



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 100

CA17/26

OPINION OF LORD SANDISON

In the cause

WELL-FED SCOTLAND CIC

Pursuer

against

SERCO LIMITED

First Defender

and

SERCO GROUP PLC

Second Defender

**Pursuer: Christopher Gray (Lay Representative)**

**Defenders: Manson; Burness Paull LLP**

9 October 2026

**Introduction**

[1] The pursuer in this commercial action, which previously operated a community catering enterprise funding food-related social programmes, seeks an award of damages against the defenders jointly and severally in the amount of £5,250,000 with interest; an order that the defenders should deliver up to it, or else destroy, material said to embody its intellectual property, with interim and permanent orders interdicting the use of that

material; and certain declarators concerning the nature and operation of a whistleblowing or ethics scheme operated by the defenders. The defenders challenge the relevancy and specification of the pursuer's averments on a broad front, and the case came before me for a debate on those matters.

## **Background**

[2] The pursuer's case is predicated on the core suggestion that the defenders initiated and sustained an engagement with it, in the course of which they extracted some of its intellectual property, on the basis that they intended to enter into a contractual relationship or relationships with it, the truth being that they never had any such intention.

[3] It is averred that an employee of the first defender, Mr Dodgson, emailed the pursuer in March 2023 describing a potential catering opportunity at the former RAF Scampton location in connection with the Home Office Asylum Accommodation and Support Contract operated by that defender, and obtained from it a quote for a daily *per capita* catering provision. Although no contract is claimed to have eventuated on that occasion, it is averred that over a period of 26 months until April 2025 the defenders repeatedly represented to the pursuer that large-scale catering contracts for government-sponsored work were likely to be entered into and that in that connection a commercial relationship between the parties was in place. Various specific email and other communications are condiscended upon, and it is averred that each representation contained therein was made with the intention that the pursuer would rely upon it in committing resources to the commercial relationship, which in various ways it did. The pursuer also avers that it engaged a consultant, Mr Paul Howell, on the introduction of the defenders, and that he caused it to incur various further kinds of

expenditure on the basis that that was necessary to secure the contemplated contracts from the defenders.

[4] The pursuer further claims that intellectual property which it had developed over years of trading, made up of its recipe database, its allergen matrix, its nutritional and product specification sheets, and its menu specifications and rotations, was at the request of the defenders transmitted from its systems to theirs, for the purposes of the supplier relationship under discussion, and that the defenders were enriched by the receipt and retention of that material.

[5] It is further maintained that, once it became dissatisfied with how events were transpiring, the pursuer was induced to engage (at cost to it) with the defenders' ethics process, called "Speak Up", on the basis of representations that its concerns would be investigated in a thorough, fair, balanced, and transparent manner, and that those representations were false.

[6] The pursuer claims that, in consequence of the cost of the actions taken by it on the basis of the claimed fraudulent representations made by the defenders, it became insolvent and had to cease its food production operations and make additional staff it had hired redundant. It advances heads of loss in respect of the cost of the conversion of its production to frozen food to satisfy the defenders' anticipated requirements, together with the cost of various other alterations to its modes of working; mobilisation costs; the amount of the consultancy fees it paid to Mr Howell; the cost of the redundancy of the additional workforce; various costs arising out of the loss of its business as a going concern; and the value of the intellectual property it transmitted to the defenders.

### Submissions for the defenders

[7] On behalf of the defenders, counsel submitted that the pursuer's case of fraudulent misrepresentation was bound to fail. There was a general presumption against fraud which the party making the allegation had to overcome: *Walker & Walker on Evidence* (6<sup>th</sup> edition), at 3.7.1. There had to be specific averments of fraud and rigorous standards fell to be applied when testing their adequacy: *The Royal Bank of Scotland plc v Holmes* 1999 SLT 563 at 570D. It was essential that the party alleging fraud clearly and specifically identified the act or representation founded upon, the occasion when it was committed or the representation made, and the circumstances relied upon to yield the inference that the act or representation was fraudulent: *Holmes* at 569K - L. Fraud required a machination or contrivance to deceive: *Marine & Offshore (Scotland) Ltd v Hill* [2018] CSIH 9, 2018 SLT 239 at [16]. That was to say, there had to be a scheme which made use of false representations and where the perpetrator had the intention of deceiving the victim to secure a practical result: see, eg *Kidd v Paull & Williamsons LLP* [2017] CSOH 16, 2018 SC 193 at [33]. It was a question of fact and degree as to whether a statement was false: *McBryde, The Law of Contract in Scotland* (3<sup>rd</sup> edition) at 15-67.

[8] Expressions of opinion, loose language, *verba jactantia* or trade or commercial puffs did not give rise to the remedies applicable to misrepresentations which had induced a contract: *McBryde* 6-22 and 15-67. Statements as to present opinions and intentions were not actionable in circumstances where they were not made wrongfully and where it would have been obvious to the recipient of the statement that the opinions and intentions could well be changed in the face of later events: *Hamilton v Allied Domecq plc* 2006 SC 221, 2005 SLT 1151 per the Lord Justice Clerk (Gill) at [29] and Lord Hamilton at [50]. Where a statement was ambiguous it should be given the meaning intended by the maker or which

he knew or ought to have known the recipient would put on it: *Hamilton* at [100]. The true test was whether it was reasonable to rely upon the statement in question: *McBryde*, 6-23. If it would be absurd to hold that importance would ever have been attached to the words in question in all the relevant circumstances, then the statement ought not to be regarded as an actionable misrepresentation: *Robeson v Waugh* (1874) 2 R 63 per the Lord President (Inglis) at 66. There had to be a representation made by the defenders in the knowledge that it was false and with the intention of inducing the pursuer to take certain actions which, when taken in reliance on the statement, resulted in loss: *McLellan v Gibson* (1843) 5 D 1032 per the Lord Justice Clerk (Hope) at 1034; and *AW Gamage Ltd v Charlesworth's Trustee* 1910 SC 257, 1910 1 SLT 11, per Lord Kinnear at 1910 SC 264, 1910 1 SLT 14.

[9] When dealing with the suggestion that there had been an implied representation, the court should seek to ascertain whether it was impliedly represented to the pursuer that there existed some state of facts which was different from the true state of facts, such that a reasonable representee in the position of the pursuer would naturally assume on the basis of the statement that the true state of facts did not exist, and there had to be clear words or clear conduct giving rise to the implication: *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] EWCA Civ 355, [2018] 1 WLR 3529 at [127] – [132].

[10] Applying those principles to the present proceedings, the essence of the pursuer's case was that it incurred expenditure because:

“[o]ver the twenty-six months from February 2023 to April 2025 the defenders represented to the pursuer, repeatedly and from their corporate systems, that a contract was imminent and that a commercial relationship was operative”.

[11] It followed from the applicable legal framework that the court must be able to ascertain from the pleadings that the statements relied upon could reasonably give rise to the view that a contract was imminent and that a commercial relationship was operative,

and that a reasonable person would have acted in reliance upon that. Although the pursuer sought to particularise the statements and conduct relied upon as fraudulent, on a proper analysis it was bound to fail in establishing that there was an actionable fraud based on any of the statements and conduct founded upon.

[12] A fundamental flaw which permeated through the entirety of the pursuer's case was the failure to recognise that the crystallisation of any opportunity depended entirely upon the acts of a third party (HM Government) who would be the employer on the projects. In other words, the circumstances averred did not give rise to a scenario in which it was in the defenders' gift to create the business opportunity upon which any potential contract with the pursuer would depend. Anything that the defenders said had to be construed bearing in mind that the election to be made by the prospective employer would determine whether there would be any need for a contract between the pursuer and the first defender.

[13] The pursuer contended that certain statements alleged to have been made by the defenders' employee Mr Feeney at a meeting on 20 April 2023 amounted to an implied representation that the defenders would procure supply from the pursuer across the wider Serco business:

"...at the pursuer's premises, Mr Feeney represented that the first defender could take supply only in frozen form, and that if the pursuer converted, it 'would be massive,' was 'absolute gold' for the defenders' corporate responsibility profile, and that 'there would be a Well-Fed in every city.'"

[14] A reasonable person in the position of the pursuer would understand the statements to be mere expressions of opinion or puff. In any event, the pursuer had to be taken to have known the truth once it received a later email from Mr Feeney dated 16 May 2023, warning it not to invest in freezing equipment in the expectation that a contract with the first defender would follow, such that the representation could no longer thenceforth have any

continuing effect: *Batchelor v Opel Automobile GmbH* [2025] CSOH 93 at [153]; *Cramaso LLP v Ogilvie-Grant, Earl of Seafield* [2014] UKSC 9, 2014 SC (UKSC) 121, 2014 SLT 521 at [20]. The pursuer averred, obliquely, that Mr Feeney's warning of 16 May 2023 was "displaced by... subsequent representations" but did not identify any subsequent express statement which was capable of bearing the idea that there was such displacement and that the alleged misrepresentation became operative again.

[15] The pursuer further relied upon the first defender issuing a vendor reference to the pursuer on 17 August 2023, upon an email of 15 May 2024 sent by Mr Feeney, stating "it will be good to get our first order dispatched for Scampton", upon an email from Mr Feeney on 15 May 2024 at 14:36 where he introduced the pursuer to other Serco business units, and to an email of 26 July 2024 where in response to being sent a sample of new packaging by the pursuer, Mr Dodson stated "[t]hanks for this Chris. It all looks positive".

[16] A reasonable representee would not naturally assume from the statements pled that the true state of facts was anything other than indeed it was – ie that the first defender was then liaising with the pursuer on a single prospective business opportunity in relation to RAF Scampton, which was not certain to proceed. A reasonable person in the position of the pursuer would understand the statements to be expressions of opinion or puff conveying a sense of optimism that the parties were in a good position to take advantage of the opportunity, should it crystallise. It would be entirely unreasonable to construe the statements as positive representations that there was, as a matter of fact, a contract about to be awarded and for the purposes of which the pursuer should make considerable investment.

[17] In any event, the pursuer must be taken to have known the truth once it received Mr Feeney's email of 16 May 2023, so that the representation could no longer have any

continuing effect. Again, the pursuer did not identify any subsequent express statement which was capable of bearing the idea that there was such displacement and that the alleged misrepresentation became operative again.

[18] On 18 May 2023, the pursuer's director responded to confirm that its planned capital expenditure would be a "natural progression for the business in the future regardless of Scampton". The pursuer sought to explain that acknowledgement of Mr Feeney's warning by saying that the new business anticipated was that to come from the defenders. However, the statements made by the defenders were not capable of giving rise reasonably to that understanding on the part of the pursuer.

[19] In the period from October 2024 to March 2025, which followed HM Government's decision in September 2024 that the Scampton project would not proceed, the only purported representation that the pursuer relied upon was an email by Mr Feeney dated 29 November 2024. There it was stated that the pursuer's "foot is in the door" but that the first defender had "nothing to offer at this stage". These statements could not reasonably be understood as amounting to express or implied representations that the first defender would imminently and as a matter of certainty provide business or award a contract to the pursuer. Again, the statements could only be understood reasonably as expressions of opinion as regards the perception of the pursuer's standing with the defenders but in a context where the defenders made clear that there was nothing to offer.

[20] The pursuer further relied upon an email from Mr Dodgson of 2 April 2025 where he said that the pursuer should "prepare for a short-notice order". The email's subject line was "Potential food supply" and in the email Mr Dodgson went on to state that "I need sign off from the Home Office". The pursuer's pleadings omitted part of Mr Dodgson's sentence: "has the potential to grow much bigger than this one site (hopefully)". On any reasonable

interpretation the whole terms of the email (including the subject, the statement that sign-off would be required and the express reference to “hope”) meant that it was not possible to interpret this email as an express or implied representation that business was about to be placed with the pursuer.

[21] The difficulties for the pursuer were compounded by its having subscribed on 26 March 2025 to a Confidentiality Agreement with the first defender, clause 11.1.3 of which provided that, insofar as one particular possible opportunity was concerned, the carrying on of any discussions or negotiations about a possible transaction would not constitute or imply any offer, representation, commitment or promise by the first defender to enter into any further agreement, or the development or supply of any product or service. This represented a contractual bar to any assertion being made by the pursuer that any of the discussions in relation to the opportunity could ever give rise relevantly to a claim of misrepresentation. A separate provision in the same contract, clause 12.10, which provided that it did not supersede fraudulent representations, was not relevant; it was part of an entire agreement clause designed to regulate a different aspect of the parties’ relationship.

[22] Further, the pursuer’s case based on breach of confidence was bound to fail. For there to be a breach of confidence, there had to be misuse of confidential information to the detriment of the disclosing party: *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, [2007] 2 WLR 920 per Lord Hoffmann at [111] (applied at [117], [119] – [125]). The pursuer appeared to accept that there was no breach of confidence in circumstances where the documentation provided by it to the defenders was used for the purposes of preparing for opportunities. Its case appeared to be that the defenders were not permitted to use the documentation for other opportunities or retain, integrate or make operationally available the documentation after the parties’ engagements with one another ended. However, it did

not positively aver that the defenders ever used the pursuer's information for other opportunities. It did not offer to prove that the information was integrated or made operationally available by the defender after any relationship between the parties ceased. Retention of information was not "use". The pursuer did not aver the detriment which the alleged use caused or how that gave rise to any quantifiable pecuniary loss. Accordingly, its claim for damages in respect of breach of confidence was irrelevant.

[23] Next, the pursuer's case based on unjustified enrichment was bound to fail. The pursuer pled unjustified enrichment as an alternative to its breach of confidence case. Unjustified enrichment should not be available where the pursuer had an alternative remedy, unless special or strong circumstances were averred: *Pert v McCaffrey* [2020] CSIH 5, 2020 SC 259, 2020 SLT 225 at [17] – [22]. No such circumstances were averred. The pursuer had an alternative remedy. It sought to establish breach of confidence. Breaches of intellectual property rights provided remedies under statute and at common law. In any event, it was impossible to find in the pursuer's pleadings any contention that the defenders had been enriched to any quantifiable extent or the financial measure of recompense which should be applied.

[24] The pursuer made various complaints about Mr Howell and the actions he took once engaged by the pursuer. There was no relevant basis stated which could ever support the contention that either of the defenders had any legal responsibility for the acts or omissions of Mr Howell.

[25] The pursuer finally contended that it engaged with the Speak Up process and that the second defender fraudulently misrepresented that the process would be independent. The facts and circumstances condescended upon by the pursuer relative to that process could not reasonably give rise to any inference of fraud. Nor did the pursuer aver that there

was an intention to deceive the pursuer into understanding something different from the truth. Separately, the pursuer did not identify any quantifiable loss said to flow from the Speak Up process. The closest it got to that was stating that it refrained from taking steps to recover its losses while its financial position continued to deteriorate. It did not identify the losses incurred because of its engagement with the Speak Up process which would not otherwise have been incurred. The bare declarators which it proposed would have no practical effect. A declarator that the Speak Up process was not independent would achieve no practical result. There was no relevant or competent basis to pronounce the proposed declarators. Reference was made to *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62, 2019 SC 111, 2018 SLT 959 at [21] – [25].

[26] Counsel confirmed that no point was taken that the pleadings, if otherwise in an acceptable form, did not adequately make out a case against each of the defenders; that case either stood or fell as against both.

### **Submissions for the pursuer**

[27] On behalf of the pursuer, its lay representative Mr Gray moved the court to appoint the cause to a proof before answer on the parties' whole averments with all pleas standing. No basis existed upon which the action as a whole should be dismissed. The cases in fraudulent misrepresentation, breach of confidence (with its subsidiary unjustified enrichment claim in the alternative), and in respect of the Speak Up process should in any event be remitted to proof before answer.

[28] Although the pursuer had done its best in its pleadings to set out the essence of its case, it would have been impossible for it to incorporate therein, or even refer to, the hundreds of forms of communication, some written, some oral, which together composed

the whole background against which the decision as to the fraudulent or other nature of what had happened would require to be made.

[29] The defenders nowhere addressed the central representation of present fact pleaded by the pursuer, that the defenders "use them [the Pursuer] in our AASC [Asylum Accommodation and Support Contract] contract". Rather, they sought to argue the merits of the case, inviting the court to prefer their account of disputed matters over the meaning and inferences pleaded by the pursuer. They presented not a preliminary question of law capable of disposing of the action, but their own disputed factual defence, and asked the court to decide it without evidence.

[30] The question at the debate was whether the defenders had identified a discrete issue of relevancy or specification which could usefully be determined without evidence and which, if determined in their favour, was capable of disposing of the action or of materially reducing the scope of the proof. The ultimate test was whether, taking the pursuer's averments *pro veritate* and reading the pleadings as a whole, the action or an identifiable branch of it was bound to fail: *Jamieson v Jamieson* 1952 SC (HL) 44, 1952 SLT 257. The defenders identified no such issue.

[31] The modern practice of the court deprecated the defenders' approach. Reference was made to *Chalmers v Diageo Scotland Ltd* [2024] CSIH 2 at [22] – [23]:

"The arguments for the reclaimers repeatedly seek to isolate parts of the pleadings from other parts, rather than to consider the pleadings as a whole";

and

"The whole point of a proof before answer is that after evidence the case may not be established as a matter of both fact and law; the simple question at the moment is whether the averments are sufficient for inquiry".

[32] In *Sarwar v Phlo Technologies Ltd* [2026] CSIH 20, 2026 SLT 384 at [21] – [24] the court reaffirmed that questions requiring the evaluation of conduct in its factual context were by their nature fact sensitive; that their determination without evidence would be exceptional; and that the stringent test remained whether, even if the pursuer proved all that it averred, the case must fail.

[33] This was a commercial action proceeding under an abbreviated pleadings regime. The requirement was fair notice of the essential elements, not technical elaboration: Practice Note No. 1 of 2017; *Leonardo Hotel Management (UK) Ltd v Galliford Try Building 2014 Ltd* [2024] CSOH 43 at [98]. Even where criticisms of specification had some merit, clarification rather than dismissal or wholesale exclusion was the proportionate commercial court response: *Leonardo* at [104] – [105].

[34] The defenders identified no short, self-contained proposition of law which, taking the pursuer's averments *pro veritate*, disposed of the action. From first to last they invited the court to prefer their interpretation of disputed words, intentions and conduct over the meaning and inferences which the pursuer pleaded, and to decide the merits without evidence; the very method *Chalmers* forbade. Their complaint, properly analysed, was the one the court identified in *Pipeline Cleaning Solutions Ltd v Coretrax Technology Ltd* [2025] CSOH 122 at [75]: not that they did not understand the case pleaded, but that they did not believe it would be made out, which was not a proper basis for sustaining a plea of want of specification, and was no better a basis for a plea directed to dismissal.

[35] In relation to the fraudulent misrepresentation case, the defenders characterised the pursuer's case as an assertion that a government-dependent contract was guaranteed. That was not the case pleaded. The pursuer founded upon a written representation of present fact made on 15 May 2024, when Mr Paul Feeney wrote to Mr Robb of the defenders' ferry

operation, copying the pursuer's director, that the defenders "use them [the pursuer] in our AASC contract, and will be providing to us for Scampton". Eight minutes later, Mr Feeney wrote to Ms Francis of the defenders' apprenticeship levy function, again copying the pursuer's director: "we use them in AASC and are looking at them for some other business units also". In relation to those statements, the pursuer averred with precision:

(a) the maker, Mr Feeney; (b) the date and time of the statement and the medium used; (c) the recipients, and the deliberate copying-in of the pursuer's director; (d) the exact terms; (e) the pleaded meaning — present use under the AASC, coupled in the same sentences with statements of intended direct future supply; (f) falsity — the pleaded meaning was that the defenders were then themselves procuring or taking supply from the pursuer under the AASC, and not merely that the pursuer's product might reach AASC accommodation through a separate route; the defenders' admissions that they took no supply from the pursuer and paid it nothing, together with the averment that a purchase order that had been issued to it was never called off or fulfilled, supplied a specific and provable basis for the pleaded falsity; whether the words bore some lesser sense was a question of fact and degree for proof; (g) the maker's means of knowledge — Mr Feeney was the "Supplier Manager" for the pursuer on the defenders' own supplier management system; (h) want of honest belief, or at least recklessness; (i) the purpose of inducement of the pursuer; (j) the acts of reliance which followed; and (k) the resulting expenditure and loss.

[36] The pursuer pleaded the commitments made after, and in reliance upon, those representations from late July 2024: the commissioning of a tray-sealing and packaging system and a compressed air installation, together with further readiness commitments also condescended upon.

[37] "We use them in our AASC contract" was pleaded as a statement of existing fact.

"Will be providing to us for Scampton" was pleaded as a representation of the defenders' then-existing intention. A representation of intention was a representation of present fact concerning the maker's state of mind: *Edgington v Fitzmaurice* (1885) 29 Ch D 459; *Derry v Peek* (1889) 14 App Cas 337. It was averred that the represented intention was not held and that the person making it acted without honest belief or recklessly. A statement of intention made without honest belief was made wrongfully. An ambiguous statement bore the meaning its maker intended, or knew or ought to have known the recipient would put upon it, matters which only an inquiry into the maker's intention and knowledge could deal with.

[38] The requirements for the relevant pleading of fraud had recently been restated in this court and in the Sheriff Appeal Court: fair notice was contextual, and the touchstone was whether the case was bound to fail: *Mackie v Mercedes-Benz Group AG* [2025] CSOH 94 at [108]; where basic specification was wanting, fraud averments might be excluded: *McAteer v Chyla* [2026] SAC (Civ) 12, 2026 SLT (SAC) 106 at [41] – [42]. The pursuer did not quarrel with that exacting standard, but rather met it. If the pursuer proved the pleaded meaning of the statements condescended upon, their falsity, their maker's want of honest belief or recklessness, their inducing purpose, reliance and resulting loss, it proved an actionable fraud. The pursuer did not require every expression used across the engagement to be an actionable representation standing alone: some were founded upon as context, corroboration or evidence of state of mind, and a conclusion that a particular phrase was opinion or puff would not touch the whole.

[39] The defenders accepted that it was a question of fact and degree whether a statement was false. Thus, the central question they asked the court to determine was one of fact and degree. A court might, in a clear case, hold at debate that pleaded words were incapable of

bearing the meaning averred, but the defenders sought to omit operative words, adopt their own account of the context, and prefer their own factual narrative.

[40] The defenders throughout sought to deploy the standard of the reasonable person. Objective reasonableness might bear upon what particular words conveyed in their context, especially where an implied or ambiguous representation was alleged. However, it was not the test of reliance. In an action of deceit, it was no answer to fraud that the representee might with reasonable diligence have discovered the truth, that another would have been more careful, or that other considerations also operated upon it — *Standard Chartered Bank v Pakistan National Shipping Corporation (No 2)* [2002] UKHL 43, [2003] 1 AC 959, [2002] 3 WLR 1547 at [14]–[18]. The correct framework was that a representation was known to be false, made to induce, relied upon and caused loss.

[41] The defenders further relied upon "a general presumption against fraud which the party making the allegation has to overcome", citing Walker & Walker on Evidence. That was a rule of evidence, addressed to the weighing of proof once led. It might also explain why fraud had to be pleaded with particularity. At debate the averments of knowledge, want of honest belief and inducing purpose were assumed true; an evidential presumption could not be deployed to neutralise them. The defenders asked the court to weigh the likelihood of fraud rather than to test the legal sufficiency of what was pleaded.

[42] The defenders' arguments all required factual determination. Their central theme was that every opportunity depended on HM Government, so that nothing said could found fraud. The pursuer did not aver that the defenders controlled the Government. It averred misrepresentation of matters lying squarely within the defenders' own gift and knowledge: whether they presently used the pursuer under the AASC; whether they then intended to procure supply from the pursuer if work arose; and whether the supplier relationship held

out as operative was genuine. A contingent opportunity might be genuinely pursued or dishonestly held out; the existence of the external condition was logically irrelevant to whether the defenders' statements about their own present use and intention were true.

Which was the actual state of affairs was the central factual issue. A rival factual narrative could not be preferred at debate; it demonstrated why evidence from the persons whose intention was in issue was required. Questions of ulterior motive, reliance and causation required to be established at proof.

[43] Whether a statement was opinion or puff was a question of meaning in context. The defenders asked the court to hold now that the pleaded expressions could only be optimism or puff. That approach isolated selected words from the pleaded course of dealing, contrary to *Chalmers* at [22]. What a statement conveyed, in its setting, to its recipient, was a question of fact.

[44] The defenders contended, citing *Batchelor* at [153], that upon receipt of Mr Feeney's email of 16 May 2023 the pursuer "must be taken to have known the truth", so that no earlier representation had continuing effect. *Batchelor* decided the opposite of what the defenders needed. It held that averments of continuing misrepresentation, absent withdrawal or correction, were relevant; it stated the principle that continuing effect ended when the true state of affairs became known; and it held that the point at which the representee's knowledge arose was itself a question reserved to proof — the averments there survived debate on exactly that basis: *Batchelor* at [150] – [153]. The point could not be decided on paper here in any event, because the email of 16 May 2023 did not disclose that the matters alleged to have been misrepresented were false. It disclosed uncertainty as to whether Scampton would proceed — a contingency the pursuer's case did not deny. It did not disclose that the represented intention or operative supplier relationship was absent; on the

contrary, the caution was coupled with the assurance "I don't say this because we don't want to work with you". It addressed the external contingency, not the truth of the defenders' own position, and it preceded by a year the statement of present use of 15 May 2024. There were then various subsequent express statements.

[45] A caution about one contingency in 2023 could not, as a matter of law to be decided at debate, neutralise a distinct written representation of present fact made in 2024 and an operational instruction to "prepare for a short-notice order" in 2025. Whether an earlier communication was corrected, displaced or overtaken by later conduct was fact-specific: *Cramaso* at [17]–[20]. In deceit it was no answer that the representee had other reasons for acting, nor that it might have discovered the truth: the misstatement need not be the sole cause of his actions resulting in loss, it sufficed that it was an inducing cause; and the representee's credulity or carelessness was no defence: *Standard Chartered* at [14]–[18]; *BP Exploration Operating Co Ltd v Chevron Shipping Co* [2001] UKHL 50, 2002 SC (HL) 19, 2001 SLT 1394 at [105]. Which communications induced which commitments was quintessentially a matter for proof.

[46] The defenders attacked an averred statement by Mr Dodgson that the defenders "were never going to use" the pursuer as incapable of inducing loss already incurred. That attacked a case that the pursuer did not plead. The statement was founded upon as evidence of the intention with which the earlier representations were made. The defenders denied the statement was made; two of the pursuer's directors averred they heard it; contemporaneous messages fixed the occurrence of the call. A dispute of that character was incapable of resolution without evidence and credibility assessment.

[47] The defenders identified no wording in clause 11.1 of the Confidentiality Agreement by which it retrospectively governed or extinguished the representations made between

March 2023 and November 2024, the reliance already placed on them, or the obligations of confidence already arising from information imparted before that date. At its highest the clause raised a discrete question of construction and effect confined to the April 2025 communications about a particular project. Even there it was not the short point the defenders suggested. Its character and effect would require consideration of the whole agreement in its context, and *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 CLC 358 at [16] established at least that general language was not construed as excluding the ordinary consequences of fraudulent inducement absent clear and unmistakable words.

[48] The pursuer's case of breach of confidence was essentially about the cost to the pursuer of creating the material which it was asked to pass to the defenders. It identified the confidential material in question (recipe database, allergen matrix, nutritional and product specifications, menu specifications and rotations); its confidential and commercially valuable character; the dates, means and systems of transmission; the circumstances importing confidence; the limited purpose of the authority for its use which was given; detriment, with a financial measure by way of saved development costs, or else a reasonable licence fee; and the need for delivery-up, destruction and interdict. Those were paradigm questions for proof. Even if the damages claim were to fail, the conclusions for delivery-up, destruction and interdict would remain. The defenders' own pleaded offer to return or destroy conceded that identifiable material remained in their hands.

[49] The pursuer's claim in unjustified enrichment was pleaded on the denied basis that it had no, or no complete, remedy in damages for breach of confidence. The enrichment was identified and its measure was pleaded (cost saved, or else a reasonable licence fee).

Whether the claim existed and how it was to be valued were matters for proof and expert evidence.

[50] The defenders maintained that no basis was pleaded for holding them responsible for Mr Howell's acts. That was correct. The material concerning Mr Howell was stated as evidence of the defenders' course of conduct in using him as a conduit for their representations, not as a ground of vicarious liability. The purpose, context and significance of what happened were evidential matters; circumstantial evidence was not excluded from probation because it was circumstantial. The expenditure incurred in consequence of the engagement of Mr Howell was claimed as damages not because the defenders answered for Mr Howell, but in so far as it was induced by the defenders' own representations and course of conduct, a causal question for evidence.

[51] As to the case based on the Speak Up episode, the pursuer expressly averred that the representation of the independence of the process made to it was made "for the purpose of inducing and sustaining the pursuer's engagement... and its disclosure of information". Reliance and prejudice were pleaded. These were matters for proof. If further specification of the loss and damage caused by engagement with the process was thought necessary, the proportionate cure was an order for a focused schedule of the claimed losses: *Leonardo* at [104] – [105]. As to the declarators sought, they stood in aid of a live reparation claim and were not an abstract or academic point. If the court considered it necessary, the proportionate commercial court response was simplification, not the extinction of the factual inquiry: *Leonardo* at [104] – [105].

[52] The court at this stage was to address the pleaded case without conducting a mini-trial: *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3, [2021] 1 WLR 1294 at [102] – [110], [120] – [122]. The defenders' entitlement was to test that case at proof, not to avoid the

testing. It was accepted that the existence or scope of a duty of care might, in an appropriate case, raise a question of law suitable for debate; but no such question was formulated by the defenders.

## **Decision**

[53] The increasing incidence of litigation in which at least one party appears without the benefit of legal representation (a situation greatly facilitated by the ever-increasing availability and utility of artificial intelligence tools) brings challenges to the court, the existence of which is obvious, but the nature of which may be more subtle. It is by now trite law that unrepresented litigants are not in principle entitled to any greater indulgence in complying with the procedural requirements, including those relating to the standards of pleading, than are those represented by qualified and experienced advocates: cf. *Barton v Wright Hassall LLP* [2018] UKSC 12, [2018] 1 WLR 1119 and cases following thereon.

However, since unrepresented litigants may, in all good faith and despite their best efforts, find it very difficult to express themselves with the precision and concision reasonably to be expected from those enjoying suitable representation, care must be taken to look to the substance of the legal tests to be applied and not to be distracted by the form in which pleadings drafted by unqualified persons are often presented. Statements of case drawn by such persons tend more than usually to superfluity, over-complexity, inaccurate use of legal terms, or the pleading of evidence (though these are vices from which even professionally drafted pleadings are not universally immune). The proper task of the court is to do its best to look through these infelicities and, assuming that at least a basic level of comprehensibility is met, to ask itself the usual substantive questions which arise at debate:

is fair notice of the case which it is sought to make given, and, if so, is that case bound in point of law to fail?

[54] In the particular situation where fraudulent misrepresentation is in issue, it is also important to recognise the efforts which are often made by those attacking the sufficiency of pleadings seeking to make out such a case to attempt to elevate dicta in cases such as *Royal Bank of Scotland v Holmes* or *Marine and Offshore (Scotland) Ltd*, unexceptionable in the particular contexts in which they were pronounced, into formidable or even unsurmountable obstacles to the inexperienced pleader, and thus potentially to the vindication of justice. The court should be, and usually has been, astute to resist such efforts.

[55] The defenders in the present case rightly accept that whether a particular statement amounts to a fraudulent misrepresentation is a question of fact and degree. Further, since there is (at least in situations of the kind liable to become the object of litigation) no such thing as an acontextual statement, not only the content of the statement but the factual matrix in which it was made are necessary elements in the exercise of identifying its true nature. The situation is functionally similar to that considered in *Sarwar v Phlo Technologies Limited*, where the court noted at [21] to [23], in line with previous authority, that where a factual context plays a significant role in ascribing a particular legal status to an action or statement (there, whether a right had been waived; here, whether statements had a fraudulent character) it would normally be necessary to hear evidence before that legal status could be established, and that it would only be in “certain rare cases” that a claim of that nature could be dismissed on the basis of the pleadings alone. Given the sheer extent, complexity and potential nuance of the background circumstances said to bear upon the true

nature of the various statements made the object of complaint here, this cannot be one of those cases.

[56] Turning to the more specific criticisms made of the pursuer's case in fraudulent misrepresentation, some of the statements founded upon are evidently expressed as the opinion of their maker, and it may be that others partake of that character to a greater or lesser extent. That, however, does not necessarily disqualify them as potentially fraudulent misrepresentations, since the gravamen of the pursuer's case is that it was deceived into acting as it did, to its detriment, at least partly on the basis of expressions of apparent opinion which were not the truly held opinions of those who expressed them. That is an entirely relevant allegation of fraudulent misrepresentation.

[57] On a related issue, whether any utterances relied upon fall properly to be characterised as mere puff or *verba jactantia* is a matter which can only be determined once they have been placed in their proper factual context. This is an example of the wider point that any attempt to isolate individual statements from the much broader connected sequence of events of which they formed part with a view to attacking their relevancy in one way or another is, at least in a case where the sort of involved, inter-dependent and developing scenario alleged here is concerned, not an exercise that can sensibly be undertaken at this relatively abstract stage of the proceedings. Another example is the reliance placed by the defenders on Mr Feeney's email of 16 May 2023 seeking to discourage the pursuer from investing in the freezing equipment it would need to service the potential contract then under discussion. The effect that that communication would have had on the mind of a reasonable person, as one negative statement amongst, it may be, very many positive ones made both before and after it, is a matter for consideration once its place in the whole sequence of fact and circumstance is explicated at proof. The pursuer's suggestion that the

defenders were by way of the debate in many respects inviting the court to conduct a selective shadow proof on the pleadings alone was, in this context at least, well made.

[58] The accepted fact that the availability of the contemplated work for the pursuer would be dependent on decisions to be taken by the UK Government is not something that is fatal to the pursuer's case in fraudulent misrepresentation, the gravamen of that case being that, whatever the government might ultimately decide, the defenders never truly intended to take the pursuer along with them into any potential work that might emerge. It is important to note that no element of the pursuer's damages claim is made up of loss of anticipated profit on future contracts; rather, it is composed of the cost of putting itself into a position to perform contracts which, on the hypothesis upon which its case proceeds, were in no circumstances ever going to be shared with it by the defenders.

[59] Turning to the impact of the Confidentiality Agreement entered into between the pursuer and the first defender in March 2025, the clauses raising relevant issues for present purposes are as follows:

**"11. Status of Agreement**

**11.1 No Offer to Enter into Further Agreement:** Neither:

- 11.1.1 the entry into this Agreement;
- 11.1.2 the disclosure or receipt of Confidential Information; nor
- 11.1.3 the carrying on of any discussions or negotiations about a possible transaction,

will constitute or imply any other offer, representation, commitment or promise by either of the Parties to enter into any further agreement, or the development or supply of any product or service to which the Confidential Information relates."

**12. General**

...

**12.10 Entire Agreement:** This Agreement constitutes the whole agreement between the Parties relating to its subject matter and supersedes and replaces all prior

communications, representations (other than fraudulent representations), warranties, stipulations, undertakings and agreements whether oral or written between the Parties.”

[60] Dealing first with clause 11, in *HIH Casualty*, an insurance contract provided *inter alia* that the insured should “have no liability of any nature to the insurers for any information provided by any other parties” and a question arose as to whether that provision operated in circumstances where it was alleged that the insured’s agent had provided information fraudulently. Lord Bingham of Cornhill (with whom Lord Steyn concurred) said the following:

“[15] ... fraud is a thing apart. This is not a mere slogan. It reflects an old legal rule that fraud unravels all: *fraus omnia corrumpit*. It also reflects the practical basis of commercial intercourse. Once fraud is proved, ‘it vitiates judgments, contracts and all transactions whatsoever’: *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712, per Denning LJ. Parties entering into a commercial contract will no doubt recognise and accept the risk of errors and omissions in the preceding negotiations, even negligent errors and omissions. But each party will assume the honesty and good faith of the other; absent such an assumption they would not deal ...”

[61] Lord Hoffmann agreed at [68] that fraud was “quite different from negligence” and noted that “in the absence of words which expressly refer to dishonesty, it goes without saying that underlying the contractual arrangements of the parties there will be a common assumption that the persons involved will behave honestly”. Lord Hobhouse of Woodborough at [97] agreed: “Fraud and negligence are different from each other in kind. Commercial men recognise the risk of want of care or skill; they do not contemplate fraud in the making of the contract.” Lord Scott of Foscote noted at [121] the rule of public policy that “A party cannot be allowed to benefit from his own fraud or from the fraud of his alter ego. So if an exclusion clause on its true construction purports to cover such fraud, it cannot, on public policy grounds, be permitted to have that effect”, although his Lordship was not

prepared to extend that principle to cases where the fraud was said to emanate from an agent.

[62] In the present case it is apparent from the pursuer's version of events that it alleges that essentially all of its actions in relation to the defenders, including the entering into of the Confidentiality Agreement, were caused by the fraud of the latter. Whether that proposition will be made out in all or any of its aspects remains to be seen, but taking its claims *pro veritate* for present purposes, the public policy principle that fraud undoes everything carries the day. Clause 11 does not represent a bar to the pursuer's fraudulent misrepresentation claim.

[63] Clause 12 does not involve the public policy considerations engaged by clause 11, but does as a matter of contractual construction reinforce the conclusion that the Confidentiality Agreement was not intended to cover a situation in which it is alleged that one or other party has engaged in fraudulent misrepresentation. It follows that the pursuer's case in fraudulent misrepresentation is fit for enquiry without the refusal of probation to any of its averments.

[64] Turning to that aspect of its case which the pursuer has labelled as being in respect of breach of confidence, it is apparent on considering the pleadings carefully, along with the explanation as to their true import offered in the course of the debate, that in fact what is being advanced is a claim that the cost to the pursuer of compiling the material embodying its intellectual property which it then passed to the defenders forms a head of loss in its fraudulent misrepresentation case, rather than constituting a separate claim in breach of confidence properly so called. So viewed, the claim is unexceptionable, and does not depend on a need to prove that the defenders used the material passed to them in any unpermitted way. The same theme is carried forward into the pursuer's suggestion that it

has a claim in unjustified enrichment in connection with the passing of the material in question to the defenders; properly viewed, what is being said is that, should this aspect of the fraudulent misrepresentation case fail for any reason, there would still be a claim in respect of the enrichment gained by the defenders as a result of the transfer of that material to them. While such a claim would be one to the extent to which the defenders were *lucrati* thereby, rather than one for the cost to the pursuer of the production of the material, the amount of the latter may, at least as a matter of relevancy, stand surrogate for the latter until proof, if and when necessary, establishes something different.

[65] The pursuer's averments concerning Mr Howell are, likewise, upon examination, capable of being recognised as designed to set up a claim in respect of the cost of employing him as part of the chain of events alleged to have been set in motion by the defenders' fraudulent misrepresentations, and, viewed in that light, are relevant, albeit venially over-pled.

[66] Dealing finally with the pursuer's claim in respect of its involvement in the Speak Up process, the essence of this claim is that it participated, at some length, in a whistleblowing or ethics process operated by the defenders in an attempt to deal with its growing dissatisfaction with what was happening amongst the parties on the basis of a representation as to the independence of that process from the defenders which was untrue, and that it would not have done so had the alleged true nature of the process been disclosed at the outset. It claims that its participation in the process caused it to incur various costs, direct and indirect, which it advances as heads of loss in respect of which it claims reparation. Understood in that light, this aspect of its claim is entirely relevant. Whether the ancillary declaratory conclusions which it seeks about the claimed lack of independence of the process are strictly necessary as a means of paving the way to that end is open to

question, but there may in any event be some independent value in having the court indicate clearly one way or another what it makes of the serious allegations about the character of a whistleblowing scheme operated by a very substantial corporate undertaking enjoying the benefit of extensive public sector contracts, and I accordingly do not consider that those conclusions in its summons require to be removed as a precondition of matters advancing as would otherwise be the case.

### **Disposal**

[67] I shall appoint the cause to proceed to a diet of proof before answer without the refusal of probation to any averments and with all pleas standing.