OUTER HOUSE, COURT OF SESSION

2022 CSOH 62

PD33/21

OPINION OF LORD MENZIES

In the cause

(FIRST) LEIGH FENWICK; and (SECOND) PAUL FENWICK

Pursuers

against

(FIRST) LEON DUNDAS; (SECOND) NICHOLAS FAULKNER; and (THIRD) CALUM PATON

Defenders

Pursuers: Galbraith QC, Thomley; Digby Brown LLP
First defender: No appearance
Second defender: Love QC, Russell; DWF LLP
Third defender: Davie QC, McConnell; Ledingham Chalmers LLP

7 September 2022

Introduction

[1] On the morning of 13 March 2018 the first and second pursuers, who are father and son, were working together in the course of their business as window cleaners. They were working at residential premises at 22 Union Street, Montrose. They had been instructed by the first defender to clean out the guttering and wash the windows of the top floor flat of that building.

[2] There were three flats at 22 Union Street which were all accessed from a set of stone steps leading from the area behind the properties on Union Street. The steps went from

ground level to a level balcony area where there were three individual doors which gave access to the flats. The balcony area was known as a platt. It was cantilevered and unsupported from below.

[3] The pursuers aver that the first defender's flat was the top floor flat, which the first defender purchased in August 2010. The second defender's flat was known as the mid-flat west and the second defender purchased it in December 2013. The pursuers aver that the second defender entered into a short assured tenancy in terms of a lease dated 26 June 2017; in terms of clause 10 of this lease the second defender was under an obligation to keep in repair the structure and exterior of the property. The third defender's flat was known as mid-flat east; the third defender purchased this in May 2016.

[4] The pursuers aver that they were standing on the platt. The first pursuer placed a ladder on the platt in order to climb up to assess the state of the guttering. The laddering was placed between the second and third defender's flats. The second pursuer stood at the bottom of the ladder footing it. The first pursuer climbed up the ladder. After assessing the state of the guttering, the first pursuer began to descend the ladder. As he did so, the platt collapsed beneath him and the second pursuer. The pursuers fell approximately 15 feet to the ground, as a result of which they each sustained severe injuries.

[5] The pursuers have raised these proceedings for damages against the defenders in terms of chapter 43 of the Rules of the Court of Session. The pursuers aver that at the material time the defenders were in occupation and control of the platt in terms of the Occupiers' Liability (Scotland) Act 1960. They aver that

> "the platt is common property. The platt is jointly owned by the defenders. The defenders were jointly responsible for the inspection, maintenance and repair of the platt. They were solely and exclusively responsible for its management: no repair or alteration could have been carried out without their knowledge or agreement. Prior to the accident concrete patching had been carried out on the plat (sic). This patching

> may have hidden cracks and defects. Further, bolts had been fitted through the plat (sic). The location of the bolts coincide with where it broke."

The pursuers go on to aver that

> "the second defender was under a contractual obligation in terms of the lease to keep the structure and exterior of the property in repair. In pursuance of that obligation, the second defender ought to have inspected and maintained the property. Clause 13 of the lease provided that at all times during the currency of the tenancy, the second defender had a right of access to the property for inspection, maintenance and repair. He accordingly had physical control of the property at the relevant time."

With regard to the third defender, the pursuers aver that "Prior to the purchase of the third defender's flat a Home Report was prepared by a surveyor at the instruction of the seller (which) … identified the platt as being a Repair Category 2. The Home Report states that the shared entrance platt or deck at the top of the common stairs is weathered and cracking in places; and that there is some deterioration to the underside of the deck. The Home Report states that Category 2 repairs require attention. There is a warning in the Home Report that if Category 2 repairs are left unattended, even for a relatively short period, they can rapidly develop into more serious Category 3 repairs, which require urgent attention. The third defender knew or ought to have known what the surveyor's inspection found in the Home Report about the deterioration in the condition of the platt. The third defender was put on notice that the platt required attention which ought to have involved an inspection by a structural engineer with a view to maintenance and repairs being carried out.

[6] Amongst other averments, the pursuers' pleadings contain the following:

> "It would have been reasonable for the defenders to instruct that necessary strengthening repairs or replacement of the platt was carried out. The strengthening works would have been designed, and would have strengthened the platt significantly. It would not have collapsed. A properly maintained platt does not collapse: *res ipsa loquitur*. Had the defenders taken reasonable care to inspect and maintain the platt, it would not have collapsed."

[7] The first defender has chosen not to address any pleas or legal arguments in advance of the proof, and on 11 May 2022 the court allowed a proof vis a vis the pursuers and the first defender which was appointed to proceed on 6 June 2023 and the 11 ensuing days. On 11 May 2022 the court also appointed the action to a debate between the pursuers and the second and third defenders. Notes of argument were submitted on behalf of the pursuers and both the second and third defenders, and I heard submissions on behalf of each of them. The first defender did not appear at the debate.

