**OUTER HOUSE, COURT OF SESSION**

**[2022] CSOH 9**

**CA64/19**

OPINION OF LORD ERICHT

In the cause

GLASGOW CITY COUNCIL

Pursuer

against

FIRST GLASGOW (NO. 1) LTD

Defender

**Pursuer: Smith QC, Gardiner; BLM**
**Defender: Dean of Faculty, Pugh; Clyde & Co (Scotland) LLP**

27 January 2022

**Introduction**

[1] On 22 December 2014 a bin lorry owned and operated by the pursuer crashed in the centre of Glasgow at George Square. It was driven by the pursuer's employee Henry (also known as Harry) Clarke. Mr Clarke suffered a vasovagal syncope immediately prior to the incident. He maintained that he had suffered a faint, or blackout, causing him to lose consciousness, the vehicle to lose control, and death and injury to pedestrians. A number of claims were intimated to the pursuer by those injured and the families of those killed. The pursuer reached settlements with the claimants but now seeks to recover the amount paid under these settlements (including legal costs and expenses) from the defender, a previous

employer of Mr Clarke, on the ground of the defender's negligence in providing an employment reference to the pursuer. The sum sued for in this action in respect of the settled claims is £6,555,872.

[2] This case raises difficult legal questions such as whether the giver of a reference owes a duty of care to the recipient of the reference rather than just to the subject of the reference, whether the giver of a reference who has received doctor's advice that the subject of a reference is fit to drive is nevertheless obliged to disclose unfitness to drive, and whether a party who has a potential defence to a case but settles it anyway can recover from a third party the amount paid in settlement.

[3] There is however a prior question which is one of fact. Was a reference given at all, and if so what did it say? The problem for the pursuer is that it has not produced the reference. It could not find the reference, or any copy of it, in either its paper file or electronic records. Nor does any copy of the reference exist in the defender's files and records. No witness remembers seeing the reference or what it said.

[4] Notwithstanding these difficulties the pursuer's case is that a reference was given to the pursuer by the defender in the form of a particular standard form (App7) issued by the pursuer which contained pre-printed questions and that the defender answered these questions and in doing so acted negligently and made negligent misstatements.

**Fatal Accident Inquiry**

[5] A Fatal Accident Inquiry was held into the incident ([2015] FAI 31). It is however important to note at the outset that my decision in this case is based on the evidence which was led before me in this case, and not on the findings of the Fatal Accident Inquiry. The determination in the Fatal Accident Inquiry is inadmissible and may not be founded upon in

the current proceedings (Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 section 26(6)). In any event, the evidence available to me in relation to the reference was fuller and more detailed than was available at the time of the FAI. For example, some evidence from the pursuer's electronic records was not available until shortly before the date originally set down for proof in this case, thus necessitating the proof to be discharged to allow further investigation, resulting in the lodging of a substantial number of further productions and expert reports

**The pursuer's case**

[6] The pursuer's averments can be summarised as follows. It was the pursuer's invariable practice to send previous employers an App7. Question 4 on the form asked "Please give details of any sickness absence that the applicant has had in his/her last two years of employment with you." Question 7 on the form stated: "Please give any other relevant information about the applicant that you feel a prospective employer should be aware of eg live disciplinary actions etc" Mr Clarke had been absent from work due to illness after an incident on 7 April 2010 when he lost consciousness in his bus. The reference was supplied by Frank McCann, or Robert Donnelly, or a member of the defender's human resources staff or another employee. Mr McCann or another member of staff provided a reference by completing the App7 but did not include the illness absence of state, nor that the reason for absence had been a vasovagal attack, nor that Mr Clarke had suffered a fainting fit and lost consciousness while in charge of a bus in April 2010. The defender should have stated in response to question 4 that he had a period of sickness for about three weeks and the reason for absence was vasovagal attack, and in response to Question 7 that he had suffered a fainting fit and lost consciousness when in charge of a bus. If these

matters had been disclosed on the form Mr Clarke would have been suspended and disciplined for dishonesty and it is likely his employment would have been terminated or he would have been moved to a non-driving job.

