

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2025] SC GLA 75

GLW-A1467-24

JUDGMENT OF SHERIFF D N TAYLOR

in the cause

MICHAEL JAMES COCHRANE

Pursuer

against

HARPER MACLEOD LLP

Defender

Pursuer: Clair, advocate; Gilson Gray LLP
Defender: Manson, advocate; Beale & Company

GLASGOW, 15 August 2025

The sheriff, having resumed consideration of the cause, sustains the first plea-in-law for the defender and dismisses the action; assigns a hearing on expenses to take place on 5 September 2025 at 9.30am within Glasgow Sheriff Court, 1 Carlton Place, G5 9DA to call in open court.

NOTE:

Background

[1] I heard counsel in debate in this ordinary cause action on 24 June 2025.

[2] The pursuer seeks payment of the following sums: £10,046.20 as first craved, £13,336.03 as second craved and £113,518 as third craved. Interest is sought on all of the foregoing sums and the expenses of the action are sought as fourth craved.

[3] The pursuer avers that he married Mrs Margo Cochrane in 1977. They separated in 2003. In 1982 the pursuer purchased a property in Eyemouth (the property) in his sole name. The pursuer and Mrs Cochrane looked to divorce in 2019.

[4] The pursuer instructed the defender in relation to his divorce. The parties entered into a Service Agreement in relation to the services to be provided.

[5] The pursuer attended a number of meetings in the course of the divorce negotiations. He was not provided with advice at any of these meetings about the potential Capital Gains Tax ("CGT") liability on the sale of the property.

[6] A joint meeting between the pursuer, the defender and his former wife's agents took place on or around 21 January 2020. At the joint meeting it was agreed that the property would be sold and the free proceeds divided 55% to 45% in Mrs Cochrane's favour. A Heads of Terms document was entered into between the pursuer and Mrs Cochrane.

[7] Subsequently the pursuer received advice that he would incur a CGT liability on the sale of the property. He claims that as a result of the advice received the agreement with his wife required to be renegotiated. The renegotiated deal resulted in him suffering a loss of up to £113,518. In addition, he claims that he suffered loss in respect of the legal fees paid to his new solicitors and the fees paid to the defender. If he had been aware of the CGT implications at the point when the Heads of Terms document was agreed the agreement could have been structured in such a way as to negate or at least reduce his tax liability and still give him the same share of the free proceeds.

[8] He avers that the defender was in breach of contract et separatim at fault in failing to identify that there was likely to be a CGT liability on the sale of the property and to actively refer him for tax advice.

[9] The debate proceeded in respect of the defender's first plea-in-law which is a general plea to the relevancy and specification of the pursuer's averments.

[10] For the purposes of the debate the parties' written pleadings are contained within a record, No 9/2 of process dated 10 June 2025. In advance of the debate parties lodged written notes of argument; Nos 12 and 14 of process for the pursuer and defender respectively. A joint bundle of authorities was lodged in electronic form. Counsel supplemented their written submissions by oral submissions at the debate. At the conclusion of the debate, I made avizandum.

[11] I now issue my judgment.

The defender's submissions

[12] The defender adopted its written note of argument.

[13] Three main submissions were advanced in the course of the debate based upon points one, two and four of the note of argument.

[14] The defender's first submission is that the pursuer's averments are irrelevant given the terms of the contract entered into between the parties. In Article 3 of condescendence the pursuer admits that the Service Agreement referred to by the defender in answer 3 delineated the scope of the services which the defender was undertaking to provide.

[15] The Service Agreement, dated 26 June 2019, appears as No 6/1 of process in the defender's first inventory of productions. It reads, in so far as material, as follows:

"Work to be carried out

We shall take instructions from you and act on your behalf in respect of all matters arising from your separation from Mrs Margo Cochrane.

We will not be providing advice in respect of tax in relation to this matter. However we do have a personal tax director who is able to provide advice on income tax,

capital gains tax, trust & executry tax and inheritance tax. If you would like to engage us in respect of one or more of these matters please let us know.

Alternatively we can work in conjunction with your chosen tax advisor in respect of any matters relating to tax”

[16] The defender submitted that as a matter of contractual interpretation it was clear that the defender did not accept responsibility in any way for the pursuer’s tax affairs. The pursuer does not aver that he engaged the defender on a separate basis in relation to any tax advice.

[17] The pursuer’s complaint on record is that the defender failed to recognise a potential tax implication of his divorce and to advise him to seek advice on that matter. Two points arise. First of all, the pursuer does not aver that the requirement to recognise the tax issue in question and refer the pursuer for advice was a reasonably incidental aspect of the defender’s instruction. Secondly, esto there was any averment that the requirement to recognise and refer was a reasonably incidental aspect of the defender’s instruction that would be of no moment as the parties contracted in advance to exclude responsibility for providing any tax advice.

