



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 78

A91/17

OPINION OF LORD SUMMERS

In the cause

G1 PROPERTIES LIMITED

Pursuer

against

THE ROYAL BANK OF SCOTLAND PLC

Defender

**Pursuer: C Wilson; Nisbets  
Defender: Cormack QC; Pinsent Masons**

3 August 2021

**Introduction**

[1] The pursuer is a limited liability company. From about 2001 it operated in the “buy to let” property market. The defender provided the pursuer with loans to enable it to purchase properties. It would appear that separate loan agreements were entered for each purchase. The defender suggested that a more flexible arrangement would be of benefit to the pursuer. It suggested a “Hunting Licence”. This was a loan facility that enabled the pursuer to purchase properties without the need for individual loan agreements. Provided the pursuer supplied the defender with an acceptable survey for any property it wished to purchase, the pursuer was entitled to borrow funds up to a limit of £750,000.

[2] The pursuer was agreeable to this course of action. It would appear however that there was a delay before the Hunting Licence was signed. The pursuer avers that it was intended to have a two year term. But by the time it was signed on 23 March 2007 the Hunting Licence had only about six months left to run. It was due to expire on 1 September 2007 (p 16B). Whatever the explanation for the delay in signature its term was amended on 30 July 2007 and extended to 1 September 2010 (p 16B-C). The pursuer avers that the defender made the loan facility available to the pursuer before the Hunting Licence was signed (p 14E).

[3] Not long after the extension of the Hunting Licence was agreed, the commercial relationship between the parties began to deteriorate (p 17C). In 2008 the defender reduced the credit available under the Hunting Licence to £360,000 and intimated that the pursuer was in breach of its lending criteria. In September 2010 the defender advised the pursuer that the Hunting Licence had expired (p 17C-D). The pursuer avers that it "attempted to discuss" the conversion of its borrowing under the Hunting Licence "into term loans" (p 17C). The defender refused to do so. The defender ultimately exercised its rights in security. A receiver was appointed on 7 March 2012 (p 6A). The receivership ran its course. On 20 March 2015 the receivership came to an end.

[4] The pursuer raised this action on 1 March 2017. The pursuer avers that the defender promised to provide a new term loan on expiry of the Hunting Licence. It avers that the defender made this promise on three occasions. The pursuer avers that the defender promised that at the end of the Hunting Licence it would give the defender the option of selling the properties purchased with funds borrowed under the Hunting Licence so as to clear its borrowings or switching its borrowings into a new loan agreement. The pursuer avers that the new loan was repayable in twenty years.

[5] The defenders submit that the pursuer's pleadings in support of its action are irrelevant and lack specification. The pursuer likewise submits that the defender's pleadings are irrelevant. I heard a debate at which their various submissions were discussed.

**What is the significance of the use of the term "indicative"?**

[6] The pursuer relies on a document entitled "The Indicative Heads of Terms" (hereafter "the Heads of Terms"). This document was given to the pursuer in 2006 when the first representation relied on by the pursuer was made by Mr White, who was a bank manager in the employment of the defender. Although the pursuer's case largely rests on the oral representations of Mr White and others its case also depends to an extent on the Heads of Terms. The defender sought to persuade me that if the document was entitled "indicative" it could not have any contractual effect and to the extent that the pursuer's case relied on this document it was irrelevant.

[7] I accept that the word "indicative" suggests the terms contained in the document were not intended to represent the parties' final position. There is no indication that the Heads of Terms were revised or re-negotiated and a final document signed. But it is also the case that the pursuer avers that the defender provided funds as anticipated by the Heads of Terms before the Hunting Licence was signed. From the pursuer's pleadings it would appear that the Hunting Licence was based on the provisions of the Heads of Terms. In light of this it is not possible at this stage of the case to treat the Heads of Terms as devoid of contractual effect on account of their description as "indicative". For aught yet seen the parties may have considered themselves bound by its terms. I am also reluctant to reject the pursuer's case at this stage in light of the fact that the pursuer avers that the Heads of Terms

may be used to interpret the defender's representations. I accept that this on its own does not establish that the heads of Terms were indicative as opposed to final. But at debate the pursuer submitted that the expression "term loan" had a defined meaning in the Heads of Terms and Mr White's use of the expression was controlled by the Heads of Terms (p 10A). In that situation I have to contemplate the possibility that it was a binding document and that its terminology had a bearing on the interpretation of the words Mr White and others used. Although there is no averment that the Heads of Terms was signed by the parties, I am unwilling to accept that the word "indicative" is a sufficient reason to treat the pursuer's pleadings based on this document as irrelevant.