[7] At proof, the pursuer narrowed its case to the following:

(i) In accordance with their usual procedures at the time, once a decision was taken to engage Mr Clarke, but subject inter alia to appropriate references being obtained, a request was sent by the pursuers' HR department to the defender's HR requesting a reference.

(ii) That was by post, sending a stamped addressed envelope and an App7.

(iii) The App7 was received by Mrs Thompson and passed by her to Mr McCann.

(iv) Mr McCann did not immediately return the form. At some stage Mr Clarke was requested to chase the reference up. He did so, and was advised that the contact point should be Darryl Turner. However, Mr Turner was never requested to provide the reference.

(v) Mr McCann did, however, provide the reference. He did so on the App7 form.

(vi) The App7 failed to mention the absences in April into May 2010. It is likely that no mention was made at all of the absences.

(vii) This gave the misleading impression, standing the terms of the question posed, that there had been no absences whatsoever during the two years prior to termination of employment with the defender.

(viii) Had the form not given that misleading impression, Mr Clarke would not have been employed by the pursuer as he was a risk to them; and that risk was one

whereby the operator of a vehicle may pass out at the wheel and cause injury to themselves and to others.

[8] Senior counsel submitted that a duty of care is owed by the provider of a reference to the recipient of a reference as well as to the subject of the reference (*Spring* v *Guardian Assurance* [1995] 2 AC 296, *Bartholomew* v *The London Borough of Hackney* [1999] IRLR 246. The duty to both is that, where a reference is provided, the reference should be true and accurate in all material respects and should not by omission be misleading on any material matter. The provider of a reference is allowed to decline to provide a reference, or to provide a reference which limits the information provided, as long as the first two principles above are not breached. It was reasonably foreseeable that a driver who had fainted when in charge of a bus might do so again and could cause loss, injury and damage to his passengers and the general public and it was not necessary for the exact circumstances of an accident to be foreseen (*Hughes* v *Lord Advocate* 1963 SC (HL) 31). By settling the claims the pursuer had not failed to mitigate its loss (*British Westinghouse-Electric & Manufacturing Co* v *Underground Electric Railways Co of London* 1912 AC 673): the pursuer had acted on advice from senior counsel.

**The defender's position**

[9] The defender's position was that in order to succeed the pursuer required to overcome all of the following hurdles, but had overcome none of them.

(1) Standing the failure to produce the reference upon which the action is periled, the pursuer must establish that it may competently bring these proceedings notwithstanding the "best evidence" rule.

(2) The pursuer must prove that it asked the defender to provide a reference, and that the defender did so.

(3) The pursuer must prove what any such reference said.

(4) The pursuer must establish that the defender, in providing a reference, owed a duty of care to the pursuer. Counsel submitted that the question of whether a duty is owed to the recipient of a reference was a novel question (*Spring* v *Guardian Assurance* [1995] 2 AC 296, *Bartholomew* v *London Borough of Hackney*). It was not fair just and reasonable for such a duty to be owed (*Robinson* v *Chief Constable of West Yorkshire Police* [2018] AC 736). There was no evidence that the pursuer asked the defender for a reference or that it was addressed to the pursuer. The defender's pro forma reference contains a clear disclaimer of legal liability. Former employers would be deterred from giving references *(AJ Allan (Blairnyle) Ltd* v *Strathclyde Fire Board* 2016 SC 304). Mr Clarke deceived both the defender and the pursuer, and there is no duty of care to protect another from the wrongful actions of a third party. A conflict of interest would arise if a duty was owed to both the subject and recipient of a reference (*McLeod* v *Crawford* 2010 SLT 1035).

(5) The pursuer must show that the scope of any such duty comprehended the losses complained of in the present action (*Caparo Industries plc* v *Dickman* 1990 2 AC 605; *Manchester Building Society* v *Grant Thornton UK LLP* [2021] 3 WLR 81, *Meadows* v *Khan* [2021] 3 WLR 147). Counsel submitted that if any duty of care rested with the defender in providing a reference, the scope of the duty did not extend to liabilities incurred by negligent driving four years after the reference was given, in circumstances where the defender had not assumed a responsibility for the

subsequent deceitful conduct of Mr Clarke and an accident caused by driving nearly four years later.

