OUTER HOUSE, COURT OF SESSION

[2025] CSOH 20

A220/23

OPINION OF LORD BRAID

In the cause

ANDREW MARR INTERNATIONAL LIMITED

Pursuer

against

MACKINNONS SOLICITORS LLP

Defender

Pursuer: Breen; Addleshaw Goddard LLP
Defender: A Mckinlay; Kennedys Scotland

21 February 2025

Introduction

[1] In 2018, a firm of solicitors in Aberdeen, Mackinnons (a partnership) acted for the pursuer in relation to a breach of warranty claim it wished to bring, arising out of a Share Purchase Agreement (SPA). The pursuer contends that Mackinnons tendered negligent advice in relation to the service of a notice under the SPA, thereby significantly weakening the pursuer's negotiating position, such that it ultimately required to settle the claim for a sum significantly less than it would otherwise have been worth. The pursuer avers that Mackinnons thereby incurred an obligation to make reparation to the pursuer arising both

from its breach of contract and from its negligence. The pursuer quantifies its loss at £2.25 million.

[2] On 16 September 2019 the firm of Mackinnons, and the partners of that firm, transferred its business, including all of the partnership assets, to a different entity, Mackinnons Solicitors LLP, by virtue of a "Transfer Agreement for Conversion of a General Partnership into an LLP" bearing that date. The recitals to the agreement included that the partners of Mackinnons wished to "convert the general partnership into a limited liability partnership"; that as part of the conversion process the partners wished to contribute the partnership business to the new LLP; and that each of the partners was to be a member of the LLP and that the partners intended to carry on the business (defined as the business of Mackinnons solicitors) through the LLP with effect from 1 October 2019.

[3] Clause 3 of the Transfer Agreement provided that the consideration for the transfer of the partnership business to the LLP was to be satisfied by the LLP procuring (among other things) that the LLP would assume all of the liabilities of the partnership; "liabilities" was defined as including all obligations of any nature of the partnership. It is not disputed that the liabilities included any obligation to satisfy the pursuer's claim (there being no suggestion, for example, that insured liabilities were excluded).

[4] In this action, the pursuer seeks to vindicate its claim against the LLP, from which it seeks payment of the sum of £2.25 million. The LLP (the defender) argues that, notwithstanding clause 3 of the Transfer Agreement, it is under no obligation to the pursuer in respect of any breach of contract or negligence on the part of Mackinnons, since there is no agreement between the pursuer and defender, express or implied, that any obligation to make reparation to the pursuer has been novated to the defender; and that the pursuer

must instead pursue its claim against the firm of Mackinnons and all those who were the partners in that firm in 2018 when the allegedly negligent advice was tendered.

[5] The action called before me on the procedure roll on the defender's plea as to the relevancy of the pursuer's action. The defender seeks dismissal of the action. The pursuer invites me to refuse that motion and to fix a proof before answer on the substantive issues in the case.

[6] There is essentially one issue: has the pursuer relevantly averred that the liabilities of Mackinnons were transferred to the defender such that the obligation to make reparation to the pursuer has been novated to the defender?

The pursuer's pleadings

[7] I was told, by way of introduction, that the summons as initially lodged proceeded on the erroneous factual basis that it was the LLP which had acted for, and tendered negligent advice to, the pursuer. After the action had been served, the LLP made the pursuer aware of the Transfer Agreement whereupon the pursuer adjusted the summons to make reference to that agreement. Article 2 of condescendence, insofar as material, now reads as follows:

> "The defender is a firm of solicitors. The defender was incorporated on 20 August 2019. The defender assumed the liabilities and obligations of the common law partnership of Mackinnons, solicitors ('Mackinnons, solicitors') by way of a Transfer Agreement between ... ('the Mackinnons partners') and Mackinnons Solicitors LLP dated 16 September 2019 ('the Transfer Agreement'). The Transfer Agreement is ... referred to for its terms which are incorporated for the sake of brevity. Clause 3 (b) of the Transfer Agreement provides inter alia that the defender 'assumes all of the Liabilities'. Clause 1 of the Transfer Agreement defines Liabilities as 'all debts, liabilities and obligations of any nature of the Partnership which arise out of or related the Business'. 'Business' is defined as 'the business of Mackinnons, solicitors carried on by the Partners at the Effective Date'. Clause 8(a) provides that 'the LLP shall: duly and properly perform, assume, pay and discharge when due all the Liabilities…' Therefore, all liabilities and obligations of Mackinnons, solicitors,