#### **Was the Hunting Licence an overdraft arrangement?**

[8] Mr Cormack QC on behalf of the defender submitted that the pursuer was wrong to describe the Hunting Licence as an overdraft arrangement (p 9E). He submitted that it could not be an overdraft because the borrowings were not repayable until the Hunting Licence expired. He submitted that an overdraft was repayable on demand. In reality Mr Cormack QC submitted that the arrangement described by the pursuer was a short term loan.

[9] I do not consider that it matters whether the Hunting Licence was an overdraft facility or a term loan. The pursuer's complaint is that the defender made a promise which it dishonoured. The pursuer's case does not depend on whether the facility was an overdraft repayable on demand or term loan. As it happens the defender waited until it had expired before taking steps to recoup its loan. If the defender was entitled to repayment on demand it did not exercise that right. That being so the accuracy of the pursuer's designation is neither here nor there. The authority supplied to me by the defender for the

proposition that overdrafts are repayable on demand was a quotation from Gloag & Henderson (*Gloag & Henderson The Law of Scotland* 14<sup>th</sup> edition, paragraph 15.04). The only authority cited is a footnote to an English case (*Williams & Glyn's Bank Ltd v Barnes* [1981] Com. L.R.205). The report is a truncated account of a lengthy judgement by Gibson, J. At page 209 he states that an overdraft is repayable on demand unless there is a term to the contrary effect. I have no difficulty in accepting this. But I do not read the case to say that an overdraft must be repayable on demand. As I read Gibson, J's comments he accepted that it may not be repayable on demand. It would appear that the expression could be used to describe an arrangement that permits the debtor to borrow up to an agreed limit whether or not it is repayable on demand. I am not disposed to accept that the term has a technical meaning and that the pursuer's case is irrelevant because the loan facility is described as an "overdraft".

### **The oral representations**

[10] The pursuer avers that at various social events in 2006 and 2007 three representatives of the defender, Mr White, Ms Gilchrist and Mr McBride, promised that once the Hunting Licence expired the pursuer would be entitled to convert its borrowing into a term loan. The pursuer avers that the defender gave it the option of selling its properties at the end of the Hunting Licence so as to repay its indebtedness or of entering a fresh loan arrangement which would last for up to twenty years (p 9E-p 10A). The first representation was by Mr White at the Grapevine Restaurant in Bothwell (p 9E), the second by Mr White's successor Ms Gilchrist at a charity fundraising event in the Glasgow Hilton (p 13B) and the third at an informal function at the defender's Motherwell branch attended by Ms Gilchrist

and Mr McBride (p 14E). The pursuer treats the promises as in effect one promise, although made on three occasions.

[11] The most detailed averments as to the terms and meaning of the promise are at p 9E-p 10D where Mr White's representation is set out. The case law shows that promises often require no action on the part of the promisee. It is sufficient that the promise is made. It takes effect without any action on the part of the promisee. This promise however gave a "discretion". The pursuer could have decided to sell its properties and repaid the loan. If it was to follow the course it relied on in this action it had to choose to convert the borrowings into a new term loan (p 10B, p 13B-C). The pursuer avers that it was entitled to the new loan on "request" (p 13E). Thus although it was a unilateral promise, the promise could not take effect until the pursuer notified the defender which option it proposed to take.

[12] The legal status of the promise is variously expressed. It is said that it was a unilateral promise or undertaking. The pursuer avers that the representation might also be regarded as a collateral warranty. Alternatively it submits that the representation was a negligent misrepresentation. The pursuer accepted that if the pursuer's pleadings in connection with its case of unilateral promise or undertaking was irrelevant then these alternative cases could not survive. This relieves me of the need to deal with some of the defender's subsidiary submissions about the pursuer's averments anent the collateral warranty and negligent misrepresentation. I will proceed on the basis of this concession. For simplicity I shall proceed on the basis of the pursuer's primary case that the defender made a promise to the pursuer.

[13] The promise on which the pursuer relies is a one sided arrangement. Its terms are entirely favourable to the pursuer and provide no protection for the defender. It is extremely brief in sharp contrast to the detailed arrangements that typically accompany a

commercial loan. The pursuer nevertheless avers that it is enforceable. The defender quite properly did not seek to argue that the pursuer's case was irrelevant because of its one sided or generous nature. No doubt it accepted that whether such a promise could in its context be reasonably regarded as an enforceable promise was a matter for proof.