(6) The pursuer must show that the losses complained of are not too remote (*Overseas Tankship (UK) Ltd* v *Miller Steamship Co Pty (The Wagon Mound (No 2))* [1967] 1 AC 617; *Meadows* v *Khan)* . Counsel submitted that the defender was entitled to rely on the advice from Dr Lyons. As the defender was entitled to accept at face value the medical advice that Mr Clarke was fit to drive, with nothing reportable to the DVLA, it could not be said that they should have foreseen he was unfit to drive (*McManus* v *City Link* [2015] CSOH 178 at [73], *Farraj* v *King's Healthcare NHS Trust* [2010] 1 WLR 2139) . The defender did not actually foresee that: in his exit interview he was deemed appropriate to be re-hired in future.

(7) The pursuer must show that any such duty was breached by the defender. Counsel submitted that a reference in the defender's pro-forma would not be negligent.

(8) The pursuer must prove causation. Counsel submitted that on the evidence of the expert witnesses it was not negligent to fail to disclose the April 2010 incident. Further there was no evidence that knowledge of the sickness absence would have led to dismissal of Mr Clarke by the pursuer.

(9) The pursuer must show that the settlements with third parties that form the losses complained of were reasonable ones in all the circumstances (*Biggin* v *Permanite* [1951] 2 KB 314. *Siemens Building Technologies FE Ltd* v *Supershield Ltd* [2009] EWHC 927 (TCC), [2010] EWCA Civ 7 *Seven Seas Properties* v *Al-Essa* [1993] 1 WLR 1083). Counsel submitted that the settlements were not reasonable as

automatism pleas were not taken (*Waugh* v *Allan*, 1963 SC 175 (upheld on appeal, 1964 SC(HL) 102) *Stewart* v *Payne, McQuade* v *Clarke* 2017 JC 155).

**Witnesses**

[10] Neither party called Mr Clarke as a witness.

***Pursuer's witnesses as to facts***

(1) Geraldine Ham is HR Manager for Neighbourhood & Sustainability Services for Glasgow City Council. She had not been personally involved with obtaining a reference for Mr Clarke, but gave evidence about the pursuer's recruitment practices in general and the searches she had made for a copy of a reference for Mr Clarke after the incident in George Square.

(2) Jean Walker (previously McEwan) was the pursuer's Assistant HR Manager.

(3) Leeann Doherty worked for the pursuer in its Central Business Services Recruitment. She gave evidence as to the pursuer's recruitment procedures, and in particular her involvement in the recruitment of Mr Clarke.

(4) Ian Miller is a solicitor employed by the pursuer. He gave evidence about the circumstances of the settlement of the families' claims.

(5) Julie Mortlock is a claims controller working for the pursuer's insurers QBE Insurance and gave evidence about the circumstances of the settlement of the claims brought by the victims and their families.

(6) Ian Buick is now retired but had previously been a transportation and logistics manager with the pursuer. He was the Recruiting Manager in respect of the recruitment of Mr Clarke.

(7) Dr Gerard McKaig was Mr Clarke's GP and gave evidence about a consultation with Mr Clarke on 7 April 2010.

(8) Dr John Langan was a GP at Dr McKaig's practice and gave evidence about a consultation with Mr Clarke on 3 and 22 April in Dr McKaig's absence on holiday.

(9) John Stewart is an inspector employed by the defender. He gave evidence about the incident on 7 April 2010.

(10) Dr Kenneth Lyons was an independent occupational health doctor working on behalf of the defender who examined Mr Clarke on 8 April 2010.

(11) Dr Joanne Wilcox was an independent occupational health medical adviser who examined Mr Clarke on 6 December 2011 on behalf of the pursuer.

(12) Dr Peter Warnock was employed by BUPA as the clinical lead for their occupational health services in Scotland and was Dr Willock's supervisor. He had no personal involvement with Mr Clarke or with Dr Willock's assessment of Mr Clarke, but gave his opinions about standard practice for a doctor filling in a D4 form for the DVLA and about what Dr Warnock would have expected the DVLA to do in response to a form which disclosed that Mr Clarke had lost consciousness at the wheel of a vehicle, and about what Dr Warnock would have done if he had been consulted at the time (which he had not been) about Mr Clarke's case. I did not find his evidence to be of assistance. It was in the nature of expert opinion evidence, but he was not put forward as an expert and indeed would not have been an appropriate expert as he was not independent, being the clinical lead for BUPA which was providing occupational health services to the pursuer and being Dr Willock's supervisor.