> including any obligation to make reparation to the pursuer in respect of damages arising from breach of contract and/or negligence on the part of Mackinnons, solicitors, were transferred to and assumed by the defender by way of the Transfer Agreement. Accordingly, any claim on the part of the pursuer for damages arising in respect of the breach of contract and/or negligence, hereinafter condescended upon, is properly directed against the defender. Formerly Mackinnons, solicitors and latterly, the defender have historically acted on behalf of the pursuer in respect of its acquisitions and business ventures in the North East of Scotland...The defender assumed the liabilities and obligations of Mackinnons, solicitors, including the obligation to make reparation to the pursuer in respect of any breach of contract and negligence on the part of Mackinnons, solicitors."

[8] In article 15, the pursuer avers, again insofar as material:

> "Mackinnons, solicitors' conduct amounts to a breach of the terms of its contract with the pursuer. Mackinnons, solicitors' breach of contract has caused the pursuer to sustain loss and damage. As hereinbefore condescended upon, in terms of the Transfer Agreement, the defender assumed the liabilities and obligations of Mackinnons, solicitors. The liabilities and obligations assumed by the defender include the obligation to make reparation to the pursuer in respect of any breach of contract on the part of Mackinnons, solicitors."

There are like averments in article 16 concerning breach of duty, *mutatis mutandis.*

Submissions

Defender

[9] Counsel for the defender submitted that the pursuer had not pled a relevant case that the defender had any liability to the pursuer. The crux of the matter was whether the partnership's obligation to make reparation to the pursuer had been novated to the defender, and there were no relevant averments of novation. Novation required the consent of all parties: McBryde, *The Law of Contract in Scotland* (3rd Edition), paragraphs 12.10, 25-23. That required to be judged objectively (*ibid*, paragraph 6.11). The Transfer Agreement was of no moment, since the pursuer was not party to it, and it had not been intimated to the pursuer (voluntary disclosure by the defender's solicitors, after the action was raised, not amounting to intimation). Only if an offer to novate had been made, whether by intimation

of an agreement or otherwise, could the pursuer have accepted that offer. The missing link was any offer to prove conduct on the part of the defender from which a willingness to novate could be inferred; the pursuer did not even make any averments that the business had been carried on by the LLP after the transfer. Accordingly, the pursuer's averment that it had elected to sue the defender was fundamentally irrelevant, because that could not, in the circumstances averred, amount to novation. Further, while there was a line of authority, culminating in the Inner House case *Scottish Pension Fund Trustees Ltd* v *Marshall, Ross & Munro* 2018 SC 523, that there was a presumption of transfer of liabilities where successive common law partnerships were involved, that did not avail the pursuer since (a) as both the Lord President (Carloway) and Lord Drummond Young made clear in that case, at paras [48] and [65] respectively, the presumption applied only where there was no outward change in the business, which could not be said where the transfer of business was from a partnership to a limited liability partnership: *cf Darknell-King* v *Slater and Gordon UK Ltd and Others* [2024] CSOH 100, Lord Sandison at [33], drawing on *Ocra (Isle of Man) Ltd* v *Anite Scotland Ltd* 2003 SLT 1232; and (b) the pursuer did not found upon the presumption.

