SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2022] SC EDIN 10

EDI-CA34-18

OPINION OF SHERIFF N A ROSS

in the cause

COULTERS PROPERTY LIMITED

Pursuer

against

MARK COULTER

Defender

Act: Dean of Faculty
Alt: Smith QC

Edinburgh 24 March 2021

The Sheriff, having resumed consideration of the cause, repels the defender's pleas-in-law in the counterclaim and dismisses the counterclaim; finds the defender liable to the pursuer in the expenses of preparation for and attendance at the diet of debate; certifies the debate as suitable for the employment of senior counsel; appoints the principal action to a proof before answer on dates to be afterwards fixed; fixes a case management conference by telephone on a date to be afterwards fixed.

Note

[1] This is the third diet of debate relating to the counterclaim. The principal action remains unaffected and parties agree it should proceed to a proof before answer. The

counterclaim has been amended. For the purposes of debate the defender's pleadings are treated as true.

[2] The defender counterclaims for loss and damage suffered as a result of misrepresentations by the pursuer, and separately as a result of their breach of contract. He was formerly a director of the pursuer and held all the shares. In March 2016 he transferred 51 per cent of the shares in the pursuer to a third party, in exchange for the acquisition of a business by the pursuer. He remained a director until 21 February 2018, when he was dismissed.

[3] The Articles of Association provide that such circumstances amount to a transfer event. The departing director is deemed to have served a transfer notice for all shares held by him or his family. The Articles set out a mechanism for offering and valuing the shareholding. If a transfer price is not agreed, there is a mechanism for valuation by the auditors, such decision to be "final and binding on the Members, save in the event of fraud or manifest error".

[4] The parties did not agree a transfer price. A firm of accountants ("AAB"), who the defender disputes were auditors at the date of termination, were instructed. AAB carried out a valuation and produced a report, which is lodged. The defender avers that the method of valuation adopted by AAB gave rise to a substantially erroneous undervalue of the shares amounting to a manifest error. Further, the defender avers that the pursuer, by its directors, exerted considerable influence on AAB by misstating the trading position of the company. The statements identified are that the pursuer was "teetering" and there was "no way" anyone would be willing to buy shares in the pursuer. These statements were relied upon by AAB and were their justification for selecting an incorrect basis for valuation, namely an

assets-based valuation rather than as a going concern. This led to a much lower value being attributed to the defender's shares.

[5] The counterclaim does not seek reduction of the valuation. The remedy of reduction *ope exceptionis* was advanced and rejected at an earlier stage in this action, and it is no longer sought. The present debate was presented by reference to the two grounds of action, namely breach of contract and misrepresentation.

Breach of contract

[6] In relation to breach of contract, the defender avers:

> "… the Articles of Association form a contract as between the pursuer on the one hand and the defender on the other. The sale of shares is governed by that contract, in the event of a forced sale as occurred in the circumstances narrated above. The sale effected by the defender did not achieve the value which, in terms of the Articles, was required to be achieved. The pursuer is accordingly in breach of contract with the defender. The defender has suffered loss and damage as a result of the breach of contract by the pursuer. As a result of that breach of contract the sale of the shares was substantially under value …"

[7] It is also averred:

> "… it is admitted that the [pursuer] instructed AAB to carry out a valuation under explanation that the pursuer was under an obligation to ensure that the valuation was carried out on the correct basis and in accordance with the Articles as hereinafter condescended upon and not based on materially incorrect information."

[8] It might be noted in passing that an obligation to "ensure" is materially more stringent than any duty of care, and "obligation" is opaque as to whether it is an obligation in contract or delict. In context, it appears the reference must be to contract, and to refer only to the process of instruction of the valuation, which was thereafter an independent process without mechanism for interference by the directors.

[9] The pursuer's criticism of the defender's contract case was straightforward. While it is correct to say the Articles represent a contract between the parties, the pursuer could not be said to be in breach while there was an existing, binding valuation which had been instructed in terms of the Articles. Article 5.2.2 specifies that, in the absence of agreement, the valuation of sale shares is to be certified by the auditors as the Fair Value (as that term is defined in the Articles). That was duly done. No defect is identified in the instruction of the valuation. The defender was paid the valuation price brought out by that valuation exercise.