### **The pursuer's option**

[14] The pleadings say that the pursuer attempted to "discuss the issue" of converting the borrowing with the defender and tried to "commence the process" of converting the borrowing into "term loans" (p 17C). The pursuer does not aver what it sought to "discuss". It does not explain what "process" it had in mind. I have been unable to locate any averment that shows that the pursuer actually exercised a right to be granted a new term loan. The pleadings indicate rather that it entered a phase of negotiation and that rather than a single new loan it sought new "term loans" with the defender. The pleadings in support of its legal case are at odds with its factual case. Given the importance of the point I consider that if the pursuer avers that it had an option, the pleadings should indicate when the option was exercised. The pleadings at present proceed on the basis that it tried to negotiate with the defender. There is confusion as to whether it was entitled to a new loan or new loans.

### **The term loan**

[15] The pursuer's pleadings state that at the meeting in the Grapevine Restaurant in April 2006 Mr White made a verbal promise to convert the borrowing into a "term loan" once the Hunting Licence was at an end (p 10A). He also gave the pursuer a copy of the Heads of Terms at this meeting. It is evident from the pleadings and from the submissions

made at debate that the pursuer relies on the Heads of Terms in order to give content to the expression “term loan” which it is said Mr White used in his representation. The pursuer’s pleadings in this connection are not easy to follow. The pursuer avers that the defender represented that “...the borrowing under the Hunting Licence could be converted into a term loan at the pursuer’s discretion at any time” (p 10A).

[16] At p 10A-B the pursuer avers that the Heads of Terms dealt with “the existing loans” and provided that they would be consolidated into one term loan. The pursuer does not aver that the Heads of Terms made any express provision for what was to happen to the borrowings under the Hunting Licence.

[17] The borrowing under the consolidated loan is described in the pleadings as the “Term Loan” and was to be available for up to twenty years. The pursuer then goes on to say “The Hunting Licence was for ‘Interest only period of up to 2 years available. Thereafter debt to be converted to Term Loan’”.

[18] Mr Wilson for the pursuer pointed out that at p 10B the expression the “Term Loan” appears twice in the pleadings. On both occasions it is capitalised. He explained that the reason the expression “term loan” which appears in Mr White’s representation is capitalised at this point in the pleadings is to show that this expression is found in the Heads of Terms where it is expressed as a “Term Loan”. The pursuer pleads, “The Term Loan available for consolidated loan was up to 20 years” (*sic*).

[19] In this connection I observe first that if the expression “Term Loan” has a defined meaning in the Heads of Terms and if it is the pursuer’s case that when Mr White used the expression “term loan” he should not be understood to refer to a term loan in a general sense but should be understood as referring to a term loan as defined by the Heads of

Terms, it should set out what that meaning is and which provisions of the Heads of Terms supply that meaning. The pursuer's pleadings fail to undertake that task.

[20] If the pursuer can demonstrate that the Heads of Terms gave the expression a defined meaning, as appears to be the reason for its capitalisation, the pursuer must form a bridge between the Heads of Terms and Mr White's words. The pursuer does not provide relevant and specific averments that enable the defender to understand why the pursuer is entitled to say that Mr White's use of the expression "term loan" is referable to the use of that expression in the Heads of Terms. To do so it requires to aver that this was the reasonable and objective meaning of his words. Although the pursuer avers that the Heads of Terms was given to the pursuer at the meeting there is no indication that Mr White referred to the document. The pursuer's case must therefore rest on implication but no basis for the necessary implication is pleaded.

[21] According to the pursuer's pleadings at p 10A-B, the Term Loan in the Heads of Terms dealt with the consolidation of existing borrowing and not future borrowing. The pleadings do not explain why a loan that was designed to deal with the pursuer's "existing loans" should reasonably and objectively be understood to refer to future borrowing under the Hunting Licence. At the time the promise was made no sums had been borrowed under the Hunting Licence. The various loans the pursuer had taken out were to be consolidated into a single term loan. It is not clear to me from the pleadings why the reasonable and objective meaning of Mr White's words was that the pursuer would be entitled to a term loan on the same basis as the consolidated loan proposed for past borrowing.