Pursuer

[10] Counsel for the pursuer agreed with counsel for the defender that the issue was whether the obligations owed by the partnership had been effectively novated to the defender such as to entitle the pursuer to enforce those obligations against the defender. She relied heavily upon *Scottish Pension Fund Trustees Ltd*, above, and in particular upon the opinion of Lord Drummond Young, at paras [63], [64], [67] and [71]. His observations therein were equally applicable to the situation before the court here. It was correct that the pursuer did not rely upon any presumption that the defender had assumed the liabilities of

the partnership; that was because it did not require to - there was no need to find a tacit agreement where there was an express agreement that the liabilities would be assumed by the defender. The court was entitled as a matter of law to infer the pursuer's consent to the novation to the defender of the obligations owed to it by the partnership, from the fact that the pursuer was seeking to enforce those obligations against the defender.

Decision

[11] Scots law has long grappled with the situation where the assets of a business have been transferred by the owner of that business (A) to a new legal entity (B) and whether B ought to be liable to A's creditors (C), recognising that, depending on the circumstances, not to hold B liable could lead to injustice. As Lord Shand put it in *Heddle's Executrix* v *McLaren* (1888) 15 R 698 at 710:

> "If a person grants a universal disposition in favour of another party, in so far as this is gratuitous and not for value, it can only be under burden of the obligations for which that person is liable. It appears to me that in such a case as I have put, where you have practically a new copartnery, with the transfer of the whole assets of the business and goodwill of the old firm, the creditors must continue to have their hold upon these assets in the new firm. To hold otherwise would be to open a door to fraud."

[12] The starting point for a discussion of the law as it currently stands is the opinion of Lord Hodge in *Sim* v *Howat* [2011] CSOH 115, which contains a detailed review of the authorities, and an analysis of the law. Although *Sim* v *Howat* was not cited to me by either party, Lord Hodge's analysis was approved by both the Lord President and Lord Drummond Young in *Scottish Pension Fund Trustees Ltd*, above. While both cases were concerned with the situation where a new partner is assumed into a partnership, many of the *dicta* (and for that matter, some of the *dicta* in the older authorities, as the above quotation illustrates) are capable of wider application.

[13] Several passages from Lord Hodge's opinion in *Sim* v *Howat* bear repetition. At [15] he said this:

> "...Scots law is not the same [as English law]; it has historically had a presumption that the gratuitous transfer of the assets of a business from a **sole trader or a partnership** to another partnership [emphasis added] entails the recipient of the assets assuming liability for the prior debts of the business. But certain circumstances must exist for the presumption to arise. Thus where the recipient has paid value for the assets the presumption does not arise. Further, in cases where there is a partnership contract which states that the new partnership is not liable for the debts of the old partnership and the reality of the transaction is consistent with that stipulation, one must find an express undertaking by the new partnership to a creditor of the old firm or dealings with him from which one can infer an undertaking of liability to him: *Stephen's Trustee* v *Macdougall & Co's Trustee* (1889) 16 R 779. While that is clear, it does not assist in circumstances such as this where there is no written or express oral agreement as to liability for pre-existing debts of the transferred business."

[14] I take three things from that passage. First, as the opening sentence makes clear, the presumption referred to can apply where there is a transfer from a sole trader to a partnership, that is, from one type of trading entity to another, and so it is not restricted to the situation where a new partner is assumed into an existing partnership. Second, the need for an express undertaking to a creditor, or dealings from which one can infer an undertaking of liability to him, arises only where the partnership contract states that the new partnership is not liable for the debts of the old, precisely the opposite of what the Transfer Agreement provided in the present case. Third, cases where there is a written or express agreement as to liability for pre-existing debts may present different challenges than cases where there is no such agreement; each case must necessarily turn on its own facts, as Lord Hodge later makes clear at para [33], referred to in para [17] below.

[15] In relation to the first of those matters, the question in this case is how the law treats the transfer from a partnership to a limited partnership, and whether the same considerations apply as in a transfer from an old partnership to a new partnership on the

assumption of a new partner. In this regard, it is relevant also to have regard to what Lord Drummond Young said at para [67] of *Scottish Pension Trustees Ltd*, above:

> "Two further reasons can be said to support the application of the presumption. The first is an essentially equitable consideration. If a new partnership takes over the assets of an old partnership, it is only fair that the old partnership's liabilities should pass with those assets. That, moreover, probably accords with the general expectations of those who deal with businesses conducted by partnerships**, and a similar expectation would arise on any transfer of a business from one entity to another** (emphasis added)".