Submissions for the second defender

[8] Senior counsel for the second defender adopted his note of argument and moved for dismissal of the action insofar as directed against the second defender, which failing deletion of certain averments. Senior counsel divided his submissions into three chapters:

(a) The second defender was not an occupier at the material time.

(b) The pursuers' averments of fact and fault were irrelevant and lacking in specification.

(c) The averment by the pursuers of *res ipsa loquitur* is irrelevant.

[9] Senior counsel developed his submissions in respect of each of these chapters as follows:

(a) The second defender was not an occupier at the material time

[10] At the material time the second defender was, along with his wife, the owner and residential landlord of the flat. Neither of them had ever resided there. The second defender avers that he did not retain a right to the possession and control of the platt. The

pursuers do not aver that he was present at the time of their accident or that he had any knowledge of any contract between the first defender and the pursuers. He had no say in whether the pursuers were allowed to come onto the property, or what they did if they were so allowed. If the pursuers seek to rely on section 3 of the Occupiers' Liability (Scotland) Act 1960, even in terms of chapter 43 proceedings they must, as a matter of fair notice, aver this. There is no such averment.

[11] A right in common to the platt is insufficient in law to establish that the second defender was an occupier of the property at the material time in terms of the 1960 Act - *Murray* v *Edinburgh District Council* 1981 SLT 253; *Gallagher* v *Kleinwort Benson (Trustees) Ltd &c* 2003 SCLR 384, particularly at paragraphs 17-19. The extent of a landlord's duty is fixed by his knowledge of what is going to be done on the platt – ie: by his control, and his capacity to say who is coming onto the platt. If the second defender had had specific knowledge of what the first defenders' contractors were going to do, he might have had liability. Without any averments in this respect, the pursuers' case against the second defender is irrelevant in terms of the 1960 Act.

(b) Relevancy and specification

[12] The action should be dismissed insofar as directed against the second defender because the pursuers failed to provide fair notice of their case against him. The 1960 Act applies to "dangers which are due to the state of the premises or to anything done or omitted to be done", and the care required of an occupier is "such care as in all the circumstances of the case is reasonable to see that the person will not suffer injury or damage by reason of any such danger". An occupier is not obliged to eliminate the risk

that an accident might happen. Moreover, the occupier must have knowledge (actual or deemed) of any danger before he can be found liable under the 1960 Act.

[13] The pursuers appear to offer to prove a case against the second defender in terms of the 1960 Act and, separately, at common law. There are no relevant factual averments made by the pursuers in support of either case. They do not aver the basis on which the second defender owed them a duty, what that duty was, how it was breached and why their conduct at the property ought to have been foreseen by the second defender. They make no positive averments that the second defender knew or ought to have known that the pursuers were in attendance (or likely to be in attendance) at the property, that the second defender ought to have foreseen that the pursuers would use the platt as a working platform, and that the platt failed due to its condition (as opposed to the manner in which it was being used by the pursuers at the material time).

[14] Use by the pursuers of the platt as a working platform does not go to establish any failure in maintenance in respect of its intended use as a means of access. In any event, the pursuers do not aver what a "reasonable inspection" would have involved, when it ought to have been carried out before March 2018, by whom, what it would have disclosed, or what steps would or ought to have been taken by the second defender and by when. Without these averments, the pursuers' case was irrelevant and bound to fail at proof insofar as directed against the second defender. There is no basis for the averment that "the defenders were put on notice that the platt required repairs or replacement". It is reasonable to infer that the pursuers assessed the platt as a working platform and determined that it was safe for them to continue. The pursuers' averment that "had a report been instructed from a structural engineer prior to the accident, it is likely to have recommended the platt was strengthened" is irrelevant and should not be admitted to probation.

[15] Senior counsel referred to *Wallace* v *City of Glasgow District Council* 1985 SLT 23, and in particular the observation at page 24:

> "There is no suggestion that the duty simply arises from the fact of 'occupancy' and clearly, on the standard of reasonable care in all the circumstances, the pursuer has to aver and prove that the danger was one of which the occupier knew or ought to have been aware, and why, and what steps were open to the occupier but not taken by him to remove the danger before the accident occurred."

[16] *Murray* v *Edinburgh District Council* 1981 SLT 253 was authority for the proposition that the obligations of a landlord do not include the obligation to inspect. The second defender did not owe a duty of inspection to the pursuers in the circumstances of this case. There was no averment that the second defender would know or anticipate what the pursuers would do on the platt. There was no averment of what caused the platt to collapse. There was no averment that there was an element of the visual appearance of the platt which would have alerted the second defender to cause an inspection to be carried out. There are no averments as to what works would have been carried out if an inspection had taken place and which would have avoided the accident. The pursuers' case against the second defender was so lacking in specification as to be irrelevant and should be dismissed.

[17] Even if the court was not prepared to dismiss the action against the second defender, there were averments which should not be admitted to probation. At page 8E/9A of the Record, there was an averment as follows: "Had a report been instructed from a structural engineer prior to the accident, it is likely to have recommended the platt was strengthened." Even if proved, this is irrelevant without an averment that there was a duty on the second defender to instruct a structural engineer to prepare a report. In a case based on the 1960 Act, involving shared ownership and leased property, it is not enough for the pursuers to say that the platt failed, without averring what sort of inspection they say ought to have been performed, when and by whom, what it would have shown, what would have

happened as a result, and when. These are minimum requirements for a relevant case, even in an action raised under chapter 43. The case against the second defender is periled on the pursuers establishing failure in their duty to instruct or carry out an inspection. If the inspection case is not admitted to probation, the case against the second defender must fail. The second defender has met the test in *Jamieson* v *Jamieson* 1952 SLT 257.

(c) Res ipsa loquitur

[18] The pursuers' pleadings do not disclose a relevant case for the application of the maxim *res ipsa loquitur*, and the averments in that regard at page 9A-B of the Record are irrelevant and should not be admitted to probation. The essential requirements for the application of the maxim are that the defender should have sole control of the premises, and that the circumstances are such that no other explanation except negligence on the defenders part is available. In the present case there is a reasonable, non-negligent explanation for why the platt gave way, namely that it was the use that the pursuers made of the platt and their positioning of and excessive weight applied to the ladder that caused the platt to fail. The second defender makes averments in support of a non-negligent explanation for the collapse of the platt at page 13B-E of the Record and the third defender makes averments in this regard at pages 15C-16C of the Record. None of these averments are answered by the pursuers.

[19] In support of his submission senior counsel referred to the well-known passages in *Devine* v *Colvilles Ltd* 1969 SC (HL) 67; *O'Hara* v *Central SMT Co* 1941 SC 363 (particularly per Lord Moncrieff at 388); *McDyer* v *The Celtic Football and Athletic Co Ltd* 2000 SC 379 (particularly per the Lord President at 384-386); *Murray* v *Edinburgh District Council*; and

McQueen v *Ballater Golf Club* 1975 SLT 160 (particularly at page 165). The maxim *res ipsa loquitur* is not applicable in the circumstances of this case.

Submissions for the third defender

[20] In moving for dismissal of the action insofar as directed against the third defender, senior counsel adopted her written note of argument; some of her oral submissions overlapped with those on behalf of the second defender, and I do not repeat these here. Senior counsel submitted that there was a lacuna in the pursuers' pleadings; they aver that they sustained injuries as a result of an accident caused by the platt collapsing, but they do not offer to prove how or why the platt collapsed. This does not give fair notice to the defenders, and will cause insuperable difficulties at any proof - any question directed at how or why the platt collapsed would be met with an objection that there was no Record. The pursuer relies on *res ipsa loquitur* to cover this lacuna. This case is therefore similar to that of *Miller* v *SSEB*, 1958 SLT 229 because it is always going to be difficult to make a finding as to what happened because the pursuers do not seek to prove how the platt collapsed.

[21] Senior counsel directed four particular arguments at the pursuers' averments between pages 8E and 9A of the Record, as follows:

(i) The pursuers' own averments do not identify a defect in the platt such as would cause its collapse. Moreover their averments do not exclude a latent causal defect which would not have been reasonably foreseeable.

(ii) The pursuers make reference to bolts fitted through the platt but fail to identify what causal connection such bolts may have to the subsequent failure of the platt, beyond suggesting that the location of the bolts bore some coincidental relation to where the platt broke, without any further specification.

(iii) At their height the pursuers' averments outline the cause of the accident as the collapse of the platt, but fail to identify any cause for the collapse of the platt, least of all a negligent cause.

(iv) Whilst the pursuers aver that the platt could have been strengthened or replaced, they fail to specify what that means and how absent any explanation of the cause of the accident, it can be averred that such steps would have avoided the accident. While the pursuers aver that "strengthening" or "replacement" of the platt would have prevented the accident, it is not clear how such averment can be properly made absent any averments identifying how the collapse occurred in the first place.

[22] The pursuers aver that the concrete patching of the platt may have hidden defects, but it is not clear what is to be taken from this. Similarly, the pursuers aver the presence of bolts, but makes no averments as to any impact they may have had on the structural integrity of the platt. There is then a vague averment that there was something about the platt which should have caused an inspection; was this to be an inspection by a structural engineer? If so, why? There is then an averment that the structural engineer would have advised strengthening works to be carried out, but there is no averment as to why strengthening works would have been required, nor how they would have avoided the accident. It is necessary for the pursuers to aver why the accident was foreseeable to the third defender, and what steps he should have taken to avoid it - see *Bennett* v *J Lamont & Sons* 2000 SLT 17.