[10] It followed, therefore, that if a valuation had been duly instructed, then the valuation stood, unless and until it was reduced. The defender complains of manifest error in the valuation method. That by itself was not enough. The defender had received what he had bargained for. Such a contractual document can't simply be ignored, and must be reduced if it is defective (*Kelly* v *Kelly* 1986 SLT 101; *Brown* v *Hamilton District Council* 1983 SC (HL) 1; *Sutherland* v *Advocate General* 2006 SC 682).

[11] In any event, the defender had not identified any term of the contract which had been breached.

[12] The defender's position was that it was enough to identify a breach of the Articles, and it followed that a purported valuation prepared on the wrong basis was a nullity. The auditors here had defied their instructions as to the basis of valuation and the Articles had been breached. The resulting valuation was rendered a nullity, and a nullity need not be reduced. *Kelly* (above) did not assist the pursuer, as the present case was not a case where valuation was final. Here, the valuation could be opened up again in certain circumstances, including if it was in manifest error - see *Invensys plc and Others* v *Automotive Sealing Systems Ltd* [2002] 1 All ER (Comm) 222. The defender offered to prove manifest error, and that was sufficient to allow the case to go to proof. In *Premier Telecommunications Group Ltd* v *Webb*

[2016] BCC 439, the Court of Appeal drew out the principles for challenging expert valuations (at para 8, quoting *Barclays Bank plc* v *Nylon Capital LLP*), and identified two types of error. The first, challengeable error is where an expert has not embarked on the exercise the parties agreed upon. The second, unchallengeable type is where the expert has embarked on the right exercise but has made errors. This was a case of the first type, as the valuer had not followed the requirements of the Articles. This argument did not depend on any misrepresentation. The valuation did not need to be reduced – it was simply an irrelevance (*Eastern Motor Company* v *Grassick and Others* [2021] CSOH 5). Support for this could also be found in *Hickman & Co* v *Roberts and Others* [1913] AC 229. This was a nuanced argument, unlike the simple context of *Kelly* (above), or *Brown* v *Hamilton District Council* (above) or *Sutherland* v *Advocate General* (above). It is a very different matter to require reduction of a certificate when it was not properly issued in the first place.

[13] Accordingly, proof should be allowed, to allow exploration of whether the wrong question was posed by the auditors.

Decision on breach of contract case

[14] In my view no relevant case of breach of contract is pled.

[15] The starting point is the averments of breach. While the defender's pleadings are eloquent of how the valuation came to be defective, and the failures by the auditors in selecting the wrong basis for valuation, the pleadings are sparse to the point of silence on how this represented a breach of contract by the pursuer. The pleadings set out the requirements of the Articles ("the directors shall instruct the Auditors to determine and certify the Fair Value…") but does not assert, far less explain, that the directors were in breach of those requirements.

[16] The defender avers that the directors "used the incorrectly derived valuation" in sending out transfer notices, which was otherwise in accordance with the Articles. They "have maintained that the Valuation was correct in its assessment of the Defender's rights". These are not said to be breaches of contract. The breach is identified as:

> "The sale effected by the defenders did not achieve the value which, in terms of the Articles, was required to be achieved. The pursuer is accordingly in breach of contract with the defender."

The only other potential breach is as identified above, namely:

> "the pursuer was under an obligation to ensure that the valuation was carried out on the correct basis and in accordance with the Articles as hereinafter condescended upon and not based on materially incorrect information."

[17] The problem is that no term of the contract is identified which has been breached. The circumstances governing valuation of shares upon a compulsory transfer are expressly regulated by the Articles. The defender does not identify which of those provisions the pursuer failed to observe. No implied term is pled or identified. No interpretation of the express terms is attempted. It is necessary therefore to look to the express terms of the contract to identify any potential breach.

[18] In my view there is no identifiable breach of the Articles by the pursuer. With regard to what is pled, there is no express contractual obligation to "ensure that the valuation was carried out on the correct basis". There is no express contractual obligation to "achieve the value which, in terms of the Articles, required to be achieved." Such a contractual duty to "ensure" or to "achieve" would run contrary to what appears to be the express purpose of the Articles, namely an independent valuation to be carried out according to fixed criteria. An entitlement upon the pursuer's directors to intervene to "ensure" or "achieve" would run entirely contrary to the principle of independence of the valuer. Had the directors

instructed the valuers to use the ABV basis for valuation, which the defender identifies as the wrong basis, then a claim for breach of contract would be available. There is no suggestion that the directors did so, or that they did anything other than instruct the valuers in accordance with the Articles.