[18] In support of its submissions the defender referred to the opinion of Lord Doherty in *McMahon v Grant Thornton UK LLP* 2020 SLT 908 at paragraphs 70 to 77. *McMahon* was an action of professional negligence raised against a firm of accountants. There was dispute about the precise scope of the defender’s retainer the material parts of which are narrated at paragraph 11 of Lord Doherty’s opinion. Lord Doherty considered the extent to which duties incidental to the contractual retainer could arise.

[19] At paragraph 71 Lord Doherty observed that in general the scope of a professional’s duty to a client depends on the terms and limits of the retainer. He quoted from the

judgment of Oliver J in *Midland Bank Trust Co Limited v Hett, Stubbs and Kemp* [1979] Ch 384

at pp 402-403 where Oliver J stated:

“There is no such thing as a general retainer in that sense. The expression ‘my solicitor’ is as meaningless as the expression ‘my tailor’ or ‘my bookmaker’ in establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.

Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors - or upon professional men in other spheres - duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v. Beuselinck* [1972] 2 Lloyd's Rep. 172; *Griffiths v. Evans* [1953] 1 W.L.R. 1424 and *Hall v. Meyrick* [1957] 2 Q.B. 455 demonstrate that the duty is directly related to the confines of the retainer.”

[20] The defender invited the court to follow the approach taken by Lord Doherty and placed emphasis on the use of the word “undertake” in the passage quoted from Oliver J's judgment.

[21] There was no point in allowing enquiry in this kind of situation. The issue turned on the express terms of the contract. There may be cases where the terms of the retainer are more fluid but that is not the position here.

[22] Continuing with the discussion of *McMahon* reference was made to paragraph 72 of Lord Doherty's opinion and to his quotation from paragraph 24 of Patten LJ's judgment in *Mehjoo v Harben Barker* [2014] 4 All ER 806 where Patten LJ stated:

“As the judge observed in [126] of his judgment, there is no such thing as a general retainer and the terms and limits of the retainer and any consequent duty of care therefore depend on what the professional is instructed to do: see *Regent Leisuretime Ltd & Ors v Skerrett & Anor* [2006] EWCA Civ 1184; [2007] P.N.L.R. 9. An accountant

in the position of HB was not therefore under a general roving duty to have regard to and to advise on all aspects of the claimant's affairs absent a request to do so."

[23] In commenting on the decision in *Mehjoo*, Lord Doherty observed that: "The retainer was for tax compliance work. A more extensive tax planning service was available only on request and was never requested (Patten LJ at paras 21 and 41)." The defender drew the comparison between the position in *Mehjoo* and the position in the present case.

[24] At paragraph 74 of *McMahon*, Lord Doherty cited Jackson LJ's summary of the relevant principles of the law in this area in *Minkin v Landsberg* [2016] 1 WLR 1489 at p 1498:

"38. Let me now stand back from the authorities and summarise the relevant principles:

- (i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.
- (ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.
- (iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.
- (iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.
- (v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed."

[25] Point (v) of the principles referred to by Jackson LJ in *Minkin* makes it clear that the parties can limit the duties which would otherwise form part of the retainer. That is what the parties have done in this case in the Service Agreement.

[26] In addition to citing what may be regarded as the main English authorities in this area Lord Doherty referred to two more recent cases. The defender drew the court's attention to Lord Doherty's reference to the quotation from Green LJ's judgment in

Denning v Greenhalgh Financial Services Limited [2017] EWCH 143 (QB) at paragraphs 51

and 52 which reads:

"51. ...The case law cited above emphasises that in both contract and tort the four corners of the retainer are, at least ordinarily, likely to be dispositive.

52. As noted in [43] above reliance is placed upon the judgment in *Credit Lyonnais (ibid)*. This establishes that, in unusual cases, the surrounding circumstances might be such that the four corners of a retainer might not describe, exhaustively, the full extent of the duty owed by a professional."

[27] In so far as it may be suggested that the present case is an unusual case as envisaged by Green LJ in *Denning*, the defender submitted that there were no averments by the pursuer from which it could be inferred that the case was in any way unusual. Reference was also made to Green LJ's focus in *Denning* on the importance of the retainer exemplified by the comments at paragraph 55 of his judgment (quoted at paragraph 76 of *McMahon*) that:

"The general thrust of the observations set out in commentaries is that the most important consideration governing the scope of the duty is the retainer and that the courts are loath to extend that duty far beyond the retainer, though it is accepted that in appropriate but narrow circumstances this may occur. The general tenor of academic commentary, and indeed that of the courts, is that for an extended duty and liability to arise there has to be a close factual and legal nexus between the retainer and the matter that it is alleged the adviser omitted to provide advice upon."