[23] In addressing paragraphs 2 and 3 of her note of argument senior counsel on reflection considered that it was going too far to suggest that the third defender did not have sufficient control of the premises for an obligation under the 1960 Act to arise. The true

issue is foreseeability; the care which an occupier requires to show is "such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger". The pursuers make no averments which would give fair notice of what danger was said to exist and how the third defender could discharge his responsibility to show reasonable care. For the purposes of section 2(1) of the 1960 Act, the occupier has to be able to foresee (1) a danger, and (2) what reasonable care he should take to guard against that danger. The scope of the duty has to be informed by what knowledge the occupier has. Neither the second nor third defender had knowledge that there would be workmen working on the platt. The pursuers' answer is simply that there was a general danger and that it was reasonably foreseeable that visitors, postmen, delivery men and the like would use the platt for access - the obligation under section 2(1) is global and applies to anyone on the platt. This is incorrect, and far too wide; what the pursuers were doing on the platt was not something which occurred in the normal course of events. The duty is owed to a particular person, who carries out a particular activity; it relates to a foreseeable danger, and to reasonable care to see that <u>that</u> person will not suffer injury or damage by reason of such danger.

[24] If the pursuers had averred that there was a large crack across the whole of the platt which was clearly visible and represented a clear danger, that would be different. However, there are no such averments. There are no averments to indicate why the third defender ought to have appreciated a danger to the pursuers, nor that he ought to have foreseen that they would work on the platt in the manner they did.

[25] The pursuers seek to fill this lacuna in their pleadings by averments regarding the Home Report dated 13 August 2014, but these too are hopelessly unspecific. The third defender purchased his flat on 13 May 2016, almost 2 years after the report. There is no

averment identifying the seller who instructed the report, nor whether it was prepared in respect of the sale to the third defender. There are no averments identifying the purpose of the report nor that it was shown to the third defender in the context of his purchase. There are no averments as to what a house owner should do when receiving a Home Report; it is clear that it was not intended to be a building survey, and any matters identified in the report were not urgent. The pursuers have no averments of contractual duty on the third defender arising simply from the existence of the Home Report, and there is no factual averment which would provide a basis for inferring that the third defender had any knowledge of its content. The pursuers appeared to rely upon imputed knowledge imposing a duty on the third defender to the pursuers, but no notice is given of the scope of any such purported duty. If the pursuers' argument based on the Home Report were to be accepted, this would have wide ranging consequences for home owners. It cannot be correct that, even if there is imputed knowledge on a home owner arising from such a report, this creates a duty on the home owner to instruct a report from a structural engineer.

[26] One constantly comes up against the lacuna in the pursuers' pleadings - they do not offer to prove what caused the platt to collapse. One would have expected this to be the first step in the pursuers' investigations in preparation for these proceedings. It was not immediately obvious that the collapse of the platt was due to a negligent cause - it may have been caused by the pursuers' own activities, or by a latent defect.

[27] The pursuers' averments regarding inspection by a structural engineer were entirely speculative. There is no averment as to why a structural engineer should be instructed, nor what an inspection by such an engineer would have shown, nor what works would be required thereafter, nor when these should be carried out, nor how they would have avoided this accident.

[28] Foreseeability is the same at common law and under the 1960 Act. There is no averment as to what the third defender ought to have foreseen, nor what the scope of his duty was to people coming onto the platt. Moreover, if there was a danger which was or ought to have been obvious to the third defender, it would be equally obvious to the pursuers, who were better placed to evaluate the particular risk of the activity they proposed to carry out on the premises. Senior counsel referred to section 2(3) of the 1960 Act, and *Titchener* v *British Railways Board* 1984 SLT 192. The defence of *volenti non fit injuria* applies.

[29] Senior counsel adopted the submissions for the second defender on *res ipsa loquitur* and submitted that the averments regarding this should be excluded from probation. The maxim is no more than an evidential mechanism to shift the onus of proof to the defender; it applies only in circumstances where the averred facts necessarily impute some negligence, and the onus then falls to the defender to prove that the circumstances are not resonant of negligence. Where the facts are equally susceptible to an explanation which imports no negligence on the part of the third defender, the maxim cannot apply. Senior counsel referred to *McCallum* v *S & D Properties (Commercial) Ltd* 2000 Rep LR 24, particularly at paragraph 6-14 and *McQueen* v *Ballater Golf Club* 1975 SLT 160.

[30] Finally, senior counsel submitted that the pursuers' averments at page 8 D-E of the Record regarding repairs to a neighbouring property at 32 Union Street were so lacking in relevance that they should not be admitted to probation. There is no averment as to why the repairs to another property in the street had any relevance to the platt at 22 Union Street, there are no averments of any similarities, the condition of the neighbour's platt is not described and there is no basis on which to assess how it compared to the platt in this case.

There is no averment that the defenders in this case had any knowledge of the neighbouring works, nor that they ought to have had any knowledge.

[31] For these reasons senior counsel submitted that the action, so far as directed against the third defender, should be dismissed. Even if the court were to be against her on dismissal, the averments regarding *res ipsa loquitur* and repairs to the neighbouring property were so irrelevant that they should be excluded from probation.

Submissions for the pursuers

[32] Senior counsel for the pursuers submitted that, within the context of a chapter 43 action, the pursuers' averments were sufficient, and sufficiently relevant and specific, that the claim against each defender is not bound to fail and ought to be admitted to probation. Any issues of relevance cannot be determined without the hearing of evidence. A proof has already been fixed in respect of the first defender, and it would be appropriate for the case against all three defenders to be considered at the same time. Senior counsel adopted her note of argument.

[33] At the outset senior counsel moved to be allowed to amend her pleadings in two respects - (1) at page 6B of the Record, by inserting after the words "in terms of clause 10 of the lease the" the word "second" before defender, and in the following line delete "anterior" and substitute "exterior"; and (2) in the third line of Article 6 of condescendence, at page 25 of the Record, by adding after the words "statutory duty under" the words "section 2 and section 3 of". This motion to amend was not opposed on behalf of either the second or third defenders, and I granted it.

[34] The pursuers' case may be summarised as follows:

- The second and third defenders were each occupiers in terms of the 1960 Act. Whether an individual or entity is an occupier in terms of the Act depends on the particular facts and circumstances of each case, and should be determined after evidence.
- The second defender had an obligation, as landlord, to keep the platt in repair, and in terms of section 3(1) of the 1960 Act he is liable to the pursuers for the damage caused by his failure to do so.
- The third defender had specific knowledge of the poor state of repair of the platt by virtue of the Home Report prepared in advance of his purchase of his flat.
- The case of *Gallagher* v *Kleinwort Benson (Trustees) Ltd c*an be distinguished - it does not exclude there being a duty of care in the circumstances of this case.
- A duty was owed to the pursuers as visitors to the premises: the specific reason for their presence is not relevant and there was no need to be aware of their engagement by the first defender in advance.
- Any issue arising from the placement of a ladder is a matter raised by the defenders, and in any event would be a matter for consideration after evidence.

[35] Senior counsel relied on the well-known *dicta* regarding the caution required of the court when considering dismissal of a case, that the action should not be dismissed unless it is clear that the pursuers' case must necessarily fail, and that personal injury actions should be dismissed on the grounds of relevancy only in the most exceptional circumstances - *Jamieson* v *Jamieson* 1952 SLT 257; *Miller* v *SSEB* 1958 SLT 229 at 235.

[36] With regard to the submissions on behalf of the second defender, the pursuers' position was that by virtue of the express terms of the lease the second defender was under

an obligation to keep the structure and exterior of the property in repair. He therefore retained sufficient control. It is irrelevant that the second defender was not aware of the fact of the pursuers working on the platt, nor their method for working. The pursuers do not base their claim on the platt being their place of work, nor do they rely on the work place regulations. This platt was open to all visitors, including postmen, delivery men and workers; it was reasonably foreseeable that these types of people would be on the platt, with no restriction on their numbers or what they might bring with them. The reasonable expectation and assumption of visitors is that the platt would be able to carry their weight.

[37] The case of *Gallagher* v *Kleinwort Benson (Trustees) Ltd* was clearly distinguishable on its facts. That case was concerned with the foreseeability of other persons' presence on a roof, to which neither the public nor casual visitors had access. This is quite different from the present case, which involves an open entrance to three properties, and where it is foreseeable that all sorts of persons would have access over the platt. *Gallagher* is also distinguishable because that case concerned a commercial lease, and the pursuer did not aver any duty on the landlords to carry out repairs - on the contrary, repairs were the tenant's sole responsibility. In the present case the only person with the power to remedy faults and maintain the external structure, so far as the second defender's flat was concerned, was the second defender himself. As Lord Reed put it in *Gallagher* (in the last sentence of paragraph 17 of his opinion) "putting the matter shortly, an occupier's liability is based on his capacity to act so as to make the premises safe."

[38] The case of *Murray* v *Edinburgh District Council* is also distinguishable from the present. In that case there was no averment that the defender was in occupation or control of the premises, and the section 3 case was irrelevant as there was no averment of any obligation to repair. That is quite different from the present case.

[39] Both defenders attack the relevancy and specification of the pursuers' averments regarding inspection, but there is no substance in these attacks. It was clear from looking at it that the platt was in poor condition. All that an inspection would involve would be for each of the defenders to look at the platt; it was visually in poor condition and it ought to have been obvious that it needed repair. The pursuers aver that the platt was in poor condition, which would have been obvious to the defenders. The slab at the top of the stairs was heavily delaminated due to age and chronic water ingress. The pursuers' averments at page 8A-C of the Record are sufficient, particularly in the context of an action raised under chapter 43, to give the defenders fair notice of the case on inspection.

[40] With regard to *res ipsa loquitur*, senior counsel accepted that this maxim did not amount to a principle of law. It is correct that the pursuers do not aver the cause of the collapse of the platt, but they aver that there was a catastrophic failure of strength, and there is reference to works to neighbouring property. The pursuers' position is that if proper maintenance had been carried out the platt would not have collapsed. The fact of its collapse shows this. The pursuers' case is not based on the platt being their workplace - there is no non-negligent cause for the accident. The three defenders did have exclusive control over the platt - they were the only three people who could effect repairs, and they were the only people who were in control of the platt. There are no witnesses as to the precise cause of the collapse, and there was no observable negligence. Senior counsel referred to *Morrison & Co* v *ICL Plastics Limited* [2014] SC (UKSC) 222, in which Lord Hodge cited with approval the *dicta* of Lord Toulson in *Smith* v *Fordyce* [2013] EWCA Civ 13. She also submitted that there were similarities between the present case and *O'Hara* v *Central SMT* in that here, as there, a position of apparent stability was disturbed.

[41] With regard to the third defender's submissions regarding foreseeability and the Home Report the third defender must have been well aware of the contents of the Home Report because he owned the property, and his agents provided the report to the pursuers' agents. Being a home owner carries with it responsibilities. If a home owner is aware of a potential hazard, he must take steps to protect people from that hazard. Senior counsel for the third defender suggested that the report was out of date, but the issue of the condition of the platt had been flagged up by a surveyor in 2014, and nothing had been done since. There was an awareness of the problem in 2014, and *a fortiori* there was an awareness in 2016. The pursuers had clear averments at page 8A-B of the Record that the third defender knew or ought to have known what the surveyor's inspection found in the Home Report about the deterioration in the condition of the platt, and the third defender was put on notice that the platt required attention which ought to have involved an inspection by a structural engineer with a view to maintenance and repairs being carried out. These averments are more than sufficient to enable this chapter 43 action to proceed to a proof. Issues of foreseeability and the scope of duties cannot be definitively answered until after the hearing of evidence. Counsel referred to *Hamilton* v *Seamark Systems Limited* 2004 SC 543, and *Higgins* v *DHL International (UK) Limited* 2003 SLT 1301.

Responses for the second and third defenders to the pursuers' submissions

[42] Senior counsel for the second defender accepted that proceedings under chapter 43 generally required a lesser standard of specification and detail than is required in other actions. However, a pursuer is still required to state briefly the facts necessary to establish the claim, and there may be cases where the facts averred are patently insufficient to establish liability on the part of a defender, despite references to common law and/or statute

- *Hamilton* v *Seamark Systems Limited* at paragraph 18. He also referred in passing to *Kinnaird* v *Paton* 2007 CSOH 105. Each case must be looked at in light of its own circumstances. This is a case which requires more detailed specification. He reiterated that the pursuers' averments were irrelevant and lacking in specification, and the action should be dismissed.

[43] Senior counsel for the third defender submitted that knowledge, or absence of knowledge, of what was going to happen on the premises may delimit the scope of an occupier's duty: some foreseeability of what is going to happen is necessary in order for an obligation under the 1960 Act to arise.

[44] There are still no averments of similarities between the platt in these premises and the platt in neighbouring premises. The pursuers aver no logical link between the two.

[45] With regard to *res ipsa loquitur*, senior counsel for the pursuers submitted that there was no non-negligent explanation for the collapse. However, that is not the pursuers' case on record. The pursuers must exclude in their pleadings any non-negligent cause - *McDyer* v *The Celtic Football and Athletic Co Limited (No 1)* 2000 SC 379. In any event, explanations for the collapse which involve no negligence on the part of the third defender were easy to conceive.

[46] At its height, the pursuers' case is a suggestion of a lack of intrinsic strength in the platt, which is a feature of these buildings. No such averment is made. The fundamental lacuna at the heart of the pursuers' pleadings remains. The action so far as directed against the third defender should be dismissed.

Discussion and decision

[47] It has long been established that an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved - *Jamieson*. "In claims of damages for alleged negligence it can only be in rare and exceptional cases that an action can be disposed of on relevancy" - *Miller* v *SSEB* at page 236. Of course, that does not mean that actions for damages for negligence can never be disposed of on points of relevancy and dismissed after debate on the procedural roll - such an event is a relatively regular occurrence. However, a defender must persuade the court that the pursuers' case must necessarily fail to achieve this outcome.

[48] The present action has been raised under chapter 43 of the Rules of the Court of Session. This chapter was inserted by the Act of Sederunt (Rules of the Court of Session Amendment No 2) (Personal Injury Actions) 2002 following the report of the Coulsfield working party and further protracted consultation, as discussed in the general note to chapter 43 at paragraph 43.1.1 of the annotated Rules of Court. One of the innovations of the new chapter 43 was the abolition of a party's automatic entitlement to a procedure roll debate. Indeed, there is no mention of a procedure roll debate in the chapter, and a party seeking such a debate must persuade the court to grant this as "some other order" in terms of rule 43.6(5). This will not be granted lightly - Practice Note No 2 of 2003. The aim of the chapter 43 procedure is to expedite the proper resolution of personal injury claims without unnecessary delay or expense. Lady Paton gave helpful guidance on the chapter 43 procedure in *Higgins* v *DHL International (UK) Limited* and *Hamilton* v *Seamark Systems Limited*.

[49] In *Higgins* at para [28} Lady Paton observed that

> "the new rules invite a different approach or culture, and consequently what might be termed a more relaxed approach to pleadings and to any objections taken in the course of evidence …"

It is worth noting that in that case, despite Lady Paton observing that she was unable to identify factual averments which would entitle the pursuer to lead evidence establishing a basis for the contention that his employers ought reasonably to have foreseen that the pursuer would be likely to suffer injury in the circumstances, she allowed the case to go to proof (refusing the motion for issues).

[50] In *Hamilton* v *Seamark Systems Limited* Lady Paton observed (at para [18]) that

> "there may be exceptional cases where a legal debate is still appropriate. For example, matters of fundamental relevancy, which could bring the litigation to an end without the need for proof of the facts averred."

However, she went on to observe at para [19] that

> "one consequence of the concise pleadings advocated by the new personal injuries rules may be that the brief statement of facts with brief references to common law and/or statute gives rise to questions of law which can only be properly resolved after evidence has been led."

She considered the case before her to be a case where

> "it cannot be said in advance of the leading of the evidence whether the facts averred are sufficient to support the legal conclusion which the pursuer requires for success - *Moore* v *Stephen & Sons* 1954 SC 331 at 335."

[51] I am not aware of any authority since these two cases which has criticised the approach taken by Lady Paton, and for my part I am in complete agreement with it.

[52] With these introductory considerations in mind, I now turn to the various lines of attack which were made on behalf of the second and third defenders to the pursuers' pleadings. First is the submission for the second defender that the second defender was not an occupier of the platt within the meaning of the 1960 Act at the time of the accident.

I cannot say at this stage, before the hearing of evidence, that the pursuers' case in this respect is bound to fail. Of course, I do not suggest that it is bound to succeed, but I am not persuaded that the second defender has met the test in *Jamieson* v *Jamieson*. The pursuers make averments about the terms of the lease, and in particular clauses 10 and 13 thereof, which provide a more specific and more relevant case than *Gallagher* v *Kleinwort Benson (Trustees) Ltd* and *Murray* v *Edinburgh District Council*. (In passing I observe that I agree with the submissions for the pursuers that each of these cases can be distinguished from the facts of the present case). It will be necessary for evidence to be led as to the circumstances in which the lease operated and how the structure and exterior of the property was kept maintained and in proper repair, before a definitive answer can be given to the question whether the second defender was an occupier for the purposes of the 1960 Act, and if so, what was the extent of his obligation to those on the platt.

[53] By her amendment in the course of the debate, senior counsel for the pursuers has made it clear that the pursuers rely on section 3 of the 1960 Act, so the case is directed at the second defender as landlord. It is fair to say that the pursuers' averments in this respect are briefly stated, and might not have satisfied a court before the advent of the "new" chapter 43; but that chapter encourages - indeed, requires - brevity. I consider that the pursuers have sufficient averments about the second defender being an occupier in terms of the 1960 Act to enable this aspect of the case to proceed to proof.

[54] I turn next to the submissions made on behalf of each of the second and third defenders as to relevancy and lack of specification, as these are summarised at paras [12] to [17] above (for the second defender) and paras [20] to [28] above (for the third defender), and I do not repeat them here. In the main, they relate to criticisms of lack of averments of foreseeability; knowledge; why an inspection ought to have been instructed and what this

would have involved; what was the cause of the collapse of the platt; and (for the third defender) misplaced reliance on the Home Report. These are each criticisms that will be familiar to practitioners who were experienced in pre-chapter 43 procedure roll debates: they were the stuff of such debates, and it may be that they would have been successful in the period before 2003. However, both senior counsel for the second and third defenders appeared to minimise the impact of the chapter 43 reforms. All of the cases on which they relied in support of their criticisms about relevancy and specification pre-dated these reforms (eg *Miller* v *SSEB*, *Bennett* v *J Lamont & Sons*, *Murray* v *Edinburgh District Council*, and *Wallace* v *City of Glasgow District Council*).

[55] Both senior counsel submitted that the pursuers had simply not averred a sufficiently relevant and specific case, even under what Lady Paton referred to as the different approach or culture, and the more relaxed approach to pleadings, to allow the action to proceed to proof. I disagree. There are indeed several gaps in the pursuers' pleadings, which may have been fatal and resulted in dismissal under the pre-chapter 43 culture, and which may cause difficulties for the pursuers at proof. However, the extent of the change in culture which chapter 43 has brought about may be seen by the fact that in *Higgins* v *DHL International (UK) Limited* Lady Paton could not identify any factual averments to support foreseeability, but still allowed the case to proceed to proof. The pursuers are required by Rule of Court 43.2 to annex to the summons a brief statement containing averments in numbered paragraphs relating only to those facts necessary to establish the claim. I have reached the conclusion that they have complied with this requirement, and that the issues raised can only be properly resolved after evidence has been led. I am therefore not prepared to dismiss the action at this stage on the basis of the submissions summarised at paras [12] to [17] and [20] to [28] above.

[56] Both the second and third defenders attacked the pursuers' averment of *res ipsa loquitur* at page 9A-B of the Record, and submitted that this should not be admitted to probation. On the pursuers' averments, it appears to me that the essential requirements for the application of this maxim are absent. There is nothing in the pursuers' averments to suggest that the collapse of the platt can only be explained on the basis of negligent acts or omissions of either the second or third defender. The collapse might have been caused by a latent defect, which would not impute negligence to either defender, or by the way in which the pursuers carried out their works. In the present case, the averred facts do not necessarily impute negligence on the part of either the second or third defenders.

> "The principle only applies where the incident suggests negligence on someone's part and, because of exclusive management and control in the defenders at the time or times when the negligence occurred, it can be presumed that it was the defenders who were negligent." - *Murray* v *Edinburgh District Council* at page 256, approved by the First Division in *McDyer* v *The Celtic Football and Athletic Co Ltd* .

The present case has some factual similarities with *McQueen* v *Ballater Golf Club* (although Lord Wyle's observations in that case were made after proof). In that case a brewery delivery man sustained injury when carrying a keg of beer, and a concrete slab, which covered a manhole and which was covered in snow, gave way. The occurrence of this accident was not enough to bring the maxim *res ipsa loquitur* into play.

[57] Where there are possible explanations for an accident which do not infer negligence on the part of defenders, I do not consider that a pursuer can rely on the maxim. That is the position here. I shall exclude from probation the sentence at page 9A/B of the Record "A properly maintained platt does not collapse: *res ipsa loquitur*."

[58] Finally I turn to the attack made by senior counsel for the third defender (recorded at para [30] above) that the pursuers' averments at page 8D-E of the Record regarding repairs to a neighbouring property at 32 Union Street were so lacking in relevance that they should

not be admitted to probation. I agree with this submission. I consider that each of the criticisms recorded in para [30] above is justified. The pursuers introduce averments about what the owners of the flats at 32 Union Street did "a few years before the accident", but there is nothing to explain why this might have any bearing on the issues relating to the pursuers' accident. These averments are likely to cause the focus of the proof to be diverted from the cause of the collapse of the platt at 22 Union Street to a dispute about similarities between the condition of the two premises, the condition of the platt at 32 Union Street, whether any defects in that platt were more or less obvious, whether the defenders knew or ought to have known that an inspection and thereafter repair works had been carried out at 32 Union Street, and why. There is risk that this will add to the length of the proof and cause unnecessary additional expense, possibly with the need to instruct expert witnesses. As Lady Paton observed in *Hamilton* v *Seamark Systems Limited*, "a court may be persuaded to allow a debate where one outcome might be a significant limitation in the extent of the proof". This is an example of just such an outcome.

[59] I shall exclude from probation the two sentences at page 8D/E of the Record:

> "The owners of the flats at 32 Union Street, a neighbouring property to 22 Union Street, carried out repairs to their platt a few years before the accident. The owners were concerned regarding the state of the balcony and steps, and builders were instructed by them jointly to carry out necessary repairs."

Disposal

[60] I refuse the motions on behalf of the second and third defenders to dismiss the action insofar as directed against these defenders. I exclude from probation (1) the averments comprising one sentence at page 9A/B of the Record concerning *res ipsa loquitur*, and (2) the averments comprising two sentences at page 8D/E of the Record referring to the owners of flats at 32 Union Street. Q*uoad ultra* I shall allow a proof as between the pursuers and the

second and third defenders, to proceed on the same dates as the proof already appointed to proceed between the pursuers and the first defender, namely 6 June 2023 and the 11 ensuing days.