Mr Usher, but, the greater the degree of enmity, the more likely that the conduct would be outwith the scope of his employment. There was insufficient averment to establish that what was done was closely connected with the activities conferred upon Mr Usher by the defenders. Mr Usher had no authority to do what he did, as the pursuer himself had averred.

[19] On the second (sale) chapter, the pursuer had eventually accepted that, in terms of the lease, the landlord had been entitled to have some input into any transfer of the tenancy, even if that could not be unreasonably withheld. The pursuer's averments were that Mr Usher was asserting the defenders' entitlement. The Lord Ordinary accepted the defenders' legal propositions that a misrepresentation must relate to a matter of fact. Where, in the course of ordinary business, a party would be expected to make independent enquiries about a fact, any statement relative thereto would be taken as being one of opinion rather than definite assertion. There were no relevant averments of misrepresentation. It was essential that there was a contract between the pursuer and the consortium of which the defenders either induced a breach or interfered with, but there were no such averments.

[20] In relation to the third (rates) chapter, the pursuer's case was irrelevant for three reasons. First, the fact that this matter was disputed, but (as revealed in submissions) subject to an extrajudicial settlement, rendered any attempts to revive any challenge to the original appeal irrelevant. Secondly, any challenge had to be by way of judicial review. It was said that a petition challenging the decision of the Appeal Committee had been dismissed two weeks previously. Thirdly, the defenders were entitled to disagree with the pursuer's view on the occupation of the premises.

Grounds of appeal and submissions

Pursuer

[21] The pursuer maintained that the Lord Ordinary had been unconsciously (*sic*) biased and had made material factual errors. On bias, he commented that the learning of the Lord Ordinary and counsel for the defenders had been in contrast to his own lack of education and thus there was a "them and us" situation. The Lord Ordinary had demonstrated a tendency to take at face value everything presented to her by the defenders and to take what the pursuer had said with a pinch of salt. She had complemented the defenders for "helpfully" lodging a note of argument, whilst criticising the pleadings of the pursuer as being "prolix", because the total length of the record extended to 35 pages.

[22] The defenders had contended that the pursuer's averments lacked specification. However, their reliance on *Avery* v *Hew Park School for Boys* 1949 SLT (notes) 6, which stressed the need for prejudice, favoured the pursuer. Similarly, their use of *Macdonald* v *Glasgow Western Hospitals* 1954 SC 453 (at 465) assisted the pursuer with its reference to the ill grace of state authorities. On relevancy, the defenders' citation of *Jamieson* v *Jamieson* 1952 SC (HL) 44 at 50 also supported the pursuer. If all his averments were proved, and he had

thus been unlawfully deprived of business as a result of "malpractice" by the defenders, it could not be said that he would necessarily fail.

[23] On vicarious liability, in *Kirby* v *National Coal Board* 1958 SC 514 it was said (at 532) that, if the master actually authorised an act, he was "clearly liable" for it. The pursuer had averred that Mr Thomson had taken his instructions from Mr Usher, who in turn had taken them from the defenders' Harbours Committee. That Committee had been chaired by Mr Henderson, who had represented Mallaig and was a member of both the Mallaig Harbours Trust and the defenders' FLAG committee, which he chaired. It was the FLAG that had authorised illegal funding for Mallaig. In doing what they did, Mr Thomson and Mr Usher were doing work which they had been appointed to do.

[24] *OBG* v *Allan* (*supra*) had made it clear that liability for the use of lawful means did not depend upon contractual relations. It was sufficient that the intended consequence of the wrongful act was damage in any form, including economic expectations.

[25] A number of alleged errors of fact were presented. It was said by the Lord Ordinary that the pursuer was the tenant of premises, when in fact he was the tenant of land. She had said that the pursuer's case had been confined to the conduct of the two employees. She had thus missed the point that the reason for the obstruction of the trials was because the defenders had wanted funding for the new facility at Mallaig. Although the Lord Ordinary had referred to the trials being related to the loading and unloading of fish, it was to do with the storage and distribution of feed stuffs. Similarly, the Lord Ordinary's reference to the assertion, that Mr Usher had been wrong to advise the consortium that they would need to make an application to the defenders to assign the lease, was wrong. The complaint was failing to impart correct and true information, for example about the use clause. The Lord Ordinary had said that the pursuer had claimed to own the premises, whereas he had not

said that. He had always been aware of the requirement for any assignation to be consented to by the defenders.