[28] The second more recent English case referred to by Lord Doherty was *Lyons v Fox Williams LLP* [2018] EWCA Civ 2347. The defender drew attention to Patten LJ's leading judgment in this case at paragraph 41 where he stated, under reference to the *Credit Lyonnais* and *Minkin* cases, that the solicitor's obligation to bring to the client's attention risks which become apparent to the solicitor when performing his retainer does not involve the solicitor in doing extra work or in operating outside the scope of his retainer.

[29] Finally on *McMahon* the defender referred to the approach taken by Lord Doherty in relation to the construction of the letter of engagement at paragraph 79 where he stated:

“In my view the letter of engagement was an engagement to provide tax compliance services. It clearly distinguished between those services (which the defender was obliged to provide under the engagement) and separate *ad hoc* tax planning and advice which, if the pursuer wished the defender to provide it, required a further arrangement to be made. In my judgement a reasonable person in the position of the parties at the time of contracting would not have understood the parties to have provided that, in addition to the Personal Tax services which it was to provide, the defender was bound to seek to inform the pursuer of any tax planning ideas of which it became aware which it thought might be of assistance to him. Rather, I think that the reasonable person would have read the section as recording that it was the defender's intention to endeavour to provide ideas of that sort to supplement the Personal Tax services, but that it was not undertaking any obligation in that regard. The section would have been understood as being no more than a statement of intention as to intended future conduct (cf Gloag, *The Law of Contract in Scotland* (2nd ed), p 464; *Royal Bank of Scotland Plc v Davidson* 2010 SLT 92, per Lord Drummond Young at para 20).”

The defender submitted that applying the principles referred to by Lord Doherty it was clear from the terms of the Service Agreement that the parties had not intended that the defender would be obliged to provide advice in respect of tax.

[30] A distinction is drawn in the pursuer’s pleadings at Article 2 of condescendence between the duty of a reasonably competent solicitor to advise the pursuer to seek tax advice and what was said to be an entirely separate obligation in the Service Agreement. This purported distinction is flawed. The simple point is that identifying circumstances in which tax advice might be required is providing tax advice. That is the very thing which the defender excluded responsibility for in terms of the Services Agreement.

[31] Lastly the defender addressed the contra proferentum submission advanced by the pursuer in paragraph 13 of his note of argument. Reference was made to *Grant v International Insurance Company of Hanover Limited* [2012] UKSC 12 per Lord Hamblen at paragraph 29 and to *Impact Funding Solutions Limited v Barrington Services Limited* [2017] AC 73 per Lord Hodge at paragraph 6. These cases were authority for the proposition that the contra proferentum doctrine could only apply where there was real doubt in the

interpretation of the contract. Here there was no doubt in the interpretation of the exclusion clause in the Service Agreement.

[32] In summary the defender invited the court to find that the whole action is irrelevant on the basis that it is concerned with allegedly negligent conduct in respect of tax.

[33] The defender's second submission proceeded on the basis that, following the recent amendment, the pursuer's claim was now pled as a loss of chance claim. In his amended pleadings the pursuer avers in Article 10 of condescence that he incurred a CGT liability given the Heads of Terms agreed with his ex-wife. He avers that he would never have agreed such Heads of Terms had he been warned of his potential CGT liability. The defender accepted that, in principle, the pursuer had adopted the correct approach by pleading his case on a loss of chance basis. However, the pleadings on loss of chance are fundamentally irrelevant et separatim lacking in specification.

[34] Reference was made to two recent cases in which loss of chance has been considered: *McMahon supra* at paragraphs 111 to 116 and *Centenary 6 Limited v TLT LLP* 2024 SLT 681 per Lord Tyre delivering the opinion of the court at paragraphs 65 to 71. At paragraph 68 of *Centenary 6 Limited* Lord Tyre quoted with approval from the speech of Lord Briggs at paragraph 20 of *Perry v Raleys Solicitors* [2020] AC 352 where Lord Briggs stated:

"To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

[35] Applying the approach adopted in *McMahon* and *Centenary 6 Limited* the first stage of a loss of chance claim is to assess, on balance of probabilities, what the pursuer would have done had there been no negligence on the defender's part. The pursuer avers in Article 10 of condescence that if he had been referred for tax advice he would have accepted such a

referral. He does not aver what advice he would have received. He simply avers that he would have acted in accordance with competent tax advice.

[36] The defender submitted that this lack of specification on the pursuer's part completely disabled the defender and the court from knowing what his proposed counterfactual is. There was a lack of fair notice. The defender queried how it could properly prepare for proof if it was unable to seek input from its own expert on what tax advice the pursuer would have received. The vagueness of the pursuer's position on record was demonstrated by the averment in Article 10 of condescence which reads: "He would not have lost the chance of negotiating a more favourable set of Heads of Terms with his ex-wife in a manner more favourable to his tax affairs". This averment begged the question of how the Heads of Terms could have been negotiated in a manner which was more favourable to the pursuer's tax affairs. The lack of specification was at the heart of the pursuer's case.