(13) Stewart Young is a customer operations manager with the pursuer who assisted in the pursuer's internal search for a copy of a reference for Mr Clarke.

(14) Andrew Gordon is an IT specialist and employee of the pursuer who designed the pursuer's Pulse system.

***Defender's witnesses as to facts***

(1) Jim Leslie is retired but was formerly employed by the defender as a human resources manager. He had no personal involvement with Mr Clarke but gave general evidence about the defender's HR procedures including the giving of references.

(2) Frank McCann is a retired former employee of the defender. He was manager of the Parkhead depot where Mr Clarke worked.

(3) Robert Donnelly is retired but formerly worked for the defender as assistant depot manager to Mr McCann, depot manager.

(4) Stuart Kennedy is employed by the defender as a recruitment and training manager and had been Mr Leslie's assistant. His evidence was agreed by joint minute.

(5) Denise Thompson was a payroll supervisor at the Parkhead depot. She had arranged a medical referral in relation to the April 2010 incident and spoke in general terms about her role at the depot.

***Expert witnesses***

[11] Both parties had expert computer forensics witnesses in relation to the pursuer's Pulse electronic workflow system. The pursuer's expert was James Borwick and the

defender's was Johnathan Munsey. The expert evidence on this matter was not controversial and was agreed by joint minute.

[12] Both parties led an expert employment witness. The pursuer's expert was David McNaught and the defender's witness was George Wilson. The employment experts proceeded on the hypothesis that the defender had given a reference to the pursuer. They addressed practice as to the giving of references, data protection, the part a reference plays in the recruitment process, what a new employer would wish to know from a reference (particularly for a driving job), standard practice for the content of references, guidelines from various institutions, how a reasonable employer would have answered Questions 4 and 7, whether it was essential that a reference mention that Mr Clarke was absent for work because of a vasovagal attack when in charge of a bus. While there was considerable disagreement between the experts on these issues, both recognised that matters of fact and matters of law were matters for the court.

**Objections to evidence**

[13] The defender objected, under the best evidence rule, to parole evidence of the reference. I heard evidence under reservation and deal with this objection below.

[14] I also heard evidence under reservation in respect of Mr Clarke's last day of work, 28 December 2010, when it was said he had run the bus ahead of the timetable and that this could constitute a disciplinary offence. I uphold the defender's objection to that evidence. The question of what Mr Clarke did on his last day, and whether that constituted a disciplinary offence, forms no part of the pursuer's case, which is founded solely on what the defender said in the reference about the April 2010 incident.

[15] I also heard evidence under reservation in respect of a fatal accident involving another of the defender's drivers in 2011. I uphold the defender's objection. This was a separate incident involving a different driver in different circumstances and has no bearing on or relevance to the issues in this case.

**Factual background**

[16] Mr Clarke was employed by the defender from 12 October 2008 to 28 December 2010, when he left to take up employment with the pursuer.

[17] On 7 April 2010 Mr Stewart attended at a bus as Mr Clarke had taken ill. A female passenger informed him that Mr Clarke had taken unwell at the stop and blacked out for a few minutes. She specifically described him as passing out when the bus was stationary, rather than when it was moving. Mr Clarke appeared ok to Mr Stewart, but said he was feeling unwell. An ambulance was called. The paramedics gave Mr Clarke the all clear.

[18] Subsequently Mr Clarke was also given the all clear by his general practitioner doctors and the defender's occupational health doctor, who reported to the defender that Mr Clarke was fit to return to bus driving duties.

[19] On 7 April 2010 Mr Clarke was seen by his GP Dr McKaig, who recorded Mr Clarke's explanation of the incident in his medical records as:

> "Had 5 [second] [loss of consciousness] at work, in canteen hot environment no warning signs, felt slightly disorientated on revival then felt fine. Paramedics attended no cvs anomalies, advised vasovagal. On balance I agree, works [doctor] appointment tomorrow"

[20] Dr McKaig's view was that on the basis of the information provided to him by Mr Clarke there was no requirement to inform the DVLA. Had he been informed by Mr Clarke that he had lost consciousness at the wheel of a bus, Dr McKaig would have

referred him for cardiovascular examination and Mr Clarke would have been obliged to inform the DVLA.