[26] The Lord Ordinary had said that the pursuer's case was irrelevant because of the absence of a contract between the pursuer and the consortium in relation to the purchase of the pursuer's business. That was not correct. An agreement had been reached between the pursuer and the consortium. Similarly, the pursuer had a contractual relationship with EWOS in relation to the trials. The actions of the defenders' employees were done by them in their capacity as employees.

[27] The Lord Ordinary had said that the rates issue had been resolved extrajudicially. That was not correct. The dispute was ongoing. It had been the subject of a judicial review. The pursuer accepted that he had paid money to the defenders in relation to the rates dispute, but was now suing for its recovery. The dismissal of the petition had nothing to do with its merits. His claim in relation to the rates did not have to proceed by way of judicial review.

Defenders

[28] The defenders submitted that there had been no bias. The fair minded and informed observer, who was neither complacent nor unduly sensitive or suspicious and having considered all the circumstances, would not conclude that there was a real possibility of bias (*Helow* v *Advocate General* 2007 SC 303). It could not be suggested that the Lord Ordinary did anything other than approach matters as she required to do by applying the tests in *Jamieson* v *Jamieson* (*supra*), *Macdonald* v *Glasgow Western Hospitals* (*supra*) and *Avery* v *Hew Park School for Boys* (*supra*).

[29] On the first (EWOS) chapter, the Lord Ordinary correctly dealt with this, under reference to the principles governing the "intentional delict" of causing loss by unlawful means. The court would, on the pleadings, be unable to make any finding that an actionable wrong had been committed by the defenders' employees which affected EWOS's freedom to treat with the pursuer. The Lord Ordinary had correctly accepted that the pursuer's case was based on the delict of causing loss by unlawful means, rather than inducing a breach of contract (eg *Global Resources Group* v *Mackay* 2009 SLT 104, at para 11). The delict required an intention to cause economic harm and the use of unlawful means in relation to a third party, which affected that party's freedom to deal with or honour a contract with the pursuer (*ibid* at para 17; *OBG* v *Allan* (*supra*)).

[30] The Lord Ordinary had been correct to determine that vicarious liability could not properly arise. The acts complained about were said by the pursuer to be deliberate and capricious. These were accordingly outwith the scope of employment (*Kirby* v *National Coal Board* 1958 SC 514 at 532). It would not be fair and just to hold the defenders liable for these acts (*Sharp* v *Highlands and Islands Fire Board* 2005 SLT 855 at 862), even under reference to the principles in *Mohamud* v *WM Morrisons Supermarkets* [2016] 2 WLR 821. There was insufficient averment of a connection between the wrongdoing and the field of activities entrusted to the employees.

[31] On the second (sale) aspect, the Lord Ordinary had again correctly analysed this under reference to the principles governing economic delicts. No argument had been presented, which supported the view that the Lord Ordinary had erred in her disposal as a matter of relevancy. There had been no contract with the consortium averred. The pursuer had simply said that he had entered into negotiations and had identified heads of agreement, without specifying the terms of a contract.

[32] On the third (rates) chapter, the petition for suspension of the charge following the decision of the Valuation Appeals Committee had been dismissed because the dispute had been settled by agreement. The pursuer had unequivocally confirmed, before both the judge hearing the petition and the Lord Ordinary, that the rates dispute had been compromised. In any event, the Committee's decisions and procedures relative to domestic rates could not be reviewed in an ordinary action; only by judicial review.

Decision

[33] This case is not about inducing a breach of contract, nor does it require to be fitted within the criteria of a general delict of causing loss by unlawful means (eg *Global Resources Group* v *Mackay* 2009 SLT 104, Lord Hodge at para [17], following *OBG* v *Allan* [2008] 1 AC 1, Lord Hoffman at paras 47-51 and 62). Rather it is about the alleged malicious actings of public officials and/or a public authority in the exercise of their duties. It falls within the principles set out by Lord Ross in *Micosta* v *Shetland Islands Council* 1986 SLT 193; a case which coincidentally also involved the actions of a harbour authority. It is the equivalent of what in England would be called "misfeasance in public office" (see eg *Three Rivers District Council* v *Bank of England* [2003] 2 AC 1 and *Jones* v *Swansea City Council* [1990] 1 WLR 1453) and consists of: (1) a deliberate misuse of statutory power; and (2) malice (*Micosta* (*supra*) at 198). As Lord Ross put it, in Scotland there is no list of named delicts, but "if the conduct complained of appears to be wrongful, the Law of Scotland will afford a remedy ...". So it is in this case, so far as the alleged actings of the defenders and their harbour officials are concerned.

[34] There is nothing surprising or unusual about *Micosta* (*supra*). It is one example of a case in which a deliberate misuse of a public authority's or official's powers or *ultra vires*

actings sound in damages, even if the pursuers in *Micosta* were ultimately unsuccessful. The principle was repeated in *Ballantyne* v *Glasgow Licensing Board* 1986 SC 266, in which Lord Jauncey explained (at 270) that, whereas public officials may be immune from suit when acting within their competence, it is different if they are shown to be acting "maliciously and without probable cause". It has been part of the law since at least the early 19th Century. Thus, in *Dawson* v *Allardyce,* 18 February 1809 (FC) (discussed in Reid: *Deliberate Misuse of powers* 1986 PL 380 at 382-3), the Court said (at 203-204) that, if the relevant public body (the Quarter Sessions) had acted on the basis of "injurious and oppressive motives", such a "malversation of duty" would sound in damages.

[35] Valid criticisms can be made of the pursuer's pleadings. The most significant is the absence of clarity on what the legal basis for the action is. The pleader seems to be attempting to ride several horses at the same time, yet the nature of each is unclear. The pleas-in-law are particularly disappointing in their nebulous reference to "wrongful actings and fault". The failure to distinguish between vicarious responsibility for the actions of employees, a liability which does not feature in the pleas-in-law but appears en passant in the averments, and direct liability for malicious actings on the part of the defenders themselves, through their controlling mind, is another major flaw. The confusion, between liability for a delict, in the form of malicious actions by a public official, and quasi-delictual actings amounting to negligence is also an unfortunate feature. The references to breaches of duty, which appear to be an attempt to introduce a case of negligence, are not reflected in the pleas-in-law.

[36] Prolixity is indeed evident; with much repetition of the same facts and references to evidence and apparently irrelevant matter. Distinguishing relevant averment from discursive background narrative is not straightforward. However, the question at this stage

is whether, in respect of each of the three aspects of the case, the pursuer is bound to fail, even if he proves all of his averments (*Jamieson* v *Jamieson* 1952 SC (HL) 44, Lord Normand at 50, Lord Reid at 63).

[37] In relation to the major element (EWOS), that is the interference with the pursuer's negotiations with EWOS, the answer is in the negative. Stripped of background narrative and repetition, the pursuer's case is plain enough. He avers that the defenders, notably through their councillor Mr Henderson and two subordinate employees, deliberately, and in bad faith (ie maliciously), prevented him progressing with his negotiations with EWOS with the ulterior motive of benefitting, illegally, the harbour at Mallaig. He maintains that the defenders' bad faith can be inferred from the facts averred in relation to: (a) the harbour officials' behaviour, not only towards him, but also in contacting EWOS and supplying them with misleading or false information; and (b) the relationship of Mr Henderson with Mallaig Harbour and what the pursuer said occurred there. There may be substantial obstacles in the pursuer's way in relation to proof, but it cannot be said that, if he proves all his averments, he will necessarily fail. Rather, his case falls within the type of liability, referred to by Lord Ross in *Micosta* (*supra*), incurred for a deliberate misuse of the defenders' powers in the management of the harbour at Kyle for malicious reasons, causing the pursuer loss; notably the chance of securing the EWOS contract. Such a case may well be made out, if it transpires that the pursuer's averments are true.