[19] There is, of course, a complaint against the directors, to the effect that they made one or more misrepresentations about the pursuer's commercial position. This is pled separately as a delictual misrepresentation, and is discussed below. It is not founded upon as part of any breach of contract. It could not be, because there is no relevant contractual term, and no implied term is pled. The averment does not go so far as to state that the auditors were not properly instructed in accordance with the Articles.

[20] The absence of relevant averments of breach of contract is sufficient to compel rejection of the contract argument. The pursuer relies on a further and separate point, namely that the valuation, until reduced, remains binding on the parties.

[21] In my view the valuation cannot simply be ignored. It is the end result of a process which the parties agreed would be independent and binding. If the valuation proceeded on a fundamentally erroneous basis, the appropriate procedure for raising such a question is by an action of reduction of the certificate (*Kelly* v *Kelly*, above, at page 104E). That is particularly so where, as here, the error does not appear on the face of the valuation. The case of *Hickman* (above) was based on English procedure which was not shown to be the same as in Scotland. *Eastern Motor Company Limited* (above) involved an application for reduction *ope exceptionis*, which is not sought here. As the court there noted (at paragraph [39]), there is a distinction between, on one hand, resisting *ope exceptionis* the enforcement of a decision whose validity is challenged and, on the other, reducing that decision. In the present case, were the shoe on the other foot, the defender could resist an action which

founded on the defective valuation, without reducing it. The defender is not in that position. He is not merely defending himself. He is the party who wishes to establish a valuation, but who is unwilling to accept an existing valuation which was obtained under the correct contractual procedure. It is difficult to see that the procedure could be operated again while the existing valuation stands, as the terms of the Articles are exhausted, and the auditors are *functus officio*.

[22] Had the provisions of Article 5.2.2 stopped short of stating that the decision was to be final and binding, albeit with exceptions for fraud and manifest error, and had provided only that the valuation was to be prepared in accordance with certain principles, it may have been possible to argue that the valuation was a nullity as it stood. I express no view on that argument, as it remains hypothetical. But such an argument could not be available, in my view, when the parties have agreed that the valuation is to be final. The defender does not seek that the valuation is reduced, and accordingly there is no proposal that the auditors be reinstructed. Accordingly to accede to the defender's argument would, in this action, have the effect that the court's findings on the proper basis for valuation of the shares, and indeed the resulting value, would be substituted for those of the auditors. The parties have contractually agreed to exclude that possibility. They have excluded the court's jurisdiction in valuing the shares, and have instead conferred binding validity upon the valuation. In my view, in order to seek to challenge the value of the shares, the defender would require to reduce the valuation.

[23] It follows that the defender has not identified a relevant contractual claim open to him under the Articles. The averments and plea-in-law relating to breach of contract are irrelevant in that they do not relevantly identify any breach of contract, and further do not

identify any relevant remedy. For these reasons, the case founded on breach of contract must be refused probation.

Misrepresentation

[24] This is a tripartite relationship, where the pursuer and defender were contractually bound, in certain circumstances, to appoint a third party valuer to fix a monetary value of the defender's shareholding. The defender alleges misrepresentation by the pursuer to the valuer, leading to a substantial undervaluation. That misrepresentation is said to amount to a delict which has caused loss to the defender, for which the defender is entitled to damages.

[25] Counsel's researches did not reveal any authority which recognised a duty of care arising out of this tripartite relationship. Senior counsel for the defender candidly acknowledged that this was an unusual case of misrepresentation for which he could discover no direct authority. The argument proceeded by analogy with existing duty of care situations with due regard to the restrictions on when a duty of care can be said to arise.

Misrepresentation case - pursuer

[26] The Dean of Faculty submitted that this can only be a case of negligent misrepresentation. Fraudulent misrepresentation requires to be specifically and clearly averred and no such case is advanced. Innocent misrepresentation does not sound in damages. By elimination, therefore, this can only be a claim for negligent misrepresentation.