[21] On 8 April 2010 Mr Clarke was seen by the defender's occupational health doctor, Dr Lyons. Mr Clarke did not say anything to Dr Lyons about losing consciousness while in a canteen. He described an incident that occurred whilst on board a stationary bus. Dr Lyons had no reason to think that Mr Clarke was not fit to drive, but needed that to be confirmed by his GP. Dr Lyons wrote to the GP Practice on 8 April advising that Mr Clarke had been off driving duties following an episode of loss of, or impaired, consciousness while on a stationary bus and asking the GP for a medical report including the prognosis regarding a return to bus driving. In the letter Dr Lyons referred to the DVLA guidelines on fitness to drive which set out two categories. The first was a "simple faint where there are definite provocational factors with associated prodromal symptoms and which are unlikely to occur whilst sitting or lying", in which case there would be no restriction on bus driving and no need to inform DVLA. The second was "loss of consciousness/ loss of altered awareness likely to be unexplained syncope low risk of occurrence" in which case there would be a three months suspension from bus driving and the DVLA should be informed.

[22] In Dr McKaig's absence on holiday, Dr Langan of Mr McKaig's GP practice saw Mr Clarke on 13 April 2010 because he needed a sick line. Dr Langan noted in the medical records "vaso vagal attack bus driver awaiting letter from employer" and issued a sick line for 14 days.

[23] Having received the awaited letter from Dr Lyon, Dr Langan saw Mr Clarke again on 22 April in order to write a medical report in response to Dr Lyon's request. In accordance with his normal practice Dr Langan went through Dr Lyon's letter with Mr Clarke. He could not remember there being any discussion about whether the incident was on a bus or

in the canteen. He pointed out that Dr Lyon's letter had referred to the incident being on a bus, rather than being at the wheel of a bus. In Dr Langan's view, on the basis of the information presented to him by Harry Clarke, there was no requirement to inform the DVLA. If Mr Clarke had told him that he had lost consciousness at the wheel, in Dr Langan's view that would have been a different set of circumstances and he would have checked the DVLA guidance and made a cardiology referral. On 26 April 2010 Dr Langan reported to Dr Lyons as follows:

> "This gentleman was waiting to have his lunch in a hot environment. He felt light-headed and then lost consciousness for a short length of time. It was felt by the paramedics attending him that this was a simple faint and they did not take him to hospital.
>
> No investigations are planned and I think he is unlikely to have another one. I think he is fit to return to work as a bus driver."

In the witness box Dr Lyon explained that this letter from Dr Langan constituted a diagnosis and that he was not in position to disagree with it. He also pointed out that there was no discrepancy on the face of Dr Langan's letter as to location of the incident: the letter referred to a "hot environment" without specifying a hot bus or a hot canteen.

[24] On 29 April 2016 Dr Lyons reported to the defender as follows:

> "**Medical history**
>
> The background to [Mr Clarke's] medical condition is in my medical report of the 8th April 2020. Mr Clarke has been off driving duties for the past 3 weeks. He told me he that he had had an episode of impaired, or loss of, consciousness while at work recently. The episode lasted about 5-10 seconds, according to an eye witness account. He had no particular warning of the event although he was aware of feeling warm. An ambulance was called and he was examined on the bus by paramedics, who did not identify any particular abnormality. The Paramedics made a diagnosis of a vasovagal attack, or fainting episode. He attended his GP later that day and his GP agreed that he did not need inform the DVLA.

> **Current symptoms**
>
> When I last saw Mr Clarke on 8th April he denied any ongoing symptoms. He indicated that he was keen to return to work. There did not appear to be any features suggestive of a seizure.
>
> **Examination**
>
> The blood pressure, heart rate and rhythm, and heart and lung sounds were all normal when I examined him on 8th April 2010.
>
> **GP Report**
>
> I wrote to his GP and I have now received Dr Langan's reply, dated 26th April 2010, in which Dr Langan indicates that the diagnosis was a 'simple faint' and that 'he is fit to work as a bus driver.'
>
> **Fitness for work**
>
> Mr Clarke is therefore fit to return to bus driving duties."

