SCOTLAND / JUDGMENT

MACROBERTS LLP AGAINST McCRINDLE GROUP Ltd [2014] ScotCS CSOH_99 (10 June 2014)

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OUTER HOUSE, COURT OF SESSION

[2014] CSOH 99

CA133/12

OPINION OF LORD TYRE

in the cause

MACROBERTS LLP

Pursuers;

against

McCRINDLE GROUP LIMITED

Defenders:

Pursuers: Jones (solicitor advocate); bto

Defenders: McIlvride; TLT Scotland Ltd

10 June 2014

Introduction

[1] The genesis of the proceedings with which this Opinion is concerned was a contractual dispute between the defender (to whom I shall refer as MGL) and a company called Haden Young Limited, which was referred to arbitration in 1992. The arbitration ran until 2004 when it was brought to an end by an agreed settlement.

[2] For most of the period during which the arbitration proceedings continued, the solicitors instructed to act on behalf of MGL were Maclay Murray and Spens (MMS). On 20 May 2002, however, MGL transferred its instructions from MMS to the pursuers. An action of damages for professional negligence against MMS was raised by MGL in about 2005. That action was sisted from 2006 until 2011 but eventually came before Lord Hodge for proof on 27 November 2012.

[3] For most of the period during which the action against MMS subsisted, the solicitors instructed to act on behalf of MGL were the pursuers. On 6 September 2012, however, MGL withdrew its instructions from the pursuers. In the present proceedings, the pursuers sue for professional fees for acting on behalf of MGL in its action against MMS. MGL contends that no fees are due to the pursuers as they were in material breach of contract. MGL also counterclaims (i) for damages consisting of expense incurred as a consequence of having had to engage a new firm of solicitors shortly before the proof in the action against MMS and (ii) for fees paid to the pursuers for work that would not have been required if the breach of contract had not occurred. The action came before me for a preliminary proof on all matters except quantification.

The alleged breaches of contract

[4] MGL contends that the pursuers were in material breach of contract in the following two respects:

(i) Firstly, it is contended that the pursuers, at a time when they were acting on behalf of MGL in its litigation against MMS, destroyed manuscript notes taken by Mr Richard Barrie, one of their partners, during a critical meeting on 29 May 2003. Destruction of contemporaneous evidence of what had been said during the meeting, it is submitted, prejudiced the

prosecution and quantification of the claim against MMS and accordingly created an actual or potential conflict of interest between the pursuers and their clients, MGL, so that MGL had no alternative but to withdraw its instructions and instruct new agents.

(ii) Secondly, it is contended that the pursuers' Mr Barrie failed to act in accordance with the instructions that he had received from MGL's managing director, Mr William McCrindle MBE, in respect that, without authority, he conducted certain settlement negotiations with agents acting on behalf of MMS's professional indemnity insurers, and further failed to inform Mr McCrindle that such discussions had taken place.

MGL contends that in these circumstances the pursuers are not entitled to insist upon its obligation to make payment of their fees and, further, that it has sustained the loss and damage sued for in the counterclaim.

Instruction by MGL of the pursuers

[5] The history of the arbitration between MGL and Haden Young prior to the instruction of the pursuers is narrated in detail by Lord Hodge in his Opinion (

McCrindle Group Ltd

v

Maclay Murray & Spens

[2013] CSOH 72) at paragraphs 7 to 37. I take up the story in 2001. On 8 October 2001, the arbiter fixed a diet of preliminary proof to run from 14 May until 5 July 2002; the commencement date was subsequently postponed to 28 May 2002. In the course of the first few months of 2002, MGL's relationship with MMS deteriorated, as described by Lord Hodge at paragraphs 31 to 37. Mr McCrindle decided to change his legal team. On 20 May 2002, he met Mr Richard Barrie, a partner in the pursuers' litigation department, and instructed him to assume MGL's agency in the conduct of the Haden Young arbitration.

The retrospective interest problem

[6] On accepting instruction, Mr Barrie identified a potential problem for MGL in that it appeared to him that the arbiter had no power to award interest for the period prior to the date of any decree arbitral, and that no protective court proceedings had been raised to preserve MGL's entitlement to interest. Given the size of the principal sum sought by MGL and the length of time that had elapsed since the dispute had been referred to arbitration, this was a matter of considerable importance in quantifying MGL's claim. Mr Barrie advised Mr McCrindle that if there had been no Deed of Submission conferring power to award interest upon the arbiter, and no protective court action, it was possible that any claim for interest had prescribed.

[7] Mr Barrie promptly raised the matter in correspondence with MMS. For example, on 17 June 2002, Mr Barrie sent a fax to MMS's Kirsti Olson in

inter alia

the following terms:

> *"...The Diet of Preliminary Proof went reasonably well from the Claimants point of view. There may be a desire on the part of the Respondents to make some form of without prejudice offer. What we will require to identify in evaluating any offer is whether or not the Claimants have any entitlement to recover interest either via the arbitration or alternatively via litigation raised subsequent to any decree arbitral. Are you able to clarify what your firms understanding of the position is relative to the retrospective interest being awarded? In particular why was no action raised and sisted in respect of interest on the remainder of the claim?"*

Correspondence continued during 2002 without any clear answer being given by MMS to Mr Barrie's questions regarding pre-award interest. On 7 February 2003, Mr Barrie wrote on behalf of MGL to MMS's senior partner, Mr Bruce Patrick, intimating that a potential claim existed against MMS in respect of its failure to advise MGL during the early 1990s that they should raise concurrent court proceedings in order to protect their position regarding interest. On 27 February 2003, Mr Patrick advised Mr Barrie that the matter had been passed to their insurers who had instructed Mr Hugh Donald of Shepherd & Wedderburn. Mr Barrie reported this information to Mr McCrindle.