[38] The Lord Ordinary's analysis of what she perceived to be a vicarious liability case is not sound in the circumstances averred. There is no question of Mr Usher or Mr Thomson acting on a frolic on their own. The pursuer's case is that, on the contrary, they were acting specifically on the instructions of their employers, that is the defenders, notably those of the relevant councillor, namely Mr Henderson, who was the chairman of the defenders'

Harbour Board. Even if they were not doing so, their actions in relation to EWOS were as officials of the defenders (see *Racz* v *Home Office* [1994] 2 AC 45, Lord Jauncey at 53). It was their authority as public officials which would, in contrast to a competing commercial enterprise, carry weight with a third party such as EWOS.

[39] The second (sale) chapter of the case, being the alternative of interference with the potential sale of the pursuer's business, is sufficiently interlinked with the major element to merit proof. Although it could have been better expressed, the case is again one of malicious actings on the part of the officials, not apparently for personal purposes, but in connection with the pursuer's lease with the defenders. The object, so far as is discernible from the averments, was to prevent the sale of the pursuer's business, including transfer of the lease, to the consortium. This was done by Mr Usher conveying to the consortium, first, that the defenders had greater powers than they in fact possessed in relation to the assignation of the lease. The Lord Ordinary appears to have misunderstood the import of the pursuer's pleadings in this area. The averments are not confined to Mr Usher asserting the defenders' entitlement under the lease; even if such assertion had come within his legitimate ambit. Secondly, he misrepresented the use clause in the lease and indicated that there was something wrong with the building warrant for part of the buildings. Thirdly, he suggested to the consortium that the pursuer was in financial difficulties. The Lord Ordinary's reference to a statement from Mr Usher being taken as one of opinion understates the difference between statements made by private, and often competing, commercial interests and those made by public officials upon whose neutrality the public are likely, and generally entitled, to rely. The legal thinking in relation to whether this is a vicarious case, or one based in negligence, remains cloudy in the pleadings, but, at this stage, the test of relevancy is met for reasons similar to those set out above regarding the major element of the claim.

[40] The third (rates) chapter falls into a different category. The pursuer's complaint is about the defenders levying the rates by maintaining that the premises were occupied by the pursuer, when they were not, and presenting a false case to the Valuation Appeal Committee. However, the mechanism for challenging the decision of the Committee is by means other than ordinary action. From what was said at the hearing of the reclaiming motion, and not disputed, and despite the pursuer's discontent, this aspect of the case has been settled extrajudicially.

[41] The court will allow the reclaiming motion in large part, recall the interlocutor of the Lord Ordinary dated 15 November 2017, repel the pursuer's fifth and sixth pleas-in-law, and sustain the defenders' first plea-in-law to the extent of excluding from probation the averments in the sixteenth article of condescendence. *Quoad ultra*, it will allow a proof before answer.

Postscript

[42] The pursuer raised an issue concerning the Lord Ordinary's subconscious bias. It was explained to the pursuer at the hearing of the reclaiming motion that this ground of challenge would have little practical consequence, since the court would judge the relevancy of his pleadings on their merits, independent of the Lord Ordinary's thinking. The court does not consider that there is substance in this allegation, but the pursuer's criticisms do highlight the need for courts to be circumspect, especially in cases involving party litigants, when complimenting legal practitioners, their assistance to the court or diligence in preparation. Praise from the Bench, when merited, can be a deserved morale boost to the practitioner concerned. There is a place for it within the wider legal system. Whether, and to what degree, it should find its way into a judicial opinion is a more delicate question.

Because of the potential effect it may have on the perception of the, often unsuccessful, opposition, especially when that party's forensic efforts have been met with opprobrium, it should certainly not feature as a matter of routine. It may be best to confine it to rare and exceptional cases. It may also assist the perception of balance if a judge, rather than avowing a wholesale acceptance of one party's submissions, simply stated, in his or her own words, what propositions and criticisms are well founded. In short, the court is not surprised that the pursuer took umbrage at the imbalance of compliment and criticism, even if the well-informed observer would not have done so.