Having been passed fit to return to work, Mr Clarke then returned to work on 4 May 2010.

[25] It was a matter of agreement that the defender was aware as at 4 May 2010: (i) that Mr Clarke had likely suffered a vasovagal attack; (ii) that it had occurred whilst he was in control of a bus, stationary at a bus stop; (iii) that it resulted in four weeks' absence; and (iv) that Mr Clarke had been medically examined and that he had been passed fit to return to work.

[26] In July 2010 Mr Buick, the pursuer's transportation and logistics manager, required further drivers. The pursuer launched an exercise to recruit a number of drivers (the "Recruitment Exercise"). There were 32 applicants shortlisted of whom 25 were successful. The exercise was conducted by the pursuer's HR and CBS Recruitment departments. Mr Buick was the Recruiting Manager for the purposes of the exercise, and interviewed the candidates.

[27] The pursuer operated a workflow system, known as the Pulse system, to manage the indexing and electronic storage of digital information that related to work processes such as payroll and recruitment. The Pulse database was used to record the steps in the Recruitment Exercise. When recording the process of a recruitment exercise the Pulse system retains a summary of all key dates and times for the duration of the exercise. The Pulse system lists the key stages in the recruitment exercise and the dates each stage is marked as completed by a user.

[28] Letters and spreadsheets completed for a recruitment exercise can also be saved in the Pulse server as attachments. In relation to the 2010 Recruitment Exercise a spreadsheet (the "Spreadsheet") was maintained to track *inter alia* the receipt of references. The Spreadsheet was not part of the Pulse system but a separate excel document. As the recruitment exercise progressed, the spreadsheet was from time to time updated and uploaded to Pulse. The Spreadsheet was created on 9 December 2010. On 24 February 2011 it was updated at 11.49 and uploaded to Pulse at 11.50. It was last saved at 15.45 on 25 March 2011.

[29] The Spreadsheet is an Excel workbook with three worksheets called "Updated", "Further info" and "further info 2". The "Updated" worksheet was kept up to date as the recruitment exercise proceeded. The other worksheets were not. So for example although in the final version of the Spreadsheet on 25 March 2011 the "further info" worksheet is unchanged from the previous version and still states that both references for Mr Clarke are "still outstanding" this is superseded by the "Updated" worksheet which has been changed to state "Received direct from RM [ie Recruiting Manager]"

[30] On 14 July 2010 Mr Clarke applied to the pursuer for a job as Land and Environmental Driver 2. He was interviewed on 10 September 2010.

[31] On 3 December 2010 the pursuer wrote to Mr Clarke offering him the position of Land and Environmental Driver 2 with effect from 5 January 2011. The offer of employment was subject to the following conditions:

"Satisfactory completion of your pre medical questionnaire.

Satisfactory referees.

Satisfactory Enhanced Disclosure Scotland check."

[32] Mr Clarke handed in his notice to the defender. The defender's employee exit form in respect of Mr Clarke dated 28 December 2010 recorded that he was suitable for re-engagement.

[33] Mr Clarke in his application form gave two referees: Mr McCann of the defender and Mr Steve Alston of DHL. He subsequently substituted Mr Claven for Mr Alston.

[34] On 8 December 2010 the pursuer faxed Mr McCann asking for a reference in the form of an App7.

[35] An App7 is the pursuer's standard reference enquiry form. It contains seven questions. Question 4 on the form asks "Please give details of any sickness absence that the applicant has had in his/her last two years of employment with you." There is a response grid headed with columns headed "From" "To" and "Reason". Question 7 on the form states: "Please give any other relevant information about the applicant that you feel a prospective employer should be aware of eg live disciplinary actions etc"

[36] The Spreadsheet records that a reminder was issued on 20 December 2010.

[37] As part of the application process Mr Clarke completed a health questionnaire, in which he stated he had had seven days absences in the last two years and gave the reason as flu. The pursuer obtained a report on Mr Clarke from its occupational health advisers BUPA dated 20 December 2010. The BUPA report stated:

> "I have assessed the questionnaire and my advice is as follows:
>
> - Based on the information supplied, the employment is suitable for the employee from a health perspective.
>
> - The employee declares 1 episodes [*sic*] of sickness amounting to 7 days off in the past two years."