[16] This supports the view that there is no difference in principle between a case where a new partner has been assumed (resulting in the formation of a new legal *persona* in the form of a new partnership), and the present case, where a common law partnership has been converted into a limited liability one. In each case, whether the new entity has assumed the liabilities of the old will be a question of fact and circumstance, turning, to some extent at least, on what the equities of the situation require.

[17] In many cases, whatever the nature of the change in the business, a creditor will not know whether, in acquiring the assets and business of A, the new entity B has agreed also to assume its liabilities. That is no doubt why the law has developed the presumption referred to in *Sim* and *Scottish Pension Trustees Ltd* that, at least in some circumstances, in acquiring the assets of A, B had also agreed to assume its liabilities, since not to make that presumption could lead to injustice to A's creditors. Counsel for the defender made great play of the fact that the pursuer is not relying on the presumption, the conditions for the application of which, he submitted, were not fulfilled in any event. However, I agree with counsel for the pursuer that there is no need for the pursuer to rely on any presumption as to what the defender might or might not have tacitly agreed to, because it is known, as a fact, from the Transfer Agreement, about which the pursuer does have averments, that the

defender *did* expressly agree to assume the liabilities of Mackinnons. As Lord Hodge put it at para [29] of *Sim:*

> "It appears to me that, in both Scots law and English law, where D is able to enforce his claim against the new partnership B, both B and the new partner C must have accepted liability **either expressly or tacitly** to meet his claim. Whether there is such acceptance will depend on the facts and circumstances of each case and also the law of obligations in each legal system. As I have said, English law does not appear to have the presumption to which the Scots cases refer. In Scots law it seems to me that the court may conclude that B has accepted liability even where the circumstances do not give rise to the presumption which judges have discussed in the case law set out above [emphasis added]."

[18] It follows that cases such as *Ocra (Isle of Man) Ltd* and *Darknell-King* (both above), relied upon by counsel for the defender in support of his submission that, because there is an outward change in form in the manner in which the business is carried on, a limited liability partnership cannot be presumed to have assumed the liabilities of a partnership, are not in point, since in those cases there was no express agreement to assume the liabilities, as there was in the present case.

[19] I therefore find that by averring that the defender agreed in the Transfer Agreement that it was to assume the liabilities of Mackinnons, the pursuer has adequately and relevantly averred that the obligation to make reparation to it arising out of the alleged breach of contract and negligence of Mackinnons was assumed by the defender.

[20] It follows that it is strictly unnecessary to decide whether, absent an express agreement, the presumption as to assumption of liabilities could never be made where a partnership converts into a limited liability one. However, in deference to the submissions made by counsel, I will deal with this briefly. As I have pointed out, there is support in the authorities for the suggestion that the presumption could apply in broader circumstances than the assumption of a new partner it always being a question of fact and circumstance as to whether the presumption applies or not. Further, although Lord Drummond Young did

say, at para [65] of his opinion in *Scottish Pension Trustees Ltd*, that there were three conditions for the operation of the presumption, including that the new partnership must be "practically the same" as the old one, he also said that the most important condition was that the business of the partnership be continued without interruption, which carries with it the necessary implication that the conditions are not of equal weight. There is in any event room for argument as to what is meant by "practically the same"; in Lord Drummond Young's view, it meant that the business entity should remain essentially the same. In the present case, it might be significant that the identity of the partners in the common law firm and in the limited liability partnership were one and the same, and that, in the eyes of the partners at least, the process embarked upon was merely one of "conversion" to limited liability which supports the view that the existing liabilities were to be transferred to the new liability body rather than that they were to remain with the partners. Contrary to the defender's submission, the pursuer does adequately aver that the business of the partnership was carried on by the LLP after the transfer. It does so partly by the incorporation into the pleadings of the Transfer Agreement, which states in terms that the business was to be carried on, and partly by the averment that the pursuer instructed both Mackinnons and subsequently the LLP to handle certain of its affairs. To the clientele of that business, it may well have seemed that the business being carried on by the same partners as previously was indeed "practically the same". I would make three final points before departing this topic. First, there is no difference in legal principle between a transfer by a sole trader to a partnership, and by a partnership to a limited liability partnership: in both cases, there is transfer by one legal *persona* to a different legal *persona.* Second, an inviolate requirement that the business entity should remain practically the same is inconsistent with Lord Drummond Young's later observation that the presumption could apply on any

transfer of a business from one entity to another, which I think merely underlines that the so-called conditions should not be treated as if they were statutory requirements which must always be fulfilled to the nth degree: rather there is a degree of flexibility as to the extent to which they must be met. And third, it is noteworthy that in the passage quoted at para [15] above, Lord Hodge's view was that there may be circumstances where the court was prepared to find that liability had been assumed by B, even where the presumption did not apply, which is also indicative that the law takes a flexible approach.

[21] I turn now to the key issue before me, which is whether the obligation to make reparation to the pursuer has been novated to the defender, which is another way of asking whether the pursuer is bound by the transfer of liabilities to the defender. Counsel for the pursuer rightly accepts that the pursuer's consent is required. To hold otherwise would be to open the door to fraud, since a debtor could avoid paying his creditors by the simple expedient of transferring his liabilities to, in old parlance, a man of straw; or a person of no means. However, that in turn leads to a further question, which is whether the defender, having agreed to assume the liabilities of the partnership, retains any residual right to refuse to accept that the obligation has been novated to it, as it is purporting to do. On the defender's approach, where an obligation owed to A by B has been transferred by B to C, novation always requires that a new contract be entered into between C and A, involving an offer to novate communicated by C to A, expressly or by implication and an acceptance of that offer by A. Counsel for the defender submitted that the offer to novate could not be inferred from the Transfer Agreement itself but that something more was required. The pursuer, on the other hand, maintains that, having learned of the assumption of liabilities, its consent to novation in the present circumstances can be inferred from its decision to sue

the defender, as it has done, and that the defender has no further choice in the matter. Which is correct?

[22] It is true, as counsel for the defender submitted, that in many situations, for a contract to be novated to a third party who is to assume the obligations of one of the original contracting parties, the consent of all those parties is required and, in effect, a new contract requires to be entered into. However, none of the authorities in the area presently under discussion suggest that such a rigid approach is required where the obligation, as here, is an obligation to meet a debt or satisfy a liability which has been transferred along with the assets of a business. On the contrary, the concept of novation in this context is closely linked to the presumption itself, and all that the court is looking for is some indication that the creditor has consented to the transfer of its debt to the new debtor. As Lord Drummond Young put it in *Scottish Pension Trustees Ltd*, at para [63]:

> "It is, on a strict analysis, a presumption that where there is a continuity of business and a transfer of assets the obligations of the old partnership are novated in such a way that they become obligations of the new partnership; novation is the standard way in which the debtor's part of an obligation may be transferred by one person to another. Normally novation requires the consent of the creditor, for obvious reasons. In the case of successive partnerships, it is perhaps rare for such consent to be given expressly, but in the great majority of cases consent can be readily implied, by accepting payment from the new entity, or by raising proceedings against the new entity for payment of a debt or fulfilment of an obligation. Moreover, it is manifestly in the interests of creditors that their debts or other obligations should be transferred to the new partnership, as that partnership has taken over the assets of the old partnership. The reasons for agreeing to novation go further than the mere transfer of assets, however. As a commercial matter a creditor normally expects its debts to be paid out of the earnings of its debtor, and if the debtor's business passes to a new legal entity it is the earnings of that entity that will provide the resources to pay the debt. Thus considerations of liquidity, as well as those of solvency, support the basic principle that debt should be transferred in such a case."

[23] There are three further reasons why I consider the defender's approach to be wrong. In the first place, in none of the cases where a liability has been held to be transferred to the new partnership by reason of the applicable presumption has there been anything

approximating to a separate offer by the new partnership to the creditor to novate the obligation in question. Rather, novation has been inferred from the presumed assumption of the liability on the one hand, and the pursuer's election to pursue the new debtor on the other. In none of the cases is it suggested that, having (expressly or tacitly) agreed to assume the liabilities of the old partnership, the new firm or partner nonetheless may elect not to meet a liability by the expedient of not agreeing to novation of the contract in question. That would deprive the presumption of any usefulness. Second, an insistence that a contract be novated is relevant only where the liability in question arises out of a contract; it does not fit so easily with a delictual or other liability; and in the present case, of course, the pursuer brings a delictual claim as well as a contractual one.

[24] Third, and most significantly, the underlying legal theory does not require novation in the strict sense. It is again instructive to have regard to Lord Hodge's analysis in *Sim*, above, at para [33], which offers a different approach*:*

> "The case law is not explicit as to the legal mechanism by which the new partnership, B, without any involvement by D [the creditor], assumes responsibility for A's debts. A cannot transfer his obligations to B without the consent of ... D. One can assign certain rights without the consent of the debtor; but one cannot transfer obligations without the creditor's consent. Otherwise one could rid oneself of very onerous obligations by transferring them to a man of straw, just as Keawe got rid of the damning bottle to the drunken boatswain in R. L. Stevenson's South Sea Tale, 'The Bottle Imp'. I think that the effect of the transaction in cases where B has been held to have assumed the liability for D's claim is that A remains liable but B is treated as having made a binding unilateral undertaking to pay the debt due to D. In other words, D can sue B as well as or instead of A. It may be that the historic inability of the English law of contract to enforce such a unilateral promise is, in part at least, an explanation for the differing approach to the issue in the two jurisdictions. The idea of a binding unilateral undertaking is also consistent with the continuing liability of the former partners of the dissolved partnership: see *Lujo Properties Ltd* v *Green 1997 SLT 225* , Lord Penrose at pp.236–237."

[25] Lord Drummond Young endorsed this approach at para [67] of *Scottish Pension Trustees Ltd:*

> "The second consideration is that it is possible in Scots law to contract a unilateral obligation. When a new partnership takes over the business and assets of an old partnership, the practical effect of the presumption is that the new partnership undertakes to meet the debts and other obligations of the old partnership. Conceptually, that is entirely intelligible in Scots law, although it might present difficulties under the English law of contract. This is the important point made by Lord Hodge in Sim v Howat (para 33) where he analyses the legal mechanism whereby the new partnership assumes responsibility for the old partnership's debts. While rights can be transferred without the consent of the creditor in certain cases, novation, the transfer of obligations, can only occur with the creditor's consent. The result is therefore that the old partnership remains liable as well as the new partnership, on the basis that it cannot rid itself of its debts. I agree with that view...."

[26] Whether the underlying legal theory is that an express or implied agreement to assume liabilities is itself an offer to novate, which the creditor in an obligation can accept by simply electing to sue the new debtor (B, in the above examples), or whether it is that B has entered into a unilateral binding obligation, leaving it to the option of the creditor which debtor(s) to pursue, on neither approach is B required to make any further offer to novate following the assumption of liabilities nor does B have the right to withdraw any implied offer to novate/unilateral obligation. As noted above, to hold otherwise would be to deprive the presumption as to transfer of liabilities of any usefulness and could lead to manifestly unfair consequences.

[27] It follows that by averring that it has elected to continue to sue the defender after learning of its assumption of the liabilities of Mackinnons, the pursuer has relevantly averred that it has consented to the novation to the defender of the obligation owed to the pursuer, and that it has a direct right of action against the defender. Nothing further is required. The pursuer could have chosen, instead (or in addition), to pursue the partners in Mackinnons but has elected not to do so. The defender has no right to resist that election.

Disposal

[28] I will refuse the defender's motion to dismiss the action, and fix a proof before answer, reserving all pleas-in-law meantime. I will reserve all questions of expenses.