[27] It followed that the defender must identify a duty of care which had been breached. As neither party could cite authority showing a duty of care in this situation, it was necessary to start from first principles. Following *Robinson* v *Chief Constable of West Yorkshire Police* [2018] AC 736, it is necessary to consider the closest analogies in the existing law, with

a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. In such cases the court will weigh the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable (*ibid* at para [29]).

[28] In attempting to find analogous situations, where a duty of care may arise notwithstanding that parties are at arms' length, an obvious (but admittedly imperfect) analogy was the question of duties owed between litigants in a court action.

[29] *Business Computers International Ltd* v *Registrar of Companies and another* [1988] Ch 229 involved a company being wrongfully wound up as it never received notification of proceedings. It brought an action in negligence for failure to exercise reasonable care to see that the registered address was correctly stated. It was held that antagonists, who sought a legal remedy in an adversarial process, owed no duty to each other. It was conceptually odd to superimpose a duty of care on top of the procedural safeguards already available (at p239F-G). That case involved a bipartite relationship.

[30] In *Customs and Excise Commissioners* v *Barclays Bank plc* [2007] 1 AC 181, a freezing injunction over assets held by the defenders was notified to them, but they failed to prevent payments out of the relevant accounts. Lord Bingham observed (at page 190) that an assumption of responsibility may be identified in some cases, but is an objective test. Lord Rodger observed (at paragraph 47) that the parties to contested court proceedings are entitled to treat the other side as opponents whom they wish to vanquish, and owe them no duty of care. That extends also to their professional representatives, who owe no duty to the other side. The Dean of Faculty observed that, either way, assumption of responsibility was the touchstone for whether there was a duty of care in pure economic loss cases. No such assumption was either averred or supported in the present case.

[31] In *Commissioners for Her Majesty's Revenue and Customs* v *Charles* [2019] EWCA Civ 2176, a Court of Appeal case, damages were sought in respect of misleading information supplied by HMRC to a tax tribunal. A duty of care was rejected, at least in cases where there had been no wilful or reckless misleading of a court. Such a duty would have profound effects on the preparation of court cases.

[32] Similar analogies might be made with arbitration, or expert determination, but there was nothing in such case law which would assist the defender.

[33] There were three reasons why a duty of care should not arise in this situation. The first is that there is a clear conflict of interest. The second was that there was no question of reliance, reasonable or otherwise, by the defender on any actings by the directors. The third reason is the contractual context of the actings.

[34] Regarding a conflict of interest, Article 5.2.2, the valuation provision, only applied where the parties could not agree a valuation. The deemed seller would wish a high valuation. The directors of the company would wish a low valuation. It was no answer to say that the company would not normally have an interest, as the Articles provide for purchase of shares by the company in certain circumstances. The parties are in conflict. In *Jain* v *Trent Strategic Health Authority* [2009] 1 AC 853 a health authority wrongfully applied under statute to have a nursing home shut down, ruining the business. The House of Lords held there was no duty of care in situations where conflicting duties might be owed to different interested parties. In the present situation the pursuer company might be required to purchase the shares if there were no buyer, so there was a conflict in whether a low or high valuation was awarded. The directors could not owe this duty both to a shareholder and a company. In *Macleod* v *Crawford* 2010 SLT 1035 the court recognised the conflict of interest between a client (whether to take a higher, final offer of damages) and the wider

interests of his family (to preserve a future claim in case of death from pleural plaques). The court recognised that conflict of interest is a major factor in determining whether a duty of care is owed (at paragraph [34]). Here, conflict was a pre-requisite for Article 5.2.2 being triggered. The existence of conflict militated against a duty of care being imposed.

[35] The second factor is reasonable reliance. It is settled that there can be no duty of care unless there was reasonable reliance on the conduct complained of. In *NRAM Ltd* v *Steel* [2018] SC (UKSC) 141, a solicitor acting for a borrower misstated to the lender that a loan was being wholly, rather than partially, redeemed, leading to a discharge of a security. The Supreme Court held that assumption of responsibility remained the foundation for liability for misrepresentation. It was necessary for a representee to establish that it was reasonable for him to have relied upon the representation and that the representor should reasonably have foreseen that he would do so. In an arms' length transaction a solicitor did not generally owe a duty to the opposing party. In the present case, not only was there no question of an assumption by the directors of responsibility to the pursuer, but none was pled. There could be no question of reliance on what was said. Even if the valuer had relied on the statement, that did not mean the defender could be said to have relied upon it.

[36] The averments about reliance remained unchanged from the earlier stages of this case, and had already been found to be inadequate.

[37] The third factor which indicated that this was not a duty of care situation is the contractual setting. In the case of Articles of Association, there might be claims in both contract and delict, but it is counter-intuitive to find there is a more extensive duty in delict than there is in contract. The Dean of Faculty referred to *Robinson* v *P E Jones (Contractors) Ltd* [2012] QB 44, where a purchaser raised an action against a house-builder for faulty construction of chimney flues. The Court of Appeal reviewed the authorities. It found that

in a case of economic loss the relationship was primarily to be governed by contract, and a co-extensive duty in tort would not be created in the absence of any assumption of responsibility by the builder. The law of tort created a different and less extensive duty, which was to take reasonable care not to cause personal injury or damage to other property. Counsel also found support for this in *Euroption Strategic Fund* v *Skavinska* [2013] Bus LR Digest and *Halvorson* v *Persimmon Homes* [2018] WLUK 600.

[38] The defender here was relying on intentional delicts, for which no duty of care is required, and accordingly the analysis was flawed. No intentional delict was pled.

Misrepresentation case - defender

[39] For the defender, senior counsel submitted that no right would arise against the valuers, AAB, who would be able to say that they acted on information given to them. Any action would require to be against the pursuer company itself.

[40] Accepting that a case based in misrepresentation in these circumstances was unusual, that was not sufficient to deny probation to these averments. A novel duty of care situation can only be decided after the facts are known, not on the pleadings. It is not possible to assess a duty like this without evidence. The defender offered to prove that there was a duty not to mislead a valuer.

[41] Counsel found himself broadly in agreement with the propositions advanced for the pursuer, but submitted that the effect of *Robinson* v *Chief Constable* (above) was that the matter should be decided at proof, unless obviously no duty of care situation arose. There was enough in the pleadings to justify proof. It was enough that the comments were calculated and intended to affect the valuation. The averments were responsibly made following recoveries under a specification. The wrongful acts include not only providing

wrong information but also in preventing the valuers from meeting the defender. That would be sufficient to find that there had been an assumption of responsibility for the accuracy of the information, by the directors to AAB.

[42] The intention of parties is a red herring. It is sufficient for a duty to be imposed that a misrepresentation is made, with the knowledge that it is likely to be relied upon. The contract expects honesty, as he put it.

[43] Reference was made to *Hickman & Co* v *Roberts and Others* [1913] AC 229. A building contract provided that the decision of the architect on all matters would be final. The architect inappropriately allowed his judgment to be influenced by the building owners and delayed issuing certificates as a result. While the detail of that case did not assist, the overall justice of not allowing reliance on the certificate was correct. The architect had acted to the instructions of one party in circumstances where he should not, and therefore the certificate was invalid. It was enough that he was influenced, so to render his certificate worthless. It was noteworthy that no reduction of the certificate was contemplated.

[44] While counsel agreed that analogous situations would assist in consideration of a duty of care, it was entirely inapposite to draw a comparison with litigation. This was a contractual situation, not a litigation, and was not adversarial. *Hickman* simply set out the consequences, that a certificate can no longer be relied upon.

[45] In relation to assumption of responsibility, the reliance was by AAB, not the defender, but the latter bore the consequences. This was a sound basis from which to draw an explanation at proof. A novel duty of care situation is a good reason to go to proof. Counsel rebutted the proposition that there was any conflict of interest here. There was no reason to distinguish between reasonable reliance by a party and that of an intermediary. In

relation to the contractual context, this problem was extraneous to the contract, which simply did not deal with a wrongful valuation.

Decision on misrepresentation

[46] In respect of the case based on misrepresentation, the central elements which the defender offers to prove are :

(i) the terms of the Articles, which require that "the directors shall instruct the Auditors to determine and certify the Fair Value of the [defender's shares]" ;

(ii) that Fair Value is "the price which the Auditors state in writing to be their opinion of the fair value of the Shares concerned, calculated on the basis that: (a) the Fair Value is the sum which a willing buyer would agree with a willing seller…(d) if the Company is then carrying on business as a going concern, it will continue to do so:…";

(iii) that the Auditors act only as experts and not as auditors, and their decision is to be final and binding except in the event of fraud or manifest error;

(iv) that the pursuer was under an obligation to ensure that the evaluation was carried out on the correct basis and in accordance with the Articles and not based on materially incorrect information.

(v) the method of valuation adopted by AAB gave rise to a substantially erroneous under-value of the shares amounting to manifest error;

(vi) the asset-based valuation method adopted was manifestly incorrect because, amongst other reasons, the pursuer was continuing to trade;

(vii) the pursuer sought to and in fact did exert considerable influence on AAB by stating the future viability of the company was in doubt;

(viii) the statement relied upon was a director, in a meeting with AAB, stating that the company was "teetering" and there was "no way" anyone would be willing to buy shares in the pursuer;

(ix) that this statement was untrue, was relied upon by AAB, and was their justification for approaching the valuation on an asset based valuation basis;

(x) it was calculated to have that effect;

(xi) AAB were not acting independently but were acting in the sole interests of the pursuer to undermine the valuation of the defender's shares;

(xii) their assessment does not meet appropriate accounting standards, was not based on independent investigation, and can only have been justified by incorrect reliance on the pursuer's misrepresentation.

[47] There is no case directed against the auditors, doubtless due to the potential difficulties with liability framed to by the defender's senior counsel. Accordingly, in considering the case of misrepresentation brought against the pursuer, criticism of the auditors' actings is for background information only, to explain the mechanism whereby loss was incurred. A practical difficulty in assessing the pleadings is that the case against the defender is interwoven with a series of complaints about the methodology and impartiality of AAB. It is necessary to leave aside those grounds of complaint which appear to direct a case against AAB, and consider only those grounds of fault which might be laid at the door of the pursuer company.

[48] The starting point for a case based on misrepresentation causing economic loss is assumption of responsibility. In a tripartite relationship, and acknowledging the dearth of authority on the point, it will be particularly important to identify to whom that responsibility is undertaken. The defender avers that the responsibility was undertaken to

him, under the Articles. Counsel were in agreement that this appears to be a novel duty of care situation, if it is one at all, and *Robertson* (above) sets out the criteria for approaching such a question.

[49] The proposition is that the pursuer, acting by its directors, owed a duty of care to the defender not to make a wrong statement about the company. In my view there are no grounds on which to find that the pursuer breached any such duty of care towards the defender.

[50] The starting point for a novel duty of care is assumption of responsibility by one party towards another. There is "no better rationalisation for liability in tort for negligent misrepresentation than the concept of an assumption of responsibility. …this concept remains the foundation of the liability. (*NRAM* v *Steel*, above, at paragraph [24]). That reliance must be reasonable, reasonableness being "central to the concept of an assumption of responsibility".

[51] The tripartite nature of this relationship means it is necessary to be careful with the use of terms. The case relies only on a duty of care owed by the pursuer to the defender. Accordingly, any "reliance" referred to must be reliance by the defender. Although in ordinary parlance the auditors might rely on what the pursuer's directors said, their reliance is not the necessary reliance to create a duty of care between the pursuer and the defender. Any "reliance" by the auditors is no more than a way of describing the causal connection between a breach of duty by the pursuer to the defender, and the mechanism leading to the defender's loss.

[52] I accept the pursuer's submission that this can only be a case of negligent misrepresentation, although the pleadings do not use that term. Innocent misrepresentation

does not sound in damages. Fraudulent misrepresentation demands careful and specific allegations of fraud, which are not made.

[53] Why, then, did a director of the pursuer owe a duty in these circumstances, to this shareholder, not to made negligent misrepresentations? In my view there is no sound case, either on the factual averments in this case or on wider principle.

[54] In *NRAM Ltd* v *Steel*, above, the Supreme Court, in holding that assumption of responsibility remained the foundation for liability for misrepresentation, stated that it is necessary for a representee to establish that it was reasonable for him to have relied upon the representation, and that the representor should reasonably have foreseen that he would do so. Once it is recognised that it is the defender's reliance, not that of the auditors, which is important, the pleadings do not set out any such case. It is nowhere stated that the defender relied on a duty of care by the pursuer.

[55] I note in passing the averment that:

> "… it is admitted that the [pursuer] instructed AAB to carry out a valuation under explanation that the pursuer was under an obligation to ensure that the valuation was carried out on the correct basis and in accordance with the Articles as hereinafter condescended upon and not based on materially incorrect information."

An obligation to "ensure" is materially more stringent than any duty of care, and "obligation" is opaque as to whether it is an obligation in contract or delict. In context, it appears the reference must be to contract, and to refer only to the process of instruction of the valuation.

[56] The pleadings set out in detail why the method of valuation adopted by the auditors gave rise to a substantially erroneous under value of the shares, and was disconform to the Articles. It is averred that their methodology was "accordingly in defiance of their instructions", as well as being in manifest error.

[57] Thereafter:

> "The pursuer sought to (and in fact did) exert considerable influence upon AAB by stating that the future viability of the company was in doubt. At a meeting on or around 28th March 2018 (at which the defender was not present), the intended valuation was discussed. Fraser Jackson told AAB that the termination notice had been served subsequent to the Valuation date. Malcolm MacPherson (a Director) told AAB that the pursuer was "teetering" and that there was "no way" anyone would be willing to buy shares in the pursuer. The statement to the effect that the company was not viable was untrue. It was relied upon by AAB, and was their justification for approaching the valuation on an ABV basis. It was calculated by Mr MacPherson to influence the valuation to be carried out by AAB."

[58] The pleadings go on to say that the auditors were acting in the sole interests of the pursuer to undermine the valuation obtained by the defender, and that they failed to make an independent assessment of the status of the company. There was no independent evidence that the director's statement was true. Had they investigated they would have "discovered that the contentions of the pursuer's directors were false".

[59] Two observations can be made. The first is that this complaint is not expressly based on the breach of any duty owed by the pursuer to the defender, does not set out any reliance by him, and does not state that there was any assumption of responsibility towards the defender. That is sufficient to exclude any delictual case based on breach of duty of care.

[60] Secondly, the reference to "false" contentions, and to the deliberate attempt to influence the auditors, tends to reveal that this allegation goes beyond mere negligent misrepresentation. The defender has pled a case based on breach of duty, but in fact the real complaint appears to be of a deliberate attempt to mislead. That would not be a duty of care situation – a deliberate wrong does not require any duty of care to be established. Such a case is beyond negligent misrepresentation, and could only be a case of fraudulent misrepresentation. Fraud requires direct accusation and specific pleading, and this is not done. That too is sufficient for dismissal of this part of the case. Even if the accusation falls

short of fraud, it is enough that it goes beyond any form of negligence. No relevant case of negligent misrepresentation is pled. That may be because the principal wrongdoing, if it exists, is laid at the door of the auditors.

[61] Accordingly, on the averments, no relevant case is advanced, as no duty of care situation was created. Even on wider principles, however, no such duty of care would arise.

[62] I accept the parties' analysis of *Robinson* v *Chief Constable of West Yorkshire Police*, above, that it is necessary to consider the closest analogies in the existing law, with a view to maintaining the coherence of the law, in identifying whether the existence of a duty of care would be just and reasonable (*ibid* at para [29]).

[63] One such, admittedly imperfect, analogy might be with duties owed between litigants, as the pursuer suggests. In *Business Computers International Ltd* v *Registrar of Companies* (above), when it was held that antagonists engaged in an adversarial process, owed no duty to each other, it was observed that it was conceptually odd to superimpose a duty of care on top of the procedural safeguards already available (at p239F-G). Similarly, in *Customs and Excise Commissioners* v *Barclays Bank plc* (above) no assumption of responsibility was found to exist in a litigation context. Parties to contested court proceedings are entitled to treat the other side as opponents whom they wish to vanquish, and owe them no duty of care. That extends also to their professional representatives, who owe no duty to the other side. In *Commissioners for Her Majesty's Revenue and Customs* v *Charles* (above), any duty of care in relation to misleading information was rejected, at least in cases where there had been no wilful or reckless misleading of a court. It is not enough to assert a logical chain of causation between the event and the result. There is no support in the authorities for a duty of care in this situation. That is particularly so when the tripartite nature of the present relationship is considered.

[64] More substantially, there are authorities which point the other way. It is unlikely that a duty of care will arise in a situation where conflicting duties would arise to different parties. The directors of a company have duties to the company and to shareholders. In a situation like the present, where in some circumstances the pursuer may require to acquire the shareholding under the Articles, there is at least a potential conflict in assessing the value of those shares.

[65] Quite apart from the conflict of interest, it is necessary to have regard to the wider context giving rise to the present dispute. That is solely a contractual context, and the counterclaim depends on the misapplication of an agreed contractual valuation mechanism. The Articles do not set out any duties on the parties other than to operate a mechanism to appoint valuers. What the defender argues for is a more extensive duty in delict than there is in contract. I accept that *Robinson v P E Jones (Contractors) Ltd* (above) is a helpful authority here, where the Court of Appeal found that in a case of economic loss the relationship was primarily to be governed by contract, and a co-extensive duty in tort would not be created in the absence of any assumption of responsibility by the builder. It held that the law of tort/delict created a different and less extensive duty, which was to take reasonable care not to cause personal injury or damage to other property. The proposition is supported by *Euroption Strategic Fund* v *Skavinska* (above) and *Halvorson* v *Persimmon Homes* (above).

[66] Where there is a contractual relationship amongst shareholders, any reasonable reliance would require to spring from the operation of the contract itself. It is difficult to see that this would require the law to imply a duty of care. In any event, in a case such as this which seeks damages for economic loss on the basis of a misrepresentation, there would require to be a representation of some sort to the claimant. None is pled here. Any

representation, accurate or otherwise, was made to a third party valuer. Further, there is no averment that the defender relied on such a statement. The defender was not involved. There is no indication the defender even knew that the statements had been made. There could not be any reliance. The defender does not satisfy the *NRAM Ltd* v *Steel* requirements for a duty of care. Further, where there is no reliance, the question of reasonableness on reliance cannot arise.

[67] Finally, I agree with the pursuer's submission that there is no relevant case that the pursuer's directors owed a duty of care not to make wrong statements. This was a contractual situation where the valuer was appointed to act independently, was subject to a well-defined regime which set out the basis upon which they were to make the valuation, and whose duties were clear. That is not to say that the directors would be entitled to mislead the auditors, but that case would not rely on negligence or a duty of care, and no such case is pled. The difficulty is that the defender asserts there has been a breach of a duty of care, in a situation where the directors have correctly appointed a valuer, and correctly directed the valuer to the terms of the Articles which regulate the valuation. The defender referred to Clerk and Lindsell on Torts at paragraph 17-02, which discusses fraud:

> "Damages may, of course, be awarded for a misrepresentation even if it is not fraudulent… since the decision of the House of Lords in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd*, it has been clear that misrepresentation can give rise to liability in the tort of negligence at common law, at least where there is something that can be construed as an acceptance of responsibility for the truth."

[68] That last element is missing here. There is no mechanism whereby the directors could be fixed with acceptance of responsibility. There is no explanation as to why they were not entitled to give any opinion they wished. Indeed, the directors might be expected to be partisan in a conflict situation, but they were entitled to be secure in the knowledge

that a fair, independent valuation procedure was already instructed, in a procedure in which they played no part.

[69] If the complaint is truly that the directors fraudulently misled the valuers, that is a different case, and is not advanced.

[70] There is therefore no relevant case based on misrepresentation. This leads, tellingly, to no necessary interference with the existing averments, and only to repelling part of a plea-in-law. Had the breach of contract case remained, I would have repelled the first plea-in-law only to the extent of "the misrepresentations by the pursuers and separately through" and substitution of "the pursuer's".

Disposal

[71] As neither basis of claim has survived debate, the counterclaim falls to be dismissed. Counsel agreed that expenses should follow success. I will therefore find the defender liable to the pursuer in the expenses of preparation for and attendance at the present debate, and grant sanction for the employment of senior counsel. Parties agreed the principal action should be appointed to a proof before answer. I will do so, and fix further incidental procedure.