[38] It was a matter of agreement that on about 21 December 2010 Mr Clarke informed the pursuer that any request for a reference should be e-mailed to Darryl Turner of the defender. This was recorded in the Spreadsheet, which states "Frank McCann (First Group) has informed Henry, any requests have to be emailed to [email address of Darryl Turner of FirstGroup]" The reference to "Henry" is a reference to Harry Clarke.

[39] Mr Clarke commenced working for the pursuer as a grade 2 minibus driver on 5 January 2011. Neither reference had been received by then.

[40] On 12 January 2011 Kim Hughes on behalf of Ms Doherty of CBSRecruitment emailed Lee-Ann Wilson of HR in respect of the 2010 Recruitment Exercise. The email listed 13 candidates and what references were outstanding. It listed both references in respect of Mr Clarke as being outstanding. In respect of the reference from the pursuer the email stated: "Frank McCann (First Group) has informed Henry, any requests have to be emailed to [email address of Darryl Turner of FirstGroup]"

[41] In respect of the reference from DHL the email stated: "Henry having difficulty contacting Steve Alston (DHL). Issued with new referee at DHL." The email went on to say:

> "The above candidates' referees have been contacted on two or more occasions requesting return of a completed reference pro forma to date they have not returned any.
>
> …
>
> Please advise what course of action you require us to take or if you will be contacting the candidates directly."

The reference pro-forma referred to in the email was the App7.

[42] On 12 January 2011 Ms Wilson forwarded the email to Mr Buick asking "Can you speak to each individual who is detailed below [which included Mr Clarke], as their offer of employment is subject to a satisfactory reference."

[43] Mr Buick responded by email on 13 January, stating:

> "The drivers highlighted are based at depots throughout the city; they do not report to Polmadie on a daily basis, contact would have to be made by mobile phone. I am not aware of what an Additional Information Sheet is, or if they can now provide a different referee, therefore I believe it would make more sense for personnel to deal with this matter."

[44] On Friday 14 January 2011 Jean Walker assistant HR manager replied saying "Tried to call you to have a chat can you please call me on Monday."

[45] On 14 January Ms Doherty noted on the Pulse system "Advised by HR that all candidates outstanding references will be asked to chase them up by the Recruiting Manager."

[46] Mr Buick contacted the various candidates to chase their referees. He did as reluctantly as he thought it wasn't his job as an operational manager to do so, and it should have been HR who did this. There was no evidence that he went beyond contacting the candidates and contacted the referees themselves.

[47] On 24 January Ms Doherty noted on the Pulse system "Further email sent to HR with update on all outstanding references, awaiting reply on how to proceed"

[48] The Spreadsheet records that the reference was "escalated again on 24.02.11" This may have been a typographical error which should have stated 24 January rather than 24 February.

[49] On 26 January Mr Buick emailed to Ms Walker, copied to Ms Wilson: "I have contacted every driver regarding difficulties with their references. Please refer to the attached updated spreadsheet."

[50] On 4 March Ms Doherty noted on the Pulse system: "No response made from Service HR –reminder email sent on how to proceed and update if any references have been returned direct to the Service" On 7 March she noted "advised by LES HR, this is being looked into by Recruiting Manager re outstanding references. Will advise once done."

[51] On 9 March Ms Doherty noted in the Pulse system:

> "Recruiting Manager has advised, he has asked all candidates to chase outstanding references and advised them that it is imperative that all references have to be submitted by Friday 18th March".

[52] On Friday 25 March at 3.35pm Ms Doherty noted in the Pulse system "All references now received." At 3.45 that day 25 March 2011 an updated version of the Spreadsheet was uploaded to the Pulse system. In the column for references received it stated "Received direct from RM". In the column "Approved by Mgr [ie Manager]" it stated "25.3.11"

[53] On Friday 25 March 2011 at 3.46pm Ms Doherty emailed Mr Buick under the heading "References Returned" as follows:

> "Dear Recruiting Manager
>
> We have now received all Reference Reports in respect of the undernoted applicants which you should now be in receipt of.
>
> [there followed a list of 24 applicants in respect of the same recