SHERIFFDOM OF NORTH STRATHCLYDE AT KILMARNOCK

[2025] SC KIL 92

KIL-A258-22

JUDGMENT OF SHERIFF GEORGE JAMIESON

in the cause

GEORGE ROBERT ELLIOT

First Pursuer

and

DONNA ELLIOT

Second Pursuer

and

HARELAW FARM WEDDINGS LIMITED

Third Pursuer

against

ANDREW SNODGRASS McCANDLISH

Defender

Pursuer: Kennedy, advocate; BTO Solicitors LLP, Glasgow
Defenders: Milloy, advocate; Levy & McRae Solicitors, Glasgow

KILMARNOCK, 16 September 2025

The sheriff, having resumed consideration of the cause, excludes from probation:

1. the pursuers' averments in Article 5 of condescendence at lines 167 – 170 of the record:

> "The defender, as the neighbouring landowner, has a duty of care not to commit a nuisance that has the effect of interfering with the third pursuer's business, or damaging the first and second pursuers' land. The defender has breached that duty through his negligence as hereinbefore condescended."

2. the pursuers' whole averments in Articles 6, 8 and 10 of condescendence;

3. the averment in Article 11 of condescendence at line 510 of the record ", or at least negligent"; and

4. the averments in Article 11 of condescendence at lines 510 and 511 of the record: "The defender has failed to take reasonable care to avoid the nuisance";

Quoad ultra allows parties, before answer, a proof of their respective averments on dates hereafter to be assigned; meantime fixes a proof management hearing on 26 November 2025 at 10.00am by way of Webex to discuss the future management of the proof and suitable dates therefor in accordance with the interlocutor of even date fixing said proof management hearing.

NOTE

Introduction

[1] Those who get married want the best possible experience for their wedding day. The third pursuer's wedding venue attracts business because in part it has a fine prospect over the East Ayrshire countryside for the enjoyment of the wedding guests. On 12 November 2022, the defender began building operations adjacent to the wedding venue.

[2] The pursuers aver those building operations have impaired the wedding guests' enjoyment of that prospect, resulting in a downturn of weddings booked with the third pursuer, and consequent economic loss to the third pursuer.

[3] In commencing those building operations, the defender has thereby engaged for consideration of the court in this case aspects of the law of nuisance, the law relating to recovery of pure economic loss, and the law relating to the third pursuer's title and interest to sue for recovery of that loss.

Background facts

[4] The land on which the wedding venue is situated is owned by the first and second pursuers. The third pursuer operates a wedding business from that property. On or around 12 November 2022, a JCB digger appeared on the defender's property. It commenced extensive excavation and development works on ground adjacent to the first and second pursuers' property, turning over large areas of soil some 50 yards from the boundary and directly in line of sight of the wedding venue, with a view to the erection of a horticultural equipment shed on the defender's land.

[5] The first and second pursuers responded by raising proceedings to interdict the defender from carrying out further excavation and development works and from erecting a horticultural equipment shed or similar building on his land. The sheriff granted interim interdict in those terms on 29 November 2022. On 29 March 2023, the sheriff refused the defender's motion to recall that interim interdict which has remained in force ever since.

[6] The case thereafter had a protracted procedural history which it is not necessary to recite in detail. The salient points are, firstly, after amendment procedure, the third pursuer was added to the action as were claims for damages by all three pursuers.

[7] Secondly, a debate was fixed on the defender's preliminary pleas in the amended record number 32 of process, lodged in process on 24 April 2025, for 29 July 2025. This amended record was certified as a true copy by the pursuers' solicitor on 14 April 2025 and appears to be identical to the amended record number 28 of process lodged in process on 14 April 2025 and also certified as a true copy by the pursuers' solicitor on that date. I made avizandum after hearing from parties' counsel on the issues raised at the debate on 29 July 2025. This is my judgment in respect of those issues (these are identified later on in this

judgment). References to the record in this judgment are to the amended record number 32 of process.

The pursuers' pleadings

[8] All three pursuers seek (1) interdict in the terms set out above (crave 1) and (2) an order *ad factum praestandum* for reinstatement by the defender of his land to its condition prior to the commencement of the excavation works (crave 2). They seek interim orders in terms of both of those craves.

[9] The third pursuers seek damages in the sum of (1) £212,024.55 (crave 3) representing the loss of profit occasioned by the downturn in viewings and wedding bookings since the excavation works were undertaken by the defender and (2) £2,332.80 (crave 4) representing loss suffered by the third pursuer as a result of the defender causing damage to a pipe supplying their hotel.

[10] The first and second pursuers seek damages in the sum of £28,445.08 representing loss suffered as a result of the defender's physical damage to their property on two occasions, the first in 2021 and the second in 2022 (crave 5).

[11] The pursuers have six pleas-in-law. Only the first two are significant for the purposes of this judgment. Pleas-in-law 3, 4 and 5 are to the effect the sums craved for damages are a reasonable estimate of the pursuers' losses.

[12] Plea-in-law 6 addresses the balance of convenience in granting interim orders in terms of craves 1 and 2. The pursuers do not have any preliminary pleas. Nor do they have a plea-in-law in support of crave 2 (as opposed to an interim order in terms of crave 2).

[13] Plea-in-law 1 is: "The defender's carrying out extensive redevelopment works to his land constituting a nuisance, interdict should be granted as first craved."

[14] Plea-in-law 2 is: "The first, second and third pursuers having suffered loss and damage by the defender's nuisance, are entitled to reparation therefor."

[15] It is necessary only to consider Articles 5 - 11 of condescendence. Article 5 narrates the building operations commenced by the defender in November 2022 and sets out a claim for damages based on the economic loss incurred by the third pursuers to which crave 3 relates. Article 6 of condescendence avers the excavation works have caused physical damage to the first and second pursuer's land, in particular to the underground drainage system, resulting in flooding and land slippage at the boundary of the two properties. Articles 7 and 8 of condescendence aver the excavation works were carried out in breach of planning permission.

[16] Article 9 of condescendence relates to the two incidents for which the pursuers crave damages in craves 4 and 5. Those pleadings were debated in relation to the third pursuer's claim for damages in crave 4 (albeit the defender's pleas-in-law 3 and 4 do not refer to crave 4).

[17] Article 10 of condescendence refers to the defender not obtaining planning permission to develop on land to the west of the first and second pursuers' property. Article 11 of condescendence avers the basis on which the defender is at fault for his actions referred to Articles 5, 6 and 9 of condescendence.

The defender's pleadings

[18] The defender admits the building operations and their purpose of erecting a horticultural equipment shed on his land (Answer 7, lines 313 - 315 of the record). He avers the effect of the interim interdict is to prevent him completing the works including restoring it to its previous condition. The works to complete the horticultural shed would be finished

within a matter of weeks. Conditions would be put in place to shield the pursuers from having sight of the shed from their property (Answer 5, lines 206 - 223 of the record and Answer 9, lines 451 - 458 of the record). In general, most other matters are disputed by the defender including the damage alleged to have been suffered by the pursuers.

[19] The defender has four preliminary pleas:

1. The pursuers' averments being irrelevant *et separatim* lacking in specification, the action should be dismissed.
2. The pursuers' whole averments being irrelevant *et separatim* lacking in specification, they ought not to be admitted to probation.
3. The action, being incompetent in terms of craves 1, 2 and 3 should be dismissed.
4. The pursuers, having no title to sue in terms of craves 1, 2 and 3 the action should be dismissed.

The law: nuisance and pure economic loss

[20] It may be useful for me to provide my understanding of the law of nuisance and of the law in relation to the recovery of damages for pure economic loss before proceeding to a description and discussion of the particular issues arising for debate in this case.

Nuisance

[21] The law of nuisance is that branch of neighbourhood law which protects owners and other lawful occupiers of land from interference with their use and comfortable enjoyment of that land. A nuisance is actionable where the pursuer is exposed to something "*plus quam tolerabile*", that is, whether, judged objectively from the standard of the reasonable person,

the interference is more than reasonably tolerable. The standard of what is "*plus quam tolerabile*" is judged from the standpoint of the victim of the interference (*Watt* v *Jamieson* 1954 SC 56).

[22] The law of Scotland does not divide nuisances into public and private, as does the law in England and Wales. However, members of the public in Scotland have similar rights in relation to public places as do private landowners or occupiers against the use of their land by another neighbour. This case concerns the law of nuisance as it applies between neighbouring proprietors or occupiers.

[23] There are differences in the law of nuisance as between Scotland and England and Wales. Case law from England and Wales may be useful, but must be treated with care, having regard to those differences (see Cameron, *Cross-Border Neighbour Law* 2014 JR 37).

[24] The law of Scotland does, however, distinguish between common law and statutory nuisances. This is a long-standing distinction (see generally *Broun's Law of Nuisance in Scotland* (1891)). The current law on statutory nuisance is set out in sections 79 and 82 of the Environmental Protection Act 1990. Section 79 provides a list of statutory nuisances which a "person aggrieved" may seek to abate or restrain by way of summary application to the sheriff under section 82 of the 1990 Act.

[25] Major differences between common law nuisance and statutory nuisance are (1) in statutory nuisance, a "person aggrieved" is not limited to an owner or occupier of land, and (2) the statutory remedy is confined to abating the nuisance and prohibiting its recurrence, rather than affording a remedy in damages.

[26] This case is based on common law nuisance. The pursuer may therefore seek interdict against the nuisance (see Burn Murdoch, *Interdict in the Law of Scotland*, Chapter IX; Scott Robinson, *The Law of Interdict*, Chapter 6) and damages. In the latter respect, nuisance

is a delict. *Culpa* on the part of the defender is therefore essential to proof of the defender's liability for reparation for loss occasioned by the nuisance (*RHM Bakeries* v *Strathclyde Regional Council* 1985 SC (HL) 17). *Culpa* may arise because the defender acted maliciously, intentionally, recklessly or negligently in respect of the commission of the nuisance (*Kennedy* v *Glenbelle* 1996 SC 95; Gatica, *Fault-based and Strict Liability in the Law of Neighbours* (Edinburgh Legal Education Trust: Studies in Scots Law, Volume 13 (2023). It is not necessary to prove *culpa* in relation to a crave for interdict (Gloag and Henderson, *The Law of Scotland*, 5th Edition (2022), paragraph 28.11).

[27] Nuisances may broadly be divided into instances of (1) physical damage to land, such as the examples of flooding and land slippage in Article 6 of condescendence and (2) interference with the pursuer's use and comfortable enjoyment of land, such as the interference with the wedding venue's prospect in Article 5 of condescendence. This distinction may be referred to as physical damage claims and amenity claims (see Cameron, *Cross-Border Neighbour Law* 2014 JR 37 at pages 50 and 51), both of which are present in this action.

Pure economic loss/secondary economic loss

[28] In general terms, the law does not allow the recovery of damages for pure economic loss (*BDW Trading Ltd* v *URS Corporation Ltd* [2025] 2 WLR 1095 at paragraph 27). There are exceptions to this principle such as in *Junior Books Ltd* v *Veitchi Co Ltd* [1983] AC 520. The pursuers relied on *Junior Books* to suggest the present case might be one in which the third pursuer could recover damages for pure economic loss arising from loss of profits consequent upon the downturn in the third pursuer's business after the defender began his building operations.

[29] The pursuer's counsel referred me to the speech of Lord Roskill in *Junior Books*, where Lord Roskill had questioned the correctness of the decision of the First Division in *Dynamco* v *Holland & Hannen & Cubitts (Scotland) Ltd* 1971 SC 257, disallowing a claim for damages for recovery of pure economic loss. I understand *Junior Books* to be a very exceptional, indeed controversial or "unique" decision, which is likely to be kept "within the narrowest of limits" (Cameron, *Thomson's Delictual Liability*, 6th Edition, 2021, paragraph 4.24; *D&F Estates Ltd* v *Church Commissioners for England* [1989] AC 177; *Architype Projects Ltd* v *Dewhurst Macfarlane & Partners* [2004] PNLR 38).

[30] Feldthusen defined pure economic loss in *Economic Negligence* (Carswell Legal Publications, Canada, 1984) at page 1 of his book as follows:

> "This book is concerned with the common law principles which govern the recovery of pure economic loss in negligence (1). A *pure* economic loss is a financial loss which is not causally consequent upon physical injury to the plaintiff's *own* person or property. It must be distinguished from a consequential economic loss which, by definition, is causally consequent upon physical damage to the plaintiff or the plaintiff's property."
>
> *Footnote 1*
> (1) The sole concern here is with recovery through the negligence action. Pure economic loss claims are recognized in other branches of tort law such as nuisance, defamation and the intentional economic torts.

[31] Expressed with reference to Canadian common law, in turn based on English law, care must be taken to express these principles in a Scottish context. Scots law recognises neither a law of torts, nor a tort of negligence. Rather, Scots law recognises a general principle that one is obliged to repair damage caused by another's wrongful act ("*damnum injuria datum*") (Brown, *Damnum is where one starts from? Questions to be asked in determining liability for negligence in Scots law* 2024 JR 119 at 120).

[32] This principle may operate in those cases in which the defender intended to cause the loss, demonstrated such recklessness as to be the equivalent of intent, or merely failed to

demonstrate the expected level of care in the circumstances (Brown, *Damnum is where one starts from? Questions to be asked in determining liability for negligence in Scots law* 2024 JR 119 at 120).

[33] There is therefore in Scotland no delict of negligence. With a possible exception for claims based in nuisance as discussed later in this judgment, damages for unintentionally caused harm (negligence) are sought under the general action for reparation (Gloag and Henderson, *The Law of Scotland*, 5th Edition (2022), paragraph 28.11).

[34] Nonetheless, within this framework, Scots law does not in general permit the recovery of damages for pure economic loss in connection with negligently caused harm (where the harm is purely financial and not connected to any other injury) or for secondary economic losses (those incurred as a result of negligently caused harm to someone else's property) (*Thomson's Delictual Liability*, 6th Edition, 2021, paragraph 4.16). *Thomson's Delictual Liability*, 6th Edition, 2021, paragraph 4.29, treats *Dynamco* v *Holland & Hannen & Cubitts (Scotland) Ltd* 1971 SC 257 as an example of secondary economic loss, given the damage to the supply cable owned by the electricity board, without calling into question its status as a reliable authority in Scots law.

[35] Feldthusen's footnote number 1 quoted above notes the restriction on the recovery of pure economic loss in connection with the negligence action, and the restriction does not apply where the liability for damages arises in the tort of nuisance.

[36] The recovery of pure economic loss in nuisance in Scots law seems to be permissible where the *culpa* involved in the commission of the nuisance was the intentional or reckless infliction of harm by virtue of a nuisance (Cameron, *Muddy Pavements and Murky Law: Intentional and Unintentional Nuisance and the Recovery of Pure Economic Loss* 2001 JR 223

at 240). Different considerations may apply where the nuisance was committed unintentionally (through negligence on the part of the defender).

Submissions

[37] Mr Milloy moved for dismissal of craves 1 and 2 of the initial writ, for dismissal of the action insofar as pursued by the third pursuer, and for certain averments to be excluded from probation. He submitted craves 1 and 2 were not competent as they amounted to an attempt to enforce planning control and the third pursuer's claim was fundamentally irrelevant as the third pursuer lacked title and interest to pursue a claim in nuisance for pure economic loss.

[38] Mr Kennedy submitted all issues should be sent to a proof before answer. The pursuers' action was based squarely on nuisance. The pursuers' averments revealed a pattern of behaviours amounting to nuisance by the defender. *Culpa* was not required in respect of the pursuer's crave for interdict. The defender's actions were deliberate, not negligent, establishing the necessary degree of *culpa* for the pursuers' claims for damages. The pursuers were not attempting to enforce planning control. The defender's breach of planning control was relevant to an assessment of whether the acts complained of were "*plus quam tolerabile*".

Discussion

Enforcement of planning control

[39] Mr Kennedy conceded the pursuers were not entitled to enforce planning control. That is not however what the pursuers are doing in this case. They have raised an action squarely founded on nuisance as their first and second pleas-in-law amply demonstrate.

[40] The defender's alleged breach of planning control in attempting to erect a horticultural equipment shed without valid planning permission and in the face of the local authority's attempts to enforce planning control is relevant to the pursuers' claims in nuisance in two respects. First, this conduct is relevant to the establishment of the "*plus quam tolerabile*" test (Whitty, *The Laws of Scotland: Stair Memorial Encyclopaedia, Nuisance, Reissue* (2001), paragraphs 67 and 68). Secondly, it is relevant to an assessment of *culpa* in respect of the pursuers' damages claims as it may be a factor, after proof, which entitles the court to find the defender's behaviour was "malicious, or … deliberate in the knowledge that his action would result in harm to the other party" (*Kennedy* v *Glenbelle* 1996 SC 95 at 100H, per Lord President Hope). Furthermore, an action for nuisance may be brought even where a local authority possesses statutory powers to permit the matter in question (*Manson* v *Forest* (1887) 14R 802 (cow byres in burghs); *Hunter* v *Canary Wharf Ltd* [1997] AC 655 at 710D, per Lord Hoffman (planning control)). I accordingly reject Mr Milloy's motion and submissions that the averments relating to the defender's breach of planning control in Article 7 of condescendence from lines 254 - 305 of the record should not be admitted to probation.

Title and interest to sue

[41] The record does not specify the legal basis upon which the third pursuer occupies the land owned by the first and second pursuers.

[42] Article 3 of condescendence merely states at line 92 of the record that the third pursuer "operates a wedding business" from the first and second pursuers' land. There is no averment of the legal basis upon which the third pursuer occupies the first and second pursuers' land. There is no heritable right averred to be vested in the third pursuer, for

example by way of registered long lease. There is no averment they have a right to occupy by virtue of a lease or a licence from the first and second pursuers.

[43] Mr Milloy accordingly submitted the third pursuer had not averred a relevant case of title and interest to sue for a claim based in nuisance and the third pursuer's action should be dismissed as being fundamentally irrelevant.

[44] Mr Kennedy referred me to averments in Articles 3 and 4 of condescendence relating to the third pursuer's occupation of the land from which it could be inferred the third pursuer was in sufficient occupation and control of the land as to have title and interest to interdict the nuisance or claim damages for economic loss.

[45] I was referred to *Hand* v *North of Scotland Water Authority* 2002 SLT 798 at page 800 and *TCS Holdings Ltd* v *Ashtead Plant Hire Co Ltd* 2003 SLT 177 at page 179 dealing with financial claims. In *Hand*, the pursuer was a tenant under a registered lease and was found to have title and interest to sue, it being remarked by the Lord Ordinary that the pursuer's interest "was not only close to ownership but … in many respects identical to the interests of that ownership". *Hand* was distinguished in *TCS Holdings Ltd* where the pursuers were held not to have title to sue as they did not have exclusive use or possession of the sewer and it was not possible for two different persons to have real rights to possess at the same time.

[46] Mr Milloy referred me to Gloag and Henderson, *The Law of Scotland*, 5th Edition (2022), paragraph 28.11 where it is stated:

> "title extends to those in possession and occupation where comfortable enjoyment is disturbed and to owner-occupiers or landlords in respect of damage to the physical integrity of the building or diminution in letting value".

[47] Footnote 52 to this sentence distinguishes Scots law from English law on this point. In English law nuisance is a tort to land and with one exception only a person with an interest in land as freeholder, tenant or licensee with exclusive possession of land may sue in

respect of that tort (*Hunter* v *Canary Wharf Ltd* [1997] AC 655 at 688E – G, exception noted). The position appears to be different in Scots law, however.

[48] In *Broun's Law of Nuisance in Scotland* (1891), pages 82 and 83, it is stated that it "is difficult to see why a property qualification should be required of the complainer in all cases of nuisance". Whitty discusses title and interest to sue in actions of nuisance at *The Laws of Scotland: Stair Memorial Encyclopaedia, Nuisance, Reissue* (2001), paragraphs 133 and 134. He notes the title and interest to sue of owners and tenants at paragraph 133 and comments at paragraph 134 there:

> "is scant authority on whether or how far persons other than the owner or tenant having a lawful interest in the use and enjoyment of land have a title to object to a nuisance invading that interest".

[49] In *Neilson* v *Waterstone* (1823) 2S 259, however, the "possessors" of a flat in Paisley applied to the court to suspend (interdict) the tenants of the flat immediately above them from occupying it as a tailor's workshop, which they alleged was a nuisance. The bill for suspension was refused, but only on the basis the application ought to have been brought before the judge-ordinary on account of the cost associated with proceedings in the Court of Session.

[50] I consider in light of the foregoing discussion the third pursuer has sufficiently averred a title and interest to sue for interdict against the erection of the horticultural equipment shed.

[51] The third pursuer sets out averments in Articles 3 and 4 of condescendence from which it is reasonably inferred the third pursuer was in substantial occupation and control of the land in question. While it would have been better had the third pursuer included more information about the legal basis of their occupation and the degree to which it may be

regarded as exclusive, I believe the existing averments are sufficient for the purpose of establishing title and interest to sue.

[52] Moreover, the state of the legal authorities in Scotland referred to above is such as to tend to *support* the third pursuers having sufficient title and interest to seek interdict to prevent a nuisance which fundamentally harms its business interests.

[53] *TCS Holdings Ltd* discusses title to sue with reference to matters such as exclusive possession of the land. *Broun* did not consider a "property qualification" as essential to title to sue in all cases of nuisance. It was sufficient in *Neilson* v *Waterstone* for the pursuers to be described as "possessors". Gloag and Henderson states "title extends to those in possession and occupation where comfortable enjoyment is disturbed" (paragraph 28.11). This part of the case is therefore at least sufficient to proceed to a proof before answer.

Pure economic loss

[54] The third pursuer's averments of pure economic loss appear in Article 5 of condescendence (loss of profit) and Article 9 from lines 419 - 426 of the record (loss caused by damage to the pipe). Mr Milloy submitted the whole of Article 5 and the foregoing averments in Article 9 should not be admitted to probation as these were both examples of pure economic loss. Mr Kennedy submitted the authorities, preventing recovery of pure economic loss, did not apply to this case as it was based on nuisance, not negligence. As noted above, I was not satisfied an appeal could be made to *Junior Books* in this regard.

[55] However, I also noted above that recovery of pure economic loss in nuisance in Scots law seems to be permissible where the *culpa* involved in the commission of the nuisance was the intentional or reckless infliction of harm by virtue of a nuisance (Cameron, *Muddy Pavements and Murky Law: Intentional and Unintentional Nuisance and the Recovery of Pure*

Economic Loss 2001 JR 223 at 240). Mr Kennedy informed me the pursuers' case was based on intentional harm, not negligence. There may therefore be force in his submission that the rule against recovery of pure economic loss does not apply to nuisance actions (except perhaps where the *culpa* averred is negligence). This is therefore a matter which is best held over to proof before answer for a final decision insofar as the loss of profit is concerned.

[56] The third pursuer's claim for loss arising from damage to the pipe might be a case of secondary economic loss (damage to the first and second pursuer's property) and it would also be preferable to hold that matter over to the proof before answer when I can have the benefit of further submissions from counsel. In this regard, I note Gloag and Henderson, *The Law of Scotland*, 5th Edition (2022), paragraph 28.11 extends title to sue in respect of physical damage "to owner-occupiers or landlords in respect of damage to the physical integrity of the building or diminution in letting value". There may, however, be no reason to make a distinction between pure economic loss and secondary economic loss, or the issue may turn into one of remoteness of damage after proof before answer.

[57] The above article "*Muddy Pavements*" is largely a comment on *The Globe (Aberdeen) Ltd* v *North of Scotland Water Authority* 2000 SC 392, which I now turn to consider. Mr Milloy distinguished this case, which had not considered title and interest to sue. In *The Globe*, the pursuers carried on business as a public house in Aberdeen. The defenders were responsible for maintaining the sewage works affecting the public house. They had been carrying out works for a substantial period, more than the 6 weeks expected. The pursuers averred that the prolonged works had become a nuisance, in particular causing the streets to become muddy, thus deterring customers from visiting the public house.

[58] The sheriff dismissed the pursuers' claim for loss of profits as it was for pure economic loss, there having been no damage caused to the pursuers' property. The action

for damages was based on nuisance with averments of *culpa* based on negligence by the defenders. However, on appeal, an Extra Division of the Inner House recalled the sheriff's interlocutor and allowed parties a proof before answer, taking the view that, on the state of the authorities, it could not be affirmed, without careful consideration of those authorities, that in a case of alleged nuisance it is necessarily too remote to claim mere financial loss.

[59] *The Globe* was the subject of some criticism in the article *"Muddy Pavements"*, the author taking the view the solution lay not in the classification of the action, but the form taken by *culpa*. His view was that considering whether pure economic loss is recoverable in nuisance as opposed to negligence was really to ask the wrong question. Rather, his view was that it ought to be recoverable in cases where *culpa* was based on intentional or reckless conduct, but not on carelessness. Indeed, as he explained in his article, *The Globe* could have been pursued in intention.

[60] I am unaware of the eventual resolution of *The Globe*. The case does not therefore particularly assist me in determining the law on this matter. The question was, in my view, left open by the Extra Division in *The Globe*. The appropriate course is therefore for me also to leave it open at this stage, reserving its determination to a proof before answer.

Averments of negligence

[61] The pursuers' averments of negligence appear in Articles 5 and 11 of condescendence. The pursuers aver in Article 5 of condescendence at lines 167 - 170 of the record:

> "The defender, as the neighbouring landowner, has a duty of care not to commit a nuisance that has the effect of interfering with the third pursuer's business, or damaging the first and second pursuers' land. The defender has breached that duty through his negligence as hereinbefore condescended."

[62] The pursuers aver in Article 11 of condescendence at lines 510 and 511 of the record: "The defender has failed to take reasonable care to avoid the nuisance";

[63] Mr Milloy submitted these averments were insufficient to be admitted to probation. He submitted these averments of negligence were "deficient" as they made no mention of the precise duty of care to prevent nuisance, reasonable foreseeability of harm to the third pursuer by breach of that duty by the defender, and harm caused by that failure.

[64] Mr Kennedy submitted there was no need for elaborate pleadings where the *culpa* averred was negligence (*RHM Bakeries* v *Strathclyde Regional Council* 1985 SC (HL) 17 at 45, per Lord Fraser of Tullybelton) and therefore the above averments were sufficient to be admitted to probation.

[65] Gloag and Henderson, *The Law of Scotland*, 5th Edition (2022), paragraph 28.18 deals with the requirements of pleading in an action of nuisance where the *culpa* averred is negligence:

> "It must be established that the harm was foreseeable to the defender. Pleadings must provide a factual basis for recognition of a duty of care and its breach … Lord Fraser's approach to pleading may be used effectively in circumstances where the pursuer is in no position to prove whether that harm resulted from an intentional act or negligent conduct."

[66] In *Kennedy* v *Glenbelle* 1996 SC 95 at 100G, Lord President Hope said that if *culpa* were based on negligence in an action of nuisance, then "the ordinary principles of negligence will provide an equivalent remedy".

[67] It is unclear what this means, and it may well be preferable for negligence as to be excluded as a form of *culpa* in nuisance actions. In other words, the two should be divorced from each other (Cameron, *Muddy Pavements and Murky Law: Intentional and Unintentional Nuisance and the Recovery of Pure Economic Loss* 2001 JR 223 at 242; and see Gatica, *Fault-based and Strict Liability in the Law of Neighbours* (Edinburgh Legal Education Trust: Studies in

Scots Law, Volume 13 (2023), paragraphs 5.20 - 5.24 for a discussion of the recovery of damages for pure economic loss in negligence actions where the *culpa* averred is negligence).

[68] However, the attraction to pleaders of using negligence in the context of a nuisance action is (as in this case) arguably (a) damages may be recovered for pure economic loss; and (b) the pleadings need not be as precise as in an action for reparation based on negligence.

[69] Nonetheless, if Lord Hope is to be taken at face value in *Kennedy* v *Glenbelle*, then these attractions may well be illusory. Indeed, in *Kennedy* v *Glenbelle* averments of negligence were excluded from probation, and a proof before answer was allowed based on an intentional nuisance. There is nothing that leads me to think Lord Fraser's approach in *RHM Bakeries* should be applied in the present case. The pursers have been able to observe the defender's actions. Things have been done openly. This therefore seems to me, if anything, a case of intentional nuisance from a pleading perspective. Although Mr Kennedy did not concede the negligence point, he did state this was not a negligence case. The averments of negligence do not set out a specific duty of care which the defender breached (other not to cause a nuisance which is circular and lacking in specification), or that this caused reasonably foreseeable harm to the third pursuer.

[70] I am therefore satisfied Mr Milloy's submissions are well founded. I have accordingly excluded the above averments from probation. The pursuers' averments of intentional harm are not very satisfactory. They fall to be inferred from what they aver in Articles 5 and 7 of condescendence regarding the building operations done in breach of planning permission, with specific averments of "deliberate intention" and "recklessness" in Article 11 of condescendence separated on lines 500 and 510 of the record. These averments, read together, are however sufficient to be admitted to proof before answer.

Relevancy and specification of certain of the pursuers' pleadings

[71] Mr Milloy criticised the pursuers' pleadings in Article 6 of condescendence relating to physical damage to the first and second pursuers' property. He submitted those pleadings did not specify the type of damage, when it happened, the scope of the damage, or that the defender expressly caused the damage. There was no crave for damages. These averments were therefore "collateral".

[72] He submitted the pursuers' averments in Article 8 of condescendence relating to the first and second pursuers' entitlement to object to the defender's planning application should not be admitted to probation as part of his larger submission the pursuers were not entitled to refer to the defender's breach of planning control.

[73] He submitted the pursuers' averments in Article 10 of condescendence regarding the defender's previous failure to obtain planning permission for erection of farm related building works on land to the west of the first and second pursuer's land was irrelevant as this was a collateral issue which did not assist the pursuers in the proof of their negligence action.

[74] Mr Kennedy replied that the averments in Article 6 of condescendence were part of the pattern of nuisance alleged by the pursuers, the averments in Article 8 of condescendence helped demonstrate the defender had acted in the knowledge that his subsequent actions would cause the third pursuer harm, and the averments in Article 10 would assist in proving the pursuers had reasonable apprehension of the defender's intention to continue with the nuisance and thus assist them in obtaining interdict. He therefore opposed any of these averments being excluded from probation.

[75] I prefer the submissions of Mr Milloy in respect of these averments. The averments in Article 6 of condescendence lack the specification referred to by Mr Milloy but crucially are not tied to any claim for damages. The pursuers have made sufficient averments about amenity nuisance affecting the third pursuer's use of the land. A claim in relation to physical damage is a different sub-set of a nuisance claim, and these averments do nothing to advance the pursuers' case in relation to the amenity nuisance. I therefore regard these averments as irrelevant.

[76] Although I have not accepted Mr Milloy's submissions regarding enforcement of planning control, I cannot see how the first and second pursuers' averments about losing their entitlement to object to the defender's planning permission in Article 8 of condescendence are relevant to anything claimed by the pursuers. The sole relevance is that the planning controls were *breached* by the defender; and those breaches are relevant to an assessment of the test "*plus quam tolerabile*", and the degree of *culpa* (malice, which is not averred, or intention or recklessness, which are both averred) involved in the nuisance. The loss of the first and second pursuers' ability to object to planning permission does not enter into either of these assessments and accordingly those are not relevant averments.

[77] The averments in Article 10 of condescendence are in my view unnecessary. There are ample averments which, if proved, would justify the conclusion the pursuers had reasonable apprehension the nuisance would continue if interdict were not granted. I therefore also consider these averments to be irrelevant.

[78] I shall accordingly refuse to admit the averments in Articles 6, 8 and 10 of condescendence to probation. I do not formally sustain the defender's second plea-in-law as that seeks to exclude the *whole* of the pursuers' averments from probation, and I have not done that.

Decision

[79] For the foregoing reasons, I have excluded from probation the pursuer's averments in Articles 5 and 11 of condescendence that *culpa* was based on negligence. The third pursuer is still entitled to proceed with a claim for damages for pure economic loss at this stage based on an intentional or reckless delict of nuisance by the defender. There is strong support in the academic opinion referred to above that damages may be recovered for pure economic loss in the case of an intentional or reckless delict. I have therefore allowed parties a proof before answer prior to determining that question. A proof before answer will also determine whether the third pursuer has a sufficient degree of control and occupation of the first and second pursuers' land as to have title and interest to sue for those damages.

[80] In addition to excluding the pursuers' averments in Articles 5 and 11 relating to negligence from probation, I have also excluded from probation the whole of the pursuers' averments in Articles 6, 8 and 10 for the reasons stated above. *Quoad ultra*, I shall fix a diet of proof before answer at the proof management hearing.

Expenses

[81] There is divided success arising from the diet of debate on 29 July 2025. I think in those circumstances the question of expenses might therefore best be dealt with by written submissions. I will discuss this with parties at the proof management hearing and, if this is the course adopted, set down a timetable for those written submissions after the proof management hearing.

Conclusion

[82] This concludes my judgment in relation to the debate. I am grateful to counsel for their very able submissions at the diet of debate.