[22] The matter is further complicated by the incorporation in the pleadings of an unattributed quotation. At p 10B the pleadings say as follows "The Hunting Licence was for 'interest only period of up to 2 years. Thereafter, debt to be converted to Term Loan'". I

accept that this quotation supports the pursuer's case. But the source of the quotation is unspecified. It includes a capitalised reference to "Term Loan". This may indicate that it is a quotation from the Heads of Terms or it may be a quotation from someone referring to the Heads of Terms. The pursuer fails to make any averments about the provenance of the quotation. I cannot be satisfied that it is a quotation from a document that has contractual effect or has any role in interpreting the representation relied on. Whether the document from which this quotation is drawn provides a basis for the pursuer's case depends on the provenance of the quotation. In my view the pursuer must identify the source of the quotation and specify how it bears on the representation attributed to Mr White.

[23] The pursuer sums up its position at p 10B-C.:

"Therefore, at this meeting, Mr White represented to the Pursuer that any property purchased via borrowing under the Hunting Licence could at the Pursuer's discretion, be converted into term loans on the same basis as the other term loans."

But at p 10A the pursuer avers that Mr White promised a single "term loan". It would appear that the Pursuer's case is that the future loan could be converted into loans (plural) on the same conditions as the consolidated loan to be made available for the other loans the pursuer held. The pursuer does not aver what the terms of these other loans were. Such an averment is contrary to its case that borrowing under the Hunting Licence would be amalgamated with the consolidated loan and that this was the "Term Loan" referred to in the Heads of Terms.

[24] This averment does not aver that the borrowing would be amalgamated with the consolidated loan but avers that the new loan would be a new term loan on the same terms as the consolidated loan. There are no pleadings to indicate why Mr White's representation should reasonably and objectively give the pursuer the right to more than one loan or loans

on the same terms as the "Term Loan". I consider that in light of these considerations the defender's plea to the relevancy of the case is well founded.

### **Mr White's statement**

[25] The defender pointed out that a section of Mr White's witness statement had been incorporated into the pleadings in Article 3 of Condescence (p 10C-D). The pursuer submitted that to the extent that these pleadings narrated Mr White's subjective opinion on the terms of the representation they were irrelevant. The defender submitted that the terms of the contract between the parties were to be determined objectively from the terms of any written document and the objective meaning of any representation made. I agree. It is rarely appropriate to insert quotations from witness statements in pleadings.

[26] The quotation is a mixture of speculation and indistinct reasoning. He opines that if a consolidated loan was provided for the "existing borrowing" the defender "could" (p 10D) have provided a twenty year loan for the Hunting Licence borrowings. The averment quotes him as saying, "I can think of no commercial reasons as to why this should not have been the case". Mr White opines that the contents of the Heads of Terms gave a "fair indication" of what the defender intended to do with the pursuer's borrowings under the Hunting Licence. The pleadings should give notice of the facts the pursuer proposes to prove and the propositions which it is said can be derived from these facts. What Mr White thought "could" have been the position is irrelevant. Fair indications are also irrelevant. What he thought is of no importance. The same difficulty arises in relation to the averments at p 21A-C where there is a further quotation from Mr White to the same effect.

**The representations of Ms Gilchrist and Mr McBride**

[27] The defender submits that the second and third representations made by Ms Gilchrist and Mr McBride in Articles 4 and 5 of Condescence are repetitions of the representations made by Mr White. I accept that for practical purposes this is the case. Ms Gilchrist's representation refers to "a term loan" and "term loans" (p 13C-D). Mr Gilchrist refers to "term loans" (p 14E). The averments made about the second and third representations do not resolve any of the difficulties that are present in relation to the first representation. If the case based on Mr White's representation is irrelevant then these averments are likewise irrelevant.

**Other matters**

[28] The defender submitted that if the pursuer's case based on promise was irrelevant then the pursuer's case based on collateral warranty was likewise irrelevant as both cases rested on the adequacy of the same averments. I accept that this is so. The pursuer likewise submitted that the pursuer's case of negligent misrepresentation was irrelevant. This case is to be found at p 24E. As I have noted above it is conceded that if the primary case based on the defender's undertaking or unilateral promise is irrelevant then the case of negligent representation cannot survive on its own.

[29] The defender submitted that the pleadings at article 9 and 10 of Condescence were irrelevant. These averments narrate that the defender's Mr Graham said to the pursuer that if what it said about the representations was true the defenders would honour their promise and would cease to hold the pursuer in default. I accept that the relevancy of these pleadings depends on the relevancy of the pursuer's pleadings at p 10A-D. I have

concluded that they are irrelevant. As a result Article 9 of Condescence is likewise irrelevant.

[30] The pursuer has a subsidiary case that the defender breached the Hunting Licence. It avers in Article 7 of Condescence that the Hunting Licence contained an implied term that in communicating with the pursuer as to matters arising under the Hunting Licence the defender would take reasonable skill and care. The pursuer avers that the defender was obliged to communicate to the pursuer why it had breached the Licence and specifically to explain why it no longer satisfied the defender's lending criteria. The pursuer further avers that not only was the defender obliged to offer a new loan to the pursuer in failing to do so it breached its obligation to communicate. I have concluded however that the pursuer has failed to set up a case that would have obliged the defender to offer a new loan. If the pursuer's case is that the obligation arises from the defender's oral representations I can see no basis for this implied obligation nor any way in which it could be connected to the pursuer's averments of loss. The pursuer does not aver that the defender's obligation to provide a new loan is based on the terms of the Hunting Licence. As I have indicated its averments are confusing and contradictory. At best the Hunting Licence is relied on as a means of explaining what the defender meant when it offered to convert the borrowings under the Hunting Licence into a term loan. But as I have indicated there is no relevant or specific case to that effect. Even if I were to assume that there was an obligation to provide a new loan I do not accept that there is a separate obligation to communicate the offer of loan. Such an obligation is swallowed up in the primary obligation to make the loan available on the exercise of the option. To fulfil that primary obligation is to communicate the offer. There is no basis for any other term to be implied based on business efficacy or reasonableness. Moreover the existence of the primary obligation excludes the existence of

an obligation to provide information about lending criteria *sine ex hypothesi* such information was irrelevant given the existence of an obligation to provide a new loan on the terms averred by the pursuer.

### **The loan over 2 Heather Gardens, Uddingston**

[31] In Article 11 of Condescence the pursuer refers to a property at 2 Heather Gardens, Uddingston. The property had been purchased by the pursuer under a separate term loan. The loan expired on 30 September 2010. The pursuer had outstanding borrowings on the loan of £81,429. The pursuer wished to raise further funds on the security of the property. The pursuer avers that the property had risen in value and the pursuer anticipated being able to raise funds based on its value. The pursuer would be able to use these funds to pay its other borrowings. The defender had a standard security over the property. It declined to discharge its security. The defender was not willing to release the security unless the pursuer cleared its debts to the pursuer including the sums due under the Hunting Licence. It would appear that the defender was not willing to release the security even if the pursuer repaid the sum outstanding under the loan secured on 2 Heather Gardens, Uddingston.

[32] The pursuer avers that had the defender permitted it to repay the loan outstanding on that property the pursuer would have ceased to be in default and that by refusing to co-operate the defender kept the pursuer in default. The pursuer avers that it was an implied term of the loan agreement that the defender would not hinder or impede the pursuer in performance of its contractual obligations (p 22E). The pursuer further avers that the defender was bound to act on valid instructions from the pursuer and that such an instruction had been issued when it told the defender that it wished to repay the

outstanding borrowings by means of a refinancing arrangement in return for a discharge of the security.

[33] These pleadings are irrelevant. The pursuer does not aver the terms of its standard security and thus does not set out the basis upon which it had been provided with funds to purchase the property in the first place. If it was a standard security the terms of the security are provided for in part 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970. The security may have been an amalgam of terms fixed by statute and the lender's terms and conditions. It may have been an all sums security. It may have been a security for a fixed sum.

[34] Whatever the position it is not possible to judge the relevancy of the implied terms contended for in the absence of any averments about the security obligations applicable to the security in question. The security is not incorporated into the pleadings and there are no averments setting out the terms of the bond in the security. I do not consider the pursuer is entitled to ignore this issue until it raises its head at proof. I consider a relevant and sufficiently specified case must set out the terms of the contract of security contained in the security document and aver why the terms contended for are to be implied having regard to the express terms of the security. "All sums" securities are ubiquitous. If this was an all sums security there would be no room for the implied terms contended for since the terms of the security would permit the defender to utilise the security to cover other debts owed to it. If the bond in the security confined the pursuer's liability to repay to the sums borrowed for the property in question the pursuer should say so. But there is no averment to that effect. I can see no basis for the implication of a term that bound the defender to accept repayment where the pursuer does not aver that the security was confined to the loan for

2 Heather Gardens, Uddingston. In this situation the averment that there was an implied term that the defender would obey valid instructions from the pursuer falls away.

### **The defender's pleadings**

[35] The pursuer submitted that if its case was relevant whether in whole or part I should grant decree *de plano*. The pursuer pointed out that the defender's pleadings in answers 3, 4, 5, 7 and 9 were largely "not known and not admitted". The pursuer submitted that it was not open to the defender to say that it did not know if the pursuer's pleadings were true and to refuse to admit them. The pursuer submitted that they related to matters within its knowledge since they arose from the actings of its own staff. The pursuer submitted that this included its averments about the terms of the representations and the obligation on the defender to provide a new loan. Mr Wilson submitted that following *Ellis v Fraser (1840) 3 D 264* at p 271 per Lord President *Pegler v Northern Agricultural Implement and Foundry Co Ltd (1877) 4 R 435* at p 440 per Lord Mure, the court was entitled to treat these non-admissions as admissions.

[36] The pursuer pointed out that the defender issued a bare denial in relation to the pursuer's averments of loss and submitted that the court was entitled to grant decree for the sum concluded for.

[37] The defender explained that it was entitled to aver that it did not know if an averment was true and entitled to aver that it did not admit averments if it did not know if the averment was true. Although no doubt the averments in question traversed matters that had involved communications and interactions between the pursuer's representatives and its staff, the persons referred to in the pleadings were no longer in the defender's employment and could not be approached to obtain precognitions. In that situation

Mr Cormack QC submitted the defender was entitled to use the “not known and not admitted” formula. He submitted that it was not possible to treat these averments as deemed admissions unless they were matters of which the defender was bound to have knowledge. In this connection I was referred to *O’Connor v WG Auld & Co (Engineering) Ltd* 1970 SLT 16. Lord Robertson was asked by the pursuer in that case to hold that the defender had admitted the weight of an object because the defender had neither admitted nor denied the pursuer’s pleadings on the point. It is clear that he did not accept that submission. But it is not clear on what basis he did so. He states that the defenders had evidence of the weight of the object. He does not say why, if the “specific figures” were “within their knowledge” they should not be deemed to have admitted the pursuer’s pleadings. Instead he decided that the proper course was to exclude the defender’s evidence of the weight of the object because they had failed to refer to their evidence in their pleadings. He decided as a matter of fairness the defenders were not entitled to lead evidence of the object’s weight since they had given no notice to the pursuer of their position. The case does not therefore shed much light on the issue. The objection was I notice taken after proof when the court would have a better idea of what the defender knew or did not know. The objection here is taken at debate.

[38] I have come to the view that *Ellis* and *Pegler* do not apply where the court is unable to determine from the pleadings or the circumstances of the case whether an averment of “not known and not admitted” relates to a matter within the defender’s knowledge.

Mr Cormack QC advised me that it did not have any information about what had been represented to the pursuer. I am not inclined to be sceptical of this. I consider I should proceed on the basis that the averments have been responsibly made. While it is reasonable to suppose that the defender has some records of the parties’ dealings, the critical averments

relate to oral representations made at social events. I was advised by Mr Cormack QC that it does not know what its former managers said to the pursuer. That could of course be addressed by means of precognition but I do not understand this rule of pleading to extend to issues of fact that require investigations of third parties.

[39] The pursuer has objected to all the “not known and not admitted” averments. I am not asked to discriminate between them. In that situation, like Lord Robertson in *O’Connor*, I consider that the correct course is to decline to treat them as deemed admissions. Thus (assuming the case gets to proof and the defender is not permitted to amend) the defender may challenge the pursuer’s evidence in cross examination but may not advance a positive alternative defence.

[40] The defender issues a bare denial of the pursuer’s averments of loss. I do not accept that a bare denial should be treated as a deemed admission in this case; see the observations of the Lord Justice Clerk (Ross) and Lord McCluskey in *Gray v Boyd* 1996 SLT 60. I consider that a denial is a relevant defence. That said the defender’s bare denial limits what it can do at proof. It may test the evidence led by the pursuer in cross examination but it may not lead evidence designed to establish an alternative set of facts.

[41] In light of the foregoing I shall dismiss the case and reserve all questions of expenses.