[37] The second submission made by the defender in relation to the loss of chance claim relates to causation. Reference was made to the averment in Article 10 of condescence that:

"But for the defender's breach of contract et separatim fault and negligence, the pursuer would have enjoyed a real and substantial chance of at least substantially mitigating a liability in relation to Capital Gains Tax"

This is the only averment made by the pursuer in relation to causation. In Article 13 of condescence the pursuer avers:

"Explained and averred that following discussions between agents acting in the divorce and the Pursuer through his agents seeking further advice in connection with Capital Gains Tax, a deal was structured in such a way that no Capital Gains Tax would be incurred."

The defender submitted that this averment rendered the pursuer's loss of chance case irrelevant. He is offering to prove that he achieved a deal which resulted in no CGT liability on his part. That flies in the face of the earlier averments in Article 10 of condescence and is a fundamental relevancy issue affecting the damages sought in the pursuer's third crave. The other averments in Article 13 do not assist the pursuer. Neither does the incorporation brevittis causa of the Minute of Agreement entered into between the pursuer and his ex-wife.

[38] The third and final submission made by the defender concerned the lack of specification in the pursuer's pleadings. Four specification points are made in the defender's note of argument. Of these points number (i) has already been discussed. Point (ii) is no longer relevant given that the pursuer has incorporated the Minute of Agreement he entered into with his former wife into his pleadings. Therefore, the focus was on points (iii) and (iv).

[39] Point (iii) concerns the fees rendered by the defender to the pursuer. In Article 11 of condescence the pursuer avers:

"The Pursuer made payment of fees to defender in the sum of £10,046.20 from February 2020 onwards. The work carried out by the Defender during that period was at least to some extent wasted expenditure. It did not advance the Pursuer's divorce and required to be renegotiated by his new agents Gilson Gray."

[40] Point (iv) concerns the fees rendered by Gilson Gray to the pursuer. In Article 12 of condescence the pursuer avers:

"The Pursuer incurred legal fees of £16,671.04 in connection with the instruction of Gilson Gray. The Pursuer reasonably estimates that 80% of those fees would not have been incurred if he had been provided with the correct advice by the Defender at the appropriate time. The Pursuer's loss in this regards totals £13,336.83."

[41] The defender submitted that the averments in Articles 11 and 12 were fundamentally lacking in specification and should not be admitted to probation. In support of this

proposition, it cited various passages from *Spartan Specialist Services Limited v LHP Solutions Limited* 2024 SCLR 428.

[42] The essence of the defender's complaint, in relation to the defender's fees, was that the averments in Article 11 of condescendence did not provide fair notice of the basis upon which the entirety of the defender's fees constituted a loss. It was incumbent upon the pursuer to explain in more detail the basis upon which all of the fees rendered by the defender represented wasted expenditure.

[43] In relation to the Gilson Gray fees it was conceded that the averments in Article 12 did provide an assessment of 80% as the extent of the wasted expenditure. However, there was no explanation of how the figure of 80% had been calculated. The pursuer should isolate and specify the elements of the Gilson Gray fees which constitute losses. The averments did not provide fair notice of these matters.

The pursuer's submissions

[44] The pursuer adopted his note of argument, No 12 of process.

[45] He made three main submissions in the course of the debate.

[46] Firstly the recent minute of amendment had cured any defects in his written pleadings. It was accepted that the focus was on the disclaimer in the Service Agreement. In that respect the critical averments for the pursuer are contained in Article 9 of condescendence. As explained in paragraphs 12 and 14 of the pursuer's note of argument his case is that the defender had an obligation to refer the pursuer on for tax advice arising from the circumstances of the proposed transfer. That obligation was a separate and distinct obligation from any obligation that might have existed for the defender to give tax advice itself. The amended averments in Article 9 were relevant averments in terms of the

well-known test set out in *Hunter v Hanley* 1955 SC 200. They dealt with the criticisms made of the pursuer's pleadings in the defender's note of argument.

[47] Secondly, the pursuer founded on the well-known proposition stated in *Jamieson v Jamieson* 1952 SC (HL) 44 that an action should only be dismissed at debate if, assuming that the pursuer proves his averments, his claim against the defender will necessarily fail. The pursuer had made sufficient averments to satisfy the test for pleading a negligence case as set out in *Macphail, Sheriff Court Practice*, at paragraph 9.35. The facts as averred gave rise to a duty on the defender to recognise that a CGT liability would arise and that in these circumstances it should refer the pursuer for advice.

[48] The pursuer referred to Lord Doherty's opinion in *McMahon* at p 926K where he quoted from Green J's judgment in the *Denning* case – see paragraph 26 above. He submitted that this was an unusual case as envisaged by Laddie J in *Credit Lyonnais SA v Russell Jones & Walker* [2002] EWCA 1310 (Ch). The averments in Article 9 of condescence are averments eloquent of an unusual case. Particular reference was made to the averments at the beginning of Article 9 of condescence:

“The defender was providing family law advice about overall financial settlement. This was in the context of there being contemplated the transfer of an asset from one party to the other or the disposal of an asset. It was further in the context that the pursuer and his ex-wife had separated approximately 16 years earlier. There was therefore the possibility of a Capital Gains Tax liability on the sale of the transfer of the matrimonial home, given the historic date of separation”.

[49] With further reference to Green J's judgment in *Denning* the pursuer submitted that there is a close factual and legal nexus between the terms of the retainer and the matter which the defender should have referred the pursuer for tax advice on. The pursuer was offering to prove that in the particular circumstances of this case the duty averred in Article 9 was incumbent on the pursuer. It was not suggested that the defender was under a

duty to provide all tax advice to the pursuer. It was though suggested that the scope of the defender's engagement was not delineated by the Service Agreement.

[50] In relation to the defender's submission on loss of chance the pursuer cited *Darknell-King v Slater and Gordon and Others* [2024] CSOH 100, a case involving the loss of a chance of negotiation. The pursuer submitted that *Darknell-King* was broadly analogous to the present case. Reference was made to paragraphs 22, 35 and 36 of Lord Sandison's opinion which read as follows:

"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.

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."

[51] The pursuer drew attention to Lord Sandison's observations in *Darknell-King* (under reference to *Kyle v P & J Stormonth Darling* WS 1993 SC 57) that the pursuer's pleadings in relation to the loss of a chance were adequate. He also cited the more recent case of *McCann v Harper Macleod* 2025 SLT 331 in which Lady Haldane observed at paragraph 26 that the question of whether or not the two limbed test set out in *Perry v Raleys supra* is applicable is fact sensitive. At paragraph 33 Lady Haldane stated that the requirements of pleading the loss of a chance such as arose in *McCann* were not onerous. A counterfactual set of averments is not a prerequisite in every case.

[52] Applying these authorities to the present case the pursuer invited the court to take the inference from the averments in Article 10 of condescendence, read as a whole, that if the defender had referred the pursuer for advice, competent advice would have been received which would have extinguished or reduced the pursuer's tax liability.

[53] Considering the pursuer's averments as a whole it was submitted that they are sufficiently clear to instruct the first and second craves.

[54] The averments in support of the third crave are contained in Article 13 of condescendence. The pursuer talked through the arithmetic of the calculations and submitted that sufficient detail had been provided of how the loss claimed of £113,518 had arisen. Finally in this part of his submissions the pursuer referred to *Hughmans (A Firm)* and *Alexandra Dunhill* and in particular to paragraph 12 of the Court of Appeal's judgment where the court observed that the extent of a retainer and the existence of a duty of care is acutely fact dependent.

[55] In his third and final submission the pursuer maintained that he had averred a relevant case of breach of duty. The court could not be satisfied, at this stage, that the action would fail. The pleadings anent causation and loss are apt for enquiry. The court should allow a proof before answer under reservation of the defender's preliminary plea.

The defender's reply to the pursuer's submissions

[56] In a reply to the pursuer's submissions the defender submitted that the pursuer had failed to engage with the express words of the contract. The court was urged by the defender to focus on the wording of the Service Agreement. There was no need to look beyond the words used. Neither party had put in dispute any factual matters which necessitated enquiry. In that respect reference was made to Jackson & Powell on *Professional Liability* (9th Edition incorporating third supplement) at paragraph 2-029:

"The extent of a professional person's engagement ---ie what he is obliged to do and what advice he is required to give -- will be a combination of express and implied terms. The meaning and effect of the express terms will be construed in accordance with the usual principles of contractual interpretation"

[57] In relation to loss of chance the *Darknell-King*, *McCann* and *Kyle* cases referred to by the pursuer were all concerned with the second stage of the two-stage approach adopted by the courts to loss of chance claims. These cases all say the same thing, ie that in considering the second stage of the test the court should not look at every single contingency. Instead, it should look at matters on a broad percentage basis in order to translate any established loss of chance into a monetary award.

[58] The defender's submissions were focused on the first stage of the test, ie on what the pursuer would have done had he been referred for tax advice by the defender. In that respect there was a critical difference between the pursuer's pleadings and the pleadings which were considered to be adequate in the *Darknell-King* and *McCann* cases.

Decision

[59] The defender's first submission is that the pursuer has not averred a relevant case of negligence et separatim breach of contract. In support of its argument the defender cited *McMahon v Grant Thornton UK LLP supra*. Lord Doherty's decision in *McMahon* is very much in point. It provides comprehensive, up to date guidance on how to determine the scope of a professional's duty to its client. The English cases cited in *McMahon* are recent, comprehensive in their analysis and consistent with established principles of Scots law.

[60] Lord Doherty's opinion in *McMahon* and the English cases cited therein all stress the importance of the contractual retainer agreed between the parties in determining the scope of the professional's duty. As observed by Jackson LJ in *Minkin supra* at paragraph 38(v) of his judgment the parties may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. That is exactly what the parties did here.

[61] In terms of the Service Agreement the defender agreed to act on behalf of the pursuer in respect of all matters arising from his separation from his ex-wife. However, the agreement stated that the defender would not provide advice “in respect of tax in relation to this matter”.

[62] The terms of the retainer agreed between the parties are straightforward. Applying the approach adopted by Lord Doherty at paragraph 79 of *McMahon* a reasonable person in the position of the parties at the time of contracting would not have understood the defender to have contracted to provide tax advice. The words used in the exclusion, ie “in respect of tax in relation to this matter” are wide. They are not qualified in any way. The submission that tax advice was excluded from the scope of the retainer is reinforced by the fact that the Service Agreement provided a mechanism by which separate tax advice could be obtained. There is no averment that this mechanism was engaged in this case. Neither is there any averment that the obligation to refer the pursuer for tax advice was reasonably incidental to the work which the defender was obliged to carry out in terms of the Service Agreement (see *Minkin supra* per Jackson LJ at paragraph 38(ii)).

[63] As explained in the English authorities cited in *McMahon* for an extended duty and liability to arise there has to be a close factual and legal nexus between the retainer and the matter that it is alleged the adviser omitted to provide advice upon. There is no such close factual and legal nexus here given the terms of the disclaimer in the Service Agreement.

[64] In his submissions the pursuer sought to differentiate between the matters covered by the Service Agreement and what was said to be a separate obligation to refer the pursuer for tax advice. This submission is misconceived. The simple point is that identifying a need to refer the pursuer for tax advice is providing tax advice. That is the very thing which the Service Agreement excluded from the scope of the retainer.

[65] The pursuer also argued that his case was an unusual one. This submission was made with reference to the comment in *Denning supra* that *Credit Lyonnais supra* established that, in unusual cases, the surrounding circumstances might be such that the four corners of a retainer might not describe, exhaustively, the full extent of the duty owed by a professional.

[66] In *Credit Lyonnais* the claimant instructed solicitors in relation to the exercise of a break option contained in a lease. The solicitors gave correct advice about the service of a notice required to trigger the entitlement to the break option. However, they failed to advise the claimant that, in addition, it required to pay the sum of £11,500 to its landlord within a certain time period. As a result of the claimant's non-payment the landlord declined to accept premature termination of the lease and the claimant had to buy its way out of the lease. Laddie J held that the solicitors were liable for breach of duty. After reviewing the authorities he stated:

"A solicitor is not a general insurer against his client's legal problems, His duties are defined by the terms of the agreed retainer. This is the normal case although *White v Jones* [1995] 2 A.C. 207 suggests that obligations may occasionally arise outside the terms of the retainer or where there is no retainer at all. Ignoring such exceptions, the solicitor only has to expend time and effort in what he has been engaged to do and for which the client has agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer. However if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing 'extra' work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions."

[67] The above passage was cited with approval by Jackson LJ in *Minkin supra*. Despite the views expressed by Green J in *Denning I* do not consider that *Credit Lyonnais* established that in unusual cases the four corners of the retainer might not describe the full extent of the duty. The key words used by Laddie J in the passage quoted are "in the course of doing that

for which he is retained". These words make it clear that the focus is on the wording of the retainer. Jackson LJ did not state, as a principle, in his five point summary in paragraph 38 of *Minkin* (quoted above at paragraph 24) that there is scope for looking outside the terms of the retainer in unusual cases. I am fortified in that view by the judgment of Patten LJ in *Lyons supra* who stated at paragraphs 41 and 42 that:

"41 ... It is, I think, worth emphasising that although cases like *Minkin* are often cited as authority in support of a legal duty to warn, they are in fact decisions about the scope of a solicitor's duty based on a particular retainer. As Laddie J explained in his judgment in *Credit Lyonnais* which was approved in *Minkin*, the solicitor's obligation to bring to the client's attention risks which become apparent to the solicitor when performing his retainer does not involve the solicitor in doing extra work or in operating outside the scope of his retainer. The risks in question are all matters which come to his attention when performing the tasks the client has instructed him to carry out and which therefore as part of his duty of care, he must make the client aware of.

42. Neither *Credit Lyonnais* nor *Minkin* are authority for the proposition that the solicitor is required to carry out investigative tasks in areas he has not been asked to deal with however beneficial to the client that might in fact have turned out to be."

[68] Even if I accepted that *Credit Lyonnais* is authority for the proposition that the court can look outwith the terms of the retainer in unusual cases I do not consider that this is an unusual case. There is nothing unusual in the fact that the parties had separated 16 years earlier and that there was likely to be a CGT liability on the transfer of the former matrimonial home. It is not uncommon for parties to be separated for years before they seek to regulate their financial affairs and divorce. As a general rule any liability to CGT is likely to increase over time. That is to be expected; it is not unusual.

[69] Lastly, in relation to the defender's first submission I deal with the pursuer's contra proferentum argument. The law in this area is clear. There must be real doubt in the interpretation of the contract before contra proferentum can be invoked. As I have already noted the terms of the retainer in this case are straightforward. There is no doubt about how

the words used should be construed and accordingly no basis for the application of the contra proferentum doctrine.

[70] In summary, for the reasons stated I accept the first submission made by the defender that the pursuer's averments anent negligence et separatim breach of contract are irrelevant. It follows that the defender's first plea-in-law should be sustained and the action dismissed.

[71] The defender's second submission relates to the pursuer's averments on loss of chance. There are two parts to this submission. Firstly, the defender complains that the averments are materially lacking in specification. Specifically, the pursuer does not aver the tax advice which he would have received had he been referred for tax advice.

[72] I accept the defender's submission that the requirements of a loss of chance case are correctly set out in the two recent cases cited, ie *McMahon supra* and *Centenary 6 supra*. In short, the first stage of the test for a loss of chance claim is for the pursuer to set out what he would have done had there been no negligence on the defender's part. This first stage falls to be assessed on a balance of probabilities basis. The second stage of the test involves an assessment of the chance lost based upon a broad evaluation of what others would have done.

[73] Three cases were cited by the pursuer as authority for the proposition that the court should take a broad approach to the assessment of a loss of chance claim; *Darknell-King supra*, *McCann supra* and *Kyle supra*.

[74] In *Darknell-King* the pursuer sustained serious personal injuries as a result of attending diving courses when she was employed by South Wales Police. She obtained damages for her injuries. However, she sued her previous solicitors and other parties on the

basis that they had failed to advise her of her right to sue South Wales Police. She claimed that as a result she lost the opportunity to obtain a more advantageous settlement.

[75] As noted by Lord Sandison at paragraph 35 of his opinion, the defender's complaint in *Darknell-King* was that there was a lack of specification in relation to the result and timing of the hypothetical negotiation with South Wales Police. The alleged lack of specification was in relation to what others would have done. In that respect Lord Sandison's citation of the court's observations in *Kyle* was entirely understandable. *Kyle* was concerned with the loss of a chance in litigation. In *Kyle* the defender complained of a lack of specification in relation to (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. Both of these matters depended on what others would have done.

[76] Similarly in *McCann*, Lady Haldane observed, in relation to the pursuer's averments at paragraph 30 of her opinion that:

"On those averments, the claim sits more easily on the 'what a third party would have done' or 'loss of a chance' side of the line rather than in the first limb described by Lord Briggs, being a scenario where the loss is dependent on what the pursuer would have done. Specifically, her loss is essentially predicated on what either an insurer or the court would have done, rather than depending more on what she would or would not have done. It is tempting to regard the 'dividing line' described in *Perry* as a bright and immutable one. Such would not reflect the reality of the factual background to many litigations that are often less than binary. One might have a scenario where both limbs of the *Perry* test are relevant, although it is clear from the language employed by Lord Briggs that he, at least, did not regard it as inevitable that both limbs required to be addressed in every case."

[77] The point about the cases cited by the pursuer is that all of them are concerned with an alleged lack of specification in the averments about what others would have done. In that respect they are distinguishable from the defender's complaint in this case. The defender's complaint is focused on what the pursuer avers he would have done had he been

referred for tax advice. In short, the pursuer says that he would have sought, received and acted upon competent tax advice. Yet he does not aver what that advice would have been.

[78] Viewed from the perspective of fair notice the pursuer must know what tax advice he would have received. The tax advice he would have received is at the heart of his claim. The defender can legitimately claim to be prejudiced by the lack of specification as it will be unable to put the hypothetical competent advice to its own expert and therefore unable to prepare properly for proof.

[79] At paragraph 11 of his note of argument the pursuer refers to paragraph 35 of *Macphail, Sheriff Court Practice*, 4th Edition. On this issue paragraph 9.30 of *Macphail* is more in point. It reads:

“The defender may seek dismissal of the action upon a plea of lack of specification. That plea finds its proper application in a case where the defender does not know the case against them and objects to being taken by surprise at the proof. It is possible for a condescendence to be relevant, in respect that it states facts sufficient to render the action relevant in law, but to be lacking in specification in respect that it does not give fair notice of all the facts which the pursuer intends to establish. The degree of specification which will be deemed sufficient for fair notice depends on the particular circumstances of each case. Enough specification must be given to enable the other party to identify what is being alleged against them and to prepare their case. Any material dates, times and places which ought reasonably to be known to the pursuer should be specified; but in certain circumstances averments may be sufficiently specific if facts peculiarly within the defender’s knowledge cannot be averred because of practical difficulties. When deciding whether the defender has been given fair notice of the pursuer’s case the court will consider the matter broadly, and will regard a complaint of lack of fair notice as justifiable only if it is likely to result in material prejudice to the defender.”

[80] Applying the above comments to the present case I agree with the submission made by the defender that the pursuer’s failure to aver what tax advice he would have received represents a fundamental lack of specification in his pleadings. On that basis, were the action to be otherwise relevant, I would sustain the defender’s first plea-in-law to the extent

of excluding from probation the averments in Article 13 of condescendence in so far as they relate to the loss of chance claim third craved by the pursuer.

[81] The second part of the defender's submission on loss of chance concerns causation.

[82] As the pursuer accepted in paragraph 11 of his note of argument, under reference to paragraph 9.35 of *Macphail*: "it should be reasonably apparent how any alleged loss is claimed to be attributable to any one or more alleged breaches of duty". I accept the submission made by the defender that the only averment which the pursuer makes in relation to causation is the averment in Article 10 of condescendence that but for the defender's breach the pursuer would have enjoyed a real and substantial chance of at least substantially mitigating a liability in relation to CGT. This averment makes it clear that the pursuer's claimed loss is his liability to pay CGT. However, in Article 13 of condescendence he avers that the subsequent deal with his ex-wife was structured in such a way that no CGT was incurred. Read pro veritate the pursuer is offering to prove that the only loss he says he would have incurred but for the defender's breach was not actually incurred. The averments which the pursuer makes about the calculation of his loss at the beginning of Article 13 of condescendence do not assist him as there is no explanation of how the estimated loss of £113,528 is causally related to any breach of duty on the defender's part. The averments incorporating the Minute of Agreement do not help the pursuer either for the same reason. It follows that the pursuer has not made any relevant averments of causation and that the loss of chance claim advanced in terms of the third crave is irrelevant for this reason too.

[83] The final submission made by the defender is that the averments of loss made in Articles 11 and 12 of condescendence are materially lacking in specification and ought not to be admitted to probation as a result.

[84] The averments in Article 11 relate to the fees of the defender from February 2020 onwards. The pursuer avers that these fees were “at least to some extent” wasted expenditure. The obvious point here is that the defender’s complaint of a lack of specification is directed at its own fees. In that respect the defender cannot claim that it is likely to be surprised at proof and is materially prejudiced as a result (see the comments made at paragraph 9.30 of *Macphail* as quoted in paragraph 79 above). It is true that the pursuer’s averments could be more specific in relation to the precise detail of the alleged wasted expenditure. However I do not consider that the lack of specification is such that the averments should be excluded from probation, were the pursuer to have otherwise pled a relevant case.

[85] The averments in Article 12 relate to the fees of Gilson Gray ie the new agents instructed by the pursuer. The pursuer avers that 80% of their fees would not have been incurred had the defender referred him for advice on his CGT liability. The fee notes issued by Gilson Gray are incorporated brevity causa into the pursuer’s pleadings and are lodged as Nos 5/2 - 24 of process. In fact the fee notes are of little assistance as they contain no detail of the work carried out by Gilson Gray. The failure to provide more detail of the work carried out is puzzling. Although no mention was made of this in the course of the debate it is apparent from the process that the defender had a specification of documents No 10 of process approved by the court on 20 March 2025. Call 1(iv) of the specification sought recovery of documents showing or tending to show:

“The work carried out for the pursuer by Gilson Gray in relation to the pursuer’s divorce from Mrs Cochrane (including the content of Gilson Gray’s time recording entries and fee notes in relation to the work carried out for the pursuer which resulted in the fees of c.£16,671.04) (see Art.10).”

There is no indication in the process of whether the commission and diligence procedure initiated by the defender yielded any further documentation relating to the Gilson Gray fees. In any event the defender should not have to recover documentation to ascertain the detail of the pursuer's alleged losses. It is incumbent on the pursuer to aver his case, including details of the losses sustained, with sufficient specification. He must know what was done on his behalf. It should be a very simple matter for him to make more detailed averments about what was done whether that be by incorporating time recording entries or otherwise. In the circumstances if the pursuer had otherwise pled a relevant case I would not be prepared to admit the averments in Article 12 of condescendence in support of the second crave to probation.

Conclusion

[86] I have found that the pursuer's averments of breach of contract et separatim fault and negligence are irrelevant. It follows that I shall sustain the first plea-in-law for the defender and dismiss the action.

[87] No submissions were made in relation to the issue of expenses on the basis that the position with expenses would depend on the outcome of the debate. Accordingly, I have fixed a hearing on expenses to take place on 5 September 2025 at 9.30am Glasgow Sheriff Court, 1 Carlton Place G5 9DA to call in open court. If parties are able to reach agreement on the issue of expenses, they can contact my clerk to seek to have the hearing discharged and an appropriate interlocutor pronounced.