[8] On 1 April 2003, Mr Barrie sent a fax to Mr Donald seeking, firstly, his confirmation that he had been instructed to act for MMS and, secondly, an indication of MMS's position. This appears to have prompted a telephone conversation between Mr Donald and Mr Barrie on 7 April 2003. Mr Donald's file note of that conversation includes the following passage:

> *"...He [i.e. Mr Barrie] confirmed that the other side were fully aware that the Arbiter had no power to award interest. He advised that it was to be hoped that the matter would be settled, though Mr McCrindle had high expectations. It was mentioned by Mr Barrie that he thought that he and Mr Spence [an expert witness in the arbitration] had yet to have the difficult conversation with Mr McCrindle. Quite clearly they had a view as to the appropriate level of settlement which was very different from Mr McCrindle's view. He noted our position and would get back to us if matters progressed."*

I should note at this stage that it appears to have been Mr Donald's practice to make full notes of telephone conversations for his file; no corresponding notes were made by Mr Barrie. Mr Donald was not called to give evidence at the proof. That being so, it is not, in my view, possible for me to make any finding as to the extent to which Mr Donald's notes were intended by him to be a verbatim record of what was said during telephone conversations or, alternatively, an assessment, in his own words, of the import of the conversations. As regards this particular conversation, Mr Barrie could not recall whether he had used the phrase "the difficult conversation" but did not think that he would have conveyed to Mr Donald that there was a difference of opinion between himself and Mr McCrindle regarding valuation of MGL's claim

against Haden Young, because as a matter of fact there had been no such difference of opinion at that time. I do not consider that I would be entitled, on this evidence, to find that Mr Barrie used the phrase "the difficult conversation" in the course of his conversation with Mr Donald.

[9] A further diet of proof in the arbitration was set down to commence on 30 April 2003. On 16 April 2003, Mr Barrie and McCrindle met to review the latter's witness statement for the proof. Mr Barrie informed Mr McCrindle that he expected to have to go to the Falkland Islands by 2 June 2003 to deal with a dispute there. Mr Barrie indicated to Mr McCrindle that he had called Haden Young's solicitor, Mr Murray Shaw of Biggart Baillie, to advise him of this possible difficulty with a view to attempting to ascertain whether Haden Young were likely to increase their tender before the arbitration proof resumed. In a diary note made on 17 April 2003, Mr McCrindle noted that Mr Barrie had "advised that I did not know about the call". Mr McCrindle concluded his diary note with the observation that "We should also chase Shepherds and Wedderburn regarding their client's position on the 'interest' issue". On the same day, Mr McCrindle sent his diary note to Mr Barrie with a covering letter which included the statement "I would have preferred you had cleared your call to Murray with me, but what's done is done".

[10] The arbitration proof resumed on about 30 April 2003. On 6 May, an offer to settle was made by Haden Young but was not at a level that was acceptable to MGL. By 27 May, there had been direct discussions between Mr McCrindle and a principal of Haden Young, in the course of which an increased offer of £350,000, inclusive of expenses, had been made. Mr Barrie estimated that the element of expenses within that offer would amount to around £100,000. On 27 May, Mr Barrie reported this offer by telephone to Mr Donald. The purpose of the call (made from his mobile phone), according to Mr Barrie, was to attempt to ascertain whether MMS's insurers would compensate MGL for lost interest on a principal sum of the order of £250,000. Interest at that time would have amounted to around 120% of the principal sum. Mr Donald indicated that the insurers would not be willing to pay such a sum.

[11] On 29 May 2003, MGL's expert witness concluded his evidence. This appears to have prompted a further attempt by Haden Young to settle the arbitration. A meeting was hastily arranged using adjacent rooms within the Faculty of Advocates' consultation centre at 142 High Street, Edinburgh. Counsel for Haden Young (Mr Angus Glennie QC) initiated discussions by indicating that if MGL indicated a willingness to accept an offer beginning with a 4, he would ensure that his clients offered an amount beginning with a 3. In the event, Haden Young offered £350,000 inclusive of expenses. Mr McCrindle and Mr Barrie discussed this offer privately. Mr McCrindle's evidence at the proof before me was that it was agreed that MGL would indicate a willingness to accept £450,000 with a view to achieving a settlement at £400,000. I note that in his Opinion in the action against MMS, Lord Hodge (at paragraph 153) rejected the evidence of Mr McCrindle and Mr Barrie that MGL would have settled at £400,000. It is not necessary for me to make any finding in fact on that issue. What matters for present purposes is that Mr McCrindle made it clear to Mr Barrie that he was not

willing to settle his claim against Haden Young without ascertaining the insurers' position regarding interest. Both Mr McCrindle and Mr Barrie remained concerned that there might be a basis upon which the insurers could argue that there had been an entitlement to interest which ought to have been pursued against Haden Young and taken into account in reaching any settlement, and which could not therefore be recovered from MMS. Mr McCrindle asked Mr Barrie to guarantee that he would recover interest from MMS's insurers but Mr Barrie refused to give any such guarantee. Mr McCrindle and Mr Barrie explained their difficulty to the Haden Young representatives who in turn made no concession of liability to pay interest. The meeting came to an end without a settlement having been achieved. There appears to have been a subsequent telephone conversation that evening between Mr Barrie and Mr Shaw, recorded by Mr Shaw in a file note which stated:

"Subsequent phone call with Richard Barrie at the house and noting that they were seeing John [sic] McNeill first thing. Discussing the position with him."

[12] Also on 29 May 2003, Mr Barrie telephoned Mr Donald to attempt once again to ascertain the insurers' position. Mr Donald's file note of the conversation states

inter alia

:

"[Mr Barrie] advised that putting aside the issue of negligence, they were progressing towards seeing if an agreement could be reached. As part of that, there would require to be an understanding that the Arbiter did not have any power to award interest. He accepted that we would not be in a position to make some commitment upon this, but clearly given that he had not had access to the files, he would wish to be satisfied that there were not arguments which would otherwise be available which should be advanced. We explained that we felt it extremely unlikely that any commitment would be made, but we would consider this point and come back to him. He advised that if interest was factored out then the settlement sum now being proposed was a figure likely to be acceptable to Mr McCrindle."

The following morning, Mr McCrindle and Mr Barrie had a brief consultation with Mr James McNeill QC, who confirmed advice which he had previously tendered to MGL in a written opinion that the arbiter had no power to award pre-decree interest.

[13] During the months following, Mr Barrie continued to update Mr Donald regarding progress in the arbitration and to attempt to ascertain the insurers' position. On 19 June 2003, Mr Barrie wrote to Mr Donald, in accordance with a draft revised and approved by Mr McCrindle:

"We appreciate that at the present moment in time that [sic] there is little incentive for the Insurers to admit liability. There is however little doubt that in the event that the Insurers were to accept liability that such an admission would pave the way to a negotiated settlement with Haden Young. What would be extremely useful however is if the Insurers could confirm that to the best of their knowledge the Arbiter has no power in this particular case to award retrospective interest..."

On 24 June, Mr Donald sent a holding reply while he carried out a review of MMS's files.

[14] On 14 July 2003, Mr McCrindle wrote to Mr Barrie with various "thoughts", including the following:

> *"...Until [MMS] and Shepherd and Wedderburn either concede the Arbiter has no powers to award interest or prove to us he has the power, a final agreement cannot be concluded between ourselves and Haden Young. Consequently, it is imperative we get their formal response on the Interest issue.*

Turning to the Arbiter's draft decision on the Contract Documents, I cannot see how this issue has any relevance to the Interest issue. Therefore, my instructions are:- If you could telephone Shepherd and Wedderburn today and obtain their response on the Interest issue and, in particular, the James McNeill opinion, and also ask them what relevance [the Arbiter's] draft decision has on the interest issue.

Please call me to discuss the foregoing before you telephone Shepherd and Wedderburn."

The reference to "the James McNeill opinion" is to Mr McNeill's written opinion, to which I have referred, and which had been exhibited to Mr Donald earlier in the year. There is no record of a telephone call having been made by Mr Barrie to Mr Donald at this time.

[15] On 16 September 2003, Mr Barrie wrote again to Mr Donald, referring to a recent telephone conversation and stating:

> *"As we understand the position, the Insurers position is unlikely to be clarified until later this month. We have discussed this development with our clients. Our clients have asked us to register their extreme disappointment at this further delay. Our clients cannot contemplate a settlement of their ongoing arbitration without clarification as to the Insurers position. In particular, in the event that the Insurers accept that the Arbiter has no power to award retrospective interest then that eliminates the possibility of our clients compromising with Haden Young and thereafter ascertaining that as a consequence of something contained within the Maclay Murray & Spens file it ultimately transpires that the Arbiter did enjoy capacity to award retrospective interest..."*

Having received an acknowledgment on 17 September, Mr Barrie sent a reminder by fax on 30 September. By now Mr Donald had sought and received a written opinion from Mr J Gordon Reid QC, in which Mr Reid expressed the view that the arbiter had no power to award interest and that the raising of an action at the outset, to secure the running of interest, would have avoided much of the difficulty that had subsequently arisen. On 2 October 2003, Mr Donald wrote to Mr Barrie advising that review of the files had revealed nothing new and that it could be concluded that the arbiter did not have power to award interest. Liability was not, however, admitted, and Mr Donald offered a meeting which duly took place on 9 October 2003. Mr Donald's file note, based upon manuscript notes that appear to have been taken during the meeting, contains the following passage:

"HRD clarified that if the insurers are minded to do anything, should they indicate a figure? RB replied yes in pounds and pence – this should be a sum to be added to the pot and to take into account fees? RB confirmed this. If McCrindle compromises at £400,000, judicial expenses would be only £100,000. David Spence has been paid more than £120,000. He has been hopeless. There is a chance that DS would not be certified as an expert."

[16] On 13 October 2003, Mr Donald made a settlement offer on behalf of MMS and their insurers. It took as a starting point a principal sum of £160,000 on which interest was calculated to amount to around £144,000. After a deduction for MMS's fees, a net sum of about £70,000 was offered. Mr Barrie reported the offer to Mr McCrindle, who replied by faxed letter expressing the view that this was a major step forward and asking Mr Barrie to send a short letter to Mr Donald confirming Mr Barrie's understanding of it, "tonight if possible". No such letter appears to have been sent, but two days later Mr Barrie wrote to Mr Shaw (Haden Young's solicitor) proposing a figure for settlement of the arbitration. Mr Donald's offer was not acceptable to Mr McCrindle. Mr McCrindle's figure was not acceptable to Haden Young. The arbitration dispute continued and was ultimately settled on 3 June 2004, when MGL accepted an offer from Haden Young of £90,000 plus VAT, with a finding of no expenses due to or by either party and an agreement that the parties would not enforce awards of expenses made in the course of the arbitration.

The action against MMS

[17] In 2005, MGL raised an action for damages against MMS in the Court of Session. The action called in 2006 but on 6 October 2006, on the unopposed motion of the pursuer, it was sisted for mediation. The sist was not recalled until January 2011. On 5 August 2011, the cause was appointed to the commercial roll. On 7 February 2012, a proof before answer was fixed to take place between 27 November and 21 December 2012. The pursuers continued to be instructed as MGL's agents. Counsel instructed on behalf of MGL were Mr Laurence Murphy QC and Mr Kenneth McBrearty.

[18] The basis of MGL's action against MMS may be summarised as follows. MGL contended that MMS had been negligent and in breach of contract in two respects. The first was in failing (a) to advise MGL that it was necessary to raise court proceedings in order to protect MGL's right to pre-decree interest, and (b) to raise such proceedings within the prescriptive period. The second was in failing, during the period when they remained instructed by MGL, i.e. until 20 May 2002, to advise MGL that it had no entitlement to recover pre-decree interest from Haden Young because any obligation to pay pre-decree interest had prescribed. By the time of the recall of the sist in 2011, MMS had admitted negligence and breach of contract in respect of the first but not the second of MGL's two complaints. The loss that MGL claimed to have sustained consisted of a number of elements, including (i) the difference between the settlement figure that would have been achieved if the arbitration had settled on 29 May 2003 and the figure ultimately obtained (£346,000); (ii) pre-decree interest on the "award" element of the settlement which would have been achieved on 29 May 2003 (£515,542); and

(iii) judicial interest on the settlement figure which ought to have been achieved, from 29 May 2003 until the date when the actual settlement figure was received (£38,084). MMS denied that there was a causal link between their negligence and breach of contract and any loss allegedly sustained by MGL.

[19] MGL's claim was dependent upon proving that MMS's second alleged breach of duty caused MGL to fail to obtain a more favourable settlement on or about 29 May 2003 than that which it eventually achieved. Evidence of what had been said at the abortive settlement meeting on 29 May 2003 was clearly of critical importance. A commission at the instance of MMS to recover documents in the pursuers' possession "relating to the conduct of the arbitration and bearing upon the terms of the settlement ultimately arrived at" was arranged to take place on 9 May 2012. Mr Barrie was cited as a haver. In the course of the commission, Mr Barrie indicated that the pursuers' hard copy files relating to the arbitration had been electronically scanned and then destroyed when the firm moved to new office premises, and that documents produced in response to MMS's specification of documents comprised copies of scanned files. When it was explained to him that the documents produced from the scanned files included no notes of meetings from his files and he was asked whether such documents had existed in the past, Mr Barrie answered "Yes, I definitely took notes of meetings, yes". Asked where such notes might be found other than with Mr McCrindle or in his files, he responded "There would have been notes taken in hardback jotters that I kept at the time." He indicated that these documents, whose contents would have included his notes of many days' evidence in the arbitration proceedings, had been destroyed about two years previously.

[20] Another aspect of preparation for the proof was the recovery under a specification of documents of Shepherd & Wedderburn's correspondence files covering the period following intimation by MMS to their insurers of a possible claim by MGL. By this time it had become clear that Mr Barrie would be required to give evidence as a witness on behalf of MGL, and the day-to-day conduct of the action had been taken over by Mr Craig Turnbull, the pursuers' managing partner, assisted by Ms Gillian Craig, a partner specialising in commercial litigation. A consultation with Mr Murphy and Mr McBrearty was arranged for 21 June 2012 to review preparations for the proof. Prior to the consultation, Mr Murphy had been advised by Mr McBrearty, who had attended the commission, that Mr Barrie's notes and notebooks in relation to the arbitration had been destroyed and that no copies were available. Mr Murphy was concerned that this might give rise to adverse judicial comment. On the evening prior to the consultation, Mr Murphy had also read the Shepherd & Wedderburn file, including a file note by Mr Donald recording his telephone conversation with Mr Barrie on 27 May 2003 (see paragraph 10

above). Mr Murphy was concerned that the note suggested that Mr Barrie might have been discussing settling the arbitration at £250,000. This did not appear to support Mr McCrindle's position that an offer of £350,000 had been made at that time. Another of Mr Donald's file entries, this time of his meeting with Mr Barrie on 9 October 2003, recorded Mr Barrie as having stated

that an offer of £350,000 had been turned down; this too appeared to conflict with Mr McCrindle's position in a draft witness statement that £350,000 would have been acceptable if MMS's insurers had accepted liability for pre-decree interest.

[21] The consultation on 21 June 2012 was attended by Mr Murphy, Mr McBrearty, Mr McCrindle, Ms Craig, and a junior colleague of Ms Craig who took detailed notes. Mr Murphy expressed his concerns to Mr McCrindle. The apparent lack of support for Mr McCrindle in the evidence of Mr Barrie's discussions with Mr Donald created a difficulty in that the judge might not accept Mr McCrindle's evidence as credible and reliable. The situation was made worse by the destruction of the pursuers' files. If Mr Barrie had made notes of the crucial meeting which had then been destroyed at a time when the matter was litigious, that might put Mr Barrie in a difficult position. Mr Murphy advised Mr McCrindle that there was a potential conflict of interest between his own best interests and those of the pursuers, which could crystallise into an actual conflict of interest in the course of the forthcoming proof.

[22] Mr McCrindle was shocked and dismayed by this advice. At first he was reluctant to accept that a conflict of interest might exist. He was inclined to blame others for the situation that had arisen. On 23 June 2012, he sent a lengthy letter to Mr Turnbull which concluded:

> *"Finally, to [Mr Murphy's] potential conflict statement. You did advise me several times that a solicitor and client can still work together by mutual consent even in a potential conflict situation. Especially if it is in the client's best interests to do so. I do believe, for many reasons, we are in this precise situation. Please advise if you agree."*

On 28 June 2012, Ms Craig sent Mr McCrindle an email which included the following:

> *"Separately, as discussed, further to [Mr Murphy's] advice in relation to a potential conflict of interest on the part of MacRoberts (resulting from the inadvertent scanning and shredding on [sic] the arbitration files) I would re-iterate that we are duty bound to suggest that you take independent legal advice in that regard."*

On 8 July 2012, Mr McCrindle sent a letter to Ms Craig, referring to her email of 28 June 2012 and stating:

> *"You have since advised me last week that this is your personal suggestion and not that of MacRoberts LLP."*

On 16 July 2012, Mr Turnbull sent an email to Mr McCrindle correcting this misapprehension and confirming:

> *"For the avoidance of any doubt, the advice set out in Gillian's email of 28 June is that of MacRoberts LLP, of Gillian and of myself."*

[23] It should be borne in mind that Mr McCrindle had not seen the Shepherd & Wedderburn file prior to the consultation with Mr Murphy on 21 June. On 26 June 2012, Mr Turnbull sent him a copy of the file. Mr McCrindle realised when he read it that, contrary to what had been suggested by Mr Murphy at the consultation, there was not in fact any conflict between his

evidence and that of Mr Barrie because the figure of £250,000 mentioned by Mr Barrie to Mr Donald had been reached after making an allowance of £100,000 for the expenses element of an all-in offer of £350,000. However, Mr McCrindle's perusal of the file raised other concerns which appeared to him to be equally serious. He formed the view that Mr Barrie had been engaging in discussion and conducting negotiations with Mr Donald without his knowledge or authorisation. In particular, his evidence was that he had been unaware of and had not authorised the telephone calls made by Mr Barrie to Mr Donald on 27 and 29 May 2003. Nor did he at any time authorise Mr Barrie to attempt to negotiate a settlement of his claim against MMS with Mr Donald. Mr Barrie's instructions were expressly limited to attempting to ascertain the insurers' position with regard to recovery of pre-award interest from Haden Young. At the meeting with Mr Donald on 9 October 2003, Mr Barrie had not had authority to refer to Mr Spence as having been "hopeless".

[24] By mid-August 2012, Mr McCrindle had finished reading the Shepherd & Wedderburn file and was moving towards making what he described as an extremely difficult decision to withdraw his instructions from the pursuers. On 17 August, he had a meeting with Mr John Sheridan, a partner of TLT LLP, who advised him that there was a conflict of interest between MGL and MacRoberts in respect of (i) the absence of notes of the meeting on 29 May 2003 and (ii) Mr McCrindle's strongly-held view that Mr Barrie had acted beyond the scope of his authority.

[25] On 6 September 2012, Mr McCrindle wrote to Mr Turnbull terminating the pursuers' engagement on his behalf in the action against MMS. In the course of his letter, Mr McCrindle stated:

"At first I resisted your combined advice as the consequences just appeared too awesome to bear. However, following my detailed overview of the Shepherd & Wedderburn and Biggart Baillie files I realised that I had no option but to follow the advice of yourself, Gillian and indeed Counsel.

The destruction of Richard's file notes was damaging enough, however, this paled into insignificance (at least from my point of view) with the discovery that Richard had been conducting a two-way dialogue with Hugh Donald and Murray Shaw during 2003; completely without my knowledge. Furthermore, his strategy of trying to negotiate a financial settlement with Shepherd & Wedderburn was damaging in the extreme and totally outwith my instructions and knowledge."

Mr McCrindle also raised three detailed issues of concern in relation to the conduct of the litigation which he said had been drawn to his attention by Mr Sheridan. His letter concluded:

"Clearly this is a very sad day for me. I have become very close to yourself, Richard, Gillian and many other employees of MacRoberts. However, reluctantly, I believe I am much more likely to achieve a fully satisfactory settlement with the assistance of Mr Sheridan and his firm as opposed to MacRoberts, given the dramatic events during and since the Consultation of 21

st

June 2012."

[26] Mr Sheridan took over the conduct of MGL's action against MMS. There was a very considerable amount of work to be done in order to familiarise himself with the case. He estimated that getting up to speed took the whole month of September 2012. He also required to consult with counsel to seek their advice and also to reassure them that the change of agency would not jeopardise the imminent proof diet.

[27] The proof went ahead on 27 November 2012 as scheduled before Lord Hodge. By then, however, MMS had admitted in a joint minute that they had been negligent and in breach of contract (i) in failing to realise by about August 2000 that MGL was unable to recover pre-decree interest on its claims against Haden Young; and (ii) in failing between August 2000 and May 2002 to advise MGL accordingly. The proof was therefore restricted to issues of causation and quantification of loss. In his opinion dated 14 May 2013, Lord Hodge found MGL entitled to payment of £189,000 by way of lost pre-decree interest, £90,000 for the loss of a 40% chance of settling the arbitration at £450,000 in May 2003 (i.e. £180,000 less the sum of £90,000 eventually paid by Haden Young), and a sum by way of compensation for legal expenses incurred by MGL between May 2003 and October 2003, when MMS acknowledged that MGL had no entitlement to pre-decree interest. In a supplementary opinion, Lord Hodge found MGL entitled to £9,472 in respect of this latter award, and pronounced decree for payment by MMS to MGL of a total amount, including interest to date of decree, of £473,706.

Mr Barrie's evidence

Destruction of notes

[28] Mr Barrie's evidence on the matter of destruction of notes of the meeting on 29 May 2003 was straightforward: there had been no such destruction because he had not taken any notes during that meeting. The notebooks that were destroyed might have contained notes of consultations with counsel regarding the pre-decree interest issue, but MMS had admitted negligence with regard to that issue before the books were thrown out. It was not his usual practice to take notes of meetings with Mr McCrindle; there had been numerous such meetings during the weeks when the arbitration proof was proceeding. Mr Barrie did not recall anyone taking notes during the meeting on 29 May 2003. His answers to questions during the commission to recover documents had been at a general level: he had not intended to imply that there had ever been notes of the 29 May 2003 meeting in a notebook which was destroyed.

Negotiations without authority

[29] Mr Barrie denied having exceeded his authority from Mr McCrindle at any time. He agreed that Mr McCrindle was an unusual client in respect that he insisted upon seeing and approving every letter sent on his behalf and upon giving specific instructions in relation to

telephone calls made on his behalf. He was unusual also in refusing to give his own agents an indication of the figure that he was willing to accept in settlement. That being so, Mr Barrie had never attempted to negotiate a settlement with Mr Donald on behalf of MMS's insurers; he could not have done because he had not known what Mr McCrindle would have accepted. From 7 February 2003, when MGL's claim against MMS had been intimated, until 29 May 2003, Mr Barrie's instructions from Mr McCrindle had been to attempt to obtain an admission of liability on the part of MMS with regard to the pre-decree interest issue. The telephone calls that he made to Mr Donald on 27 and 29 May 2003 had been made with Mr McCrindle's knowledge and on his instructions. Mr McCrindle was well aware at the time that the calls had been made. Mr Barrie and Mr McCrindle were both frustrated by the lack of substantive response from Mr Donald. After the failure to achieve settlement with Haden Young on 29 May 2003, Mr McCrindle's instructions changed and Mr Barrie was asked to focus his discussions with Mr Donald on whether or not it was accepted by the insurers that the arbiter had no power to award interest. This change of strategy could be seen in the letter of 19 June 2003 to Mr Donald (see paragraph 13

above). In cross-examination Mr Barrie accepted, somewhat reluctantly, that he had not had specific authority from Mr McCrindle to describe Mr Spence as "hopeless" at the meeting with Mr Donald on 9 October 2003. However, Mr Donald had been aware from other sources of information that Mr Spence's evidence had not gone well. Minimising the expenses element of any settlement with Haden Young was to MGL's benefit because it increased the proportion attributable to the principal sum on which interest was being sought from MMS's insurers. The insurers' acceptance on 2 October that the arbiter had no power to award pre-decree interest had been a major step forward; it would have been a waste of time to have had further discussions without mentioning figures.

Assessment of evidence: destruction of notes

[30] By a Joint Minute of Admissions, the parties to this action state that they are

> *"...agreed in principle that had Mr Barrie taken notes of the meeting on 29 May 2003, which is disputed, then the Pursuers if acting with the skill and care reasonably to be expected of an ordinarily competent solicitor ought to have taken reasonable care to preserve any such notes, or copies thereof, pending resolution of the dispute."*

I understand "the dispute" to mean MGL's action against MMS. The sole issue of fact to determine in this branch of the present case is, therefore, whether Mr Barrie took notes of what was said at the meeting on 29 May 2003. Mr Barrie asserted that he did not. I find no reason to reject that assertion. By his own acknowledgment, Mr Barrie was not an assiduous note-taker. The meeting on 29 May was not a consultation with counsel but a hastily-arranged meeting with Haden Young's principal and legal advisers to attempt to achieve a settlement of the arbitration. There is no evidence from any source that Mr Barrie – or indeed anyone else – took notes either while the parties were meeting face to face or while they were having private discussions in separate rooms. As regards the answers given by Mr Barrie during the commission to recover documents,

I accept his evidence that these answers were intended to state his usual practice and not to refer specifically to the meeting on 29 May 2003. It may be that, in accordance with his usual practice, he took notes during the brief consultation with Mr McNeill which took place the following morning, and that such notes were lost when the notebooks were destroyed. It is not, however, part of MGL's case on record in this action that such notes, if they existed, would have contained material critical to supporting MGL's quantification of its claim against MMS, and no evidence was led which would entitle me to find either that any such notes were made or, if so, that they included such material. I observe also, for the sake of completeness, that it is not contended on behalf of MGL that a failure by Mr Barrie to take notes during the meeting was itself a failure to act with the skill and care reasonably to be expected of an ordinarily competent solicitor.

[31] For these reasons, I find that MGL's case, in so far as based upon destruction by the pursuers of notes taken by Mr Barrie at the meeting on 29 May 2003, fails on the facts.

Assessment of evidence: acting outwith authority

[32] One matter of fact upon which the parties were in agreement was that Mr McCrindle was an exceptionally "hands-on" client, who expected his legal advisers to act only on the basis of his express instructions and insisted upon being consulted and approving in advance every communication with a third party on his behalf. There are many instances in the pursuers' files of Mr McCrindle being consulted on the terms of draft letters and emails. I have noted one example where Mr McCrindle expressed displeasure at the fact that a form of communication had taken place without his advance authorisation. Mr Barrie readily agreed that this was Mr McCrindle's

modus operandi

; his position was that all of his communications with Mr Donald and others had been in accordance with his instructions and with the knowledge and approval of Mr McCrindle.

[33] There is also relatively little difference between the evidence of Mr McCrindle and of Mr Barrie regarding the period after the abortive settlement meeting on 29 May 2003. It is a matter of agreement between them that from this time onwards, Mr Barrie's instructions were to ascertain the insurers' position regarding the arbiter's power to award pre-decree interest, and that this remained so until Mr Donald eventually acknowledged on 2 October 2003 that the arbiter had no such power. There is disagreement as to whether Mr Barrie had authority to say everything that he said at the meeting with Mr Donald on 9 October; I return to this below.

[34] There are, however, matters where the evidence of Mr McCrindle and of Mr Barrie cannot be reconciled. The most significant of these are (i) the precise terms of Mr Barrie's instructions from Mr McCrindle prior to and at the time of the meeting on 29 May 2003, (ii) whether the scope of Mr Barrie's instructions entitled him to conduct telephone discussions with Mr Donald and Mr Shaw; and (iii) whether Mr Barrie reported these discussions to Mr McCrindle at or about the time when they took place.

[35] As to the first of these matters, Mr McCrindle was insistent that Mr Barrie's instructions at all times, both before and after 29 May 2003, were to ascertain the insurers' position on interest, and not to attempt to negotiate a settlement of the claim against MMS which had been intimated earlier in 2003. Mr Barrie was equally insistent that his instructions prior to 29 May 2003 had been to attempt to obtain an admission of liability from Mr Donald on behalf of MMS's insurers, and that it was only when this seemed to be unachievable that, following discussion with Mr McCrindle, his instructions were amended to attempting to obtain a definitive response from Mr Donald on the issue of whether the arbiter had power to award interest. Having considered the evidence very carefully, I have concluded that on this matter Mr McCrindle's version is to be preferred. It is consistent with his comment in the file note dated 17 April 2003 that "We should also chase Shepherd and Wedderburn regarding their client's position on the 'interest' issue". It is also consistent with his attitude, explained during his oral evidence, that he wished to try to avoid fighting two battles at once. In order to conclude a settlement with Haden Young, it was sufficient for MGL to obtain clarity that the arbiter had no power to award pre-decree interest; it was not strictly necessary to establish whether this was MMS's fault, and it was certainly not necessary to reach a settlement with MMS's insurers. In contrast, I can find nothing in the documentation to support Mr Barrie's evidence that his instructions changed after 29 May 2003 and before the letter to Mr Donald, revised and approved by Mr McCrindle, was sent on 19 June. I did not find Mr Barrie's recollection, while giving evidence of the timescale of such a change of instructions, to be wholly satisfactory: he referred initially to the change occurring "months" after 29 May, when in fact any such change would have to have occurred within less than three weeks. He was unsure whether the question regarding interest had been put by him to Mr Donald on 27 May. Taking all of the evidence into account I was not satisfied that there had been a time when Mr McCrindle's instructions to Mr Barrie had been expressly changed. It follows that, to the extent that Mr Barrie discussed admission of liability with Mr Donald in the course of two telephone conversations on 27 and 29 May, I accept that he did so without the express authority of Mr McCrindle on behalf of MGL. There was no evidence that any other such discussion took place; in particular, Mr Donald's note of the telephone conversation on 7 April does not suggest that Mr Barrie was seeking an admission of liability at that time.

[36] As to the second and third of the factual matters that I have identified as controversial, I have little difficulty in accepting the evidence of Mr Barrie. There is no doubt that Mr Barrie had authority to contact Mr Donald once it had been ascertained that he was acting on behalf of MMS's insurers. The telephone call on 7 April 2003 appears to have been instigated

by Mr Donald in response to a fax sent by Mr Barrie to Mr Donald and copied to Mr McCrindle. I regard it as simply incredible that Mr Barrie would not have reported the conversation to Mr McCrindle, given that the position adopted by the insurers was critical to the hoped-for settlement discussions with Haden Young. It is, in my opinion, equally incredible that the telephone calls made by Mr Barrie to Mr Donald on 27 and 29 May were made without Mr McCrindle's knowledge or approval. The arbitration proof was running. Negotiations with Haden Young were also, however, in progress and it was essential to their success to ascertain the insurers' position. The first call followed upon the direct approach made by Haden Young to Mr McCrindle in which an offer of £350,000 was made. Mr Barrie's lack of success in achieving a clear indication of the insurers' position was disclosed to the Haden Young representatives during the meeting on 29 May; it follows that Mr McCrindle must have been well aware at that time that discussions were taking place between Mr Barrie and Mr Donald. My impression was that Mr McCrindle's evidence that he was unaware of these discussions may have been coloured by a desire, arising out of his perusal of the Shepherd & Wedderburn file, to apportion blame widely for the failure to achieve a settlement with Haden Young on 29 May. I do not find it to be a credible account of how matters unfolded during those crucial three or four days.

[37] So far as the meeting on 9 October is concerned, it is not suggested that Mr Barrie did not have authority to meet Mr Donald or that Mr McCrindle was unaware that the meeting was taking place, a week after Mr Donald had acknowledged that the arbiter had no power to award interest. I agree with Mr Barrie's observation that such a meeting would have been pointless without some discussion of the quantification of MGL's claim against MMS, and I did not understand Mr McCrindle to suggest that there was any difficulty about Mr Barrie having mentioned the figures which appear in Mr Donald's file note of the meeting (see paragraph 15

above). What Mr McCrindle took exception to were the references to a sum being "added to the pot", which he thought smacked of charity, and to Mr Spence having been "hopeless". He also emphasised that Mr Barrie had had no authority to attempt to negotiate a settlement of the claim against the insurers. I can deal with these complaints quite shortly. In my opinion Mr McCrindle's objection to use of the phrase "added to the pot" – if indeed it was used – has no reasonable foundation. Whilst I find that Mr Barrie did not have express authority to criticise Mr Spence's performance as a witness, he did, in my opinion, have authority to disclose the sums which were being discussed with Haden Young and, in particular, to offer a view as to how much of those sums might represent expenses (on which interest would not run), and why. His efforts to minimise the expenses element were in the best interests of MGL and were, in my opinion, entirely unexceptionable. There is nothing in Mr Donald's note to suggest that Mr Barrie was attempting to negotiate a settlement; as Mr Barrie emphasised in his evidence, he could not have done so because Mr McCrindle had not indicated a figure which would have been acceptable.

[38] Finally, as regards communications with Mr Shaw, the only indication of any telephone discussion is Mr Shaw's file note of a conversation on the evening of 29 May 2003. It is not recorded who instigated the call, and there is nothing to suggest that the conversation went beyond the discussions which had taken place that afternoon in Mr McCrindle's presence.

[39] Drawing the foregoing matters together, I find that Mr Barrie exceeded his express authority from Mr McCrindle in one respect only, namely in seeking from Mr Donald, in the course of the two telephone conversations on 27 and 29 May 2003, an admission of liability by MMS's insurers instead of an acknowledgment that the arbiter had no power to award pre-decree interest. Given Mr McCrindle's insistence upon being consulted on, and giving express instructions in relation to, the terms of every communication by solicitors acting for his company, I do not regard it as having been within Mr Barrie's implied authority to seek an admission of liability on those occasions.

Discussion: were the pursuers in material breach of contract?

[40] The defender's refusal to make payment of the pursuers' professional fees is based upon the principle of mutuality of contract. The principle is stated thus by Gloag,

Contract

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ed, 1929) at page 407:

> *"It is a general, though by no means universal, principle in the construction of mutual contracts, that as the obligations on the one side are the counterparts of the obligations on the other, the undertakings by each party are really conditional; each binds themselves to do his part provided that the other party does his; neither is absolutely bound to fulfil his obligations irrespective of whether the rights he has contracted for are implemented or not. The application of this rule (which for convenience may be called the principle of mutuality) and the qualifications and exceptions to it, may be considered in reference to two general concepts. The one is, that a party to a mutual contract cannot demand fulfilment of the obligations in which he is a creditor, unless he has performed, or is prepared to perform, the obligation which he is himself undertaking, and in which he is a debtor. The other, briefly stated, is that if it appears that the intention of the parties was to constitute a mutual contract, and not merely a series of independent obligations, both parties must be bound or, neither."*

In

Forster

v

Ferguson & Forster, Macfie & Alexander

2010 SLT 867

, Lord Clarke, having cited this passage from Gloag and having distinguished between the principle of mutuality on the one hand and a right of retention on the other, continued:

> *"The general principle is clearly stated in Erskine,*

Institute

, III.iii.86, in the following terms:

'No party in a mutual contract, where the obligations on the parties are the causes of one another, can demand performance from the other, if he himself either cannot or will not perform the counterpart, for the mutual obligations are considered as conditional.'

That principle has a vigour going beyond its application in relation to retention and, in particular, may be used by a party to a contract which has been broken materially by the other party to resist any claim for performance of any obligation on his part under the contract, even when the contract has been terminated. This is made clear by McBryde, [

The Law of Contract in Scotland

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ed, 2007] at p 558, footnote 162, where he states:

> *"... it should be noted that mutuality as an argument does not arise only when a contract is being performed. Many of the classic cases in Scots law dealt with contracts which had been terminated, including*

Turnbull

v

McLean & Co

(1874) 1R 730 and

Graham & Co

v

United Turkey Red Co Ltd

1922 SC 533

."

The point was specifically addressed by Lord Cowie in [

Laurie

v

British Steel Corp

1988 SLT 17], at p 19B, where he made it clear in his opinion that no distinction fell to be drawn as between a continuing contract and a terminated contract for the purposes of the operation of the principle of mutuality. That, in my judgment, was, and remains, a sound statement of our law."

[41] In the present case, it was submitted on behalf of the defender that MGL's duty to pay for the pursuers' professional services had as its counterpart the pursuers' duty (a) to act in accordance with their client's instructions, and (b) not to act in such a way as to place themselves in a position where there was a real and sensible possibility of their own interests conflicting with those of MGL. The pursuers had materially breached their contract in both respects. Either breach was material in itself and sufficient to entitle the court to hold that there had been a material breach of contract. In these circumstances, the defender had been entitled to rescind the contract on 6 September 2012, and the pursuers were disabled from insisting upon payment of their fees, regardless of whether the material breach was held to have occurred in 2003 or in 2010.

[42] It is apparent from Lord Clarke's formulation of the mutuality principle, and was accepted by counsel for the defender, that a breach of contract by one party must be a

material

breach before the other party becomes entitled to resist a claim for performance of his obligations. In the present case I have found that the pursuers did not act in accordance with their instructions only in so far as Mr Barrie, in his discussions with Mr Donald on 27 and 29 May 2003, sought admission of liability rather than a statement of the insurers' position regarding the arbiter's power to award interest. In my opinion that did not amount to a material breach of contract. The position might have been otherwise if Mr Barrie had taken it upon himself to attempt to negotiate a settlement of MGL's claim against MMS. I am quite satisfied that he did no such thing, not least because he lacked one of the necessary ingredients of such a negotiation, namely knowledge of a sum for which Mr McCrindle would be willing to settle. In the circumstances as they presented themselves in May 2003, I regard the distinction between seeking an admission of liability and seeking an acknowledgment that the arbiter had no power to award interest as having had little practical significance. Although MMS, their insurers and their advisers appear to have given some thought to whether blame for the failure to protect MGL's entitlement to interest could be laid at someone else's door, there was never, so far as the files disclose, any serious candidate. More importantly, neither Mr McCrindle nor Mr Barrie appears to have had anyone other than MMS in mind as having been at fault if it turned out that MGL's entitlement to interest had not been protected. It therefore appears to me that even without the benefit of hindsight, it would have made no material difference if on 27 and 29 May 2003 Mr Barrie had adhered to Mr McCrindle's instructions and sought only an indication of the insurers' position on interest. When one adds hindsight, it becomes even clearer that it would

have made no difference whatsoever because Mr Donald would still have provided no substantive response until he had completed his review of MMS's file.

[43] As regards the pursuers' duty not to act in such a way as to place themselves in a position where there was a real and sensible possibility of their own interests conflicting with those of the defender, I have found that the pursuers committed no breach of contract in connection with the destruction of Mr Barrie's notebooks. I do not regard the non-material breach of contract which I have held occurred in relation to Mr Barrie's discussions with Mr Donald as sufficient to have created a conflict between the interests of the defender and those of the pursuers. Nothing else was ultimately founded upon by the defender as having given rise to any actual or potential conflict of interest. In these circumstances I hold that the pursuers were not, at the time when MGL withdrew its instructions on 6 September 2012, in material breach of their contractual duties. It follows that the pursuers are entitled, in my opinion, to payment for their contractual services to the defender and that the defender's counterclaim for damages for breach of contract must be rejected.

Disposal

[44] The issue of quantification of the pursuers' claim remains to be disposed of. In order to give effect to my decision on the matters addressed in this Opinion, I am minded to sustain the pursuers' first plea-in-law and to repel the defender's third plea-in-law in the principal action, and to assoilzie the pursuers from the conclusions of the counterclaim. I shall, however, put the case out by order in order that parties may address me on the terms of the order to be pronounced at this stage, and on further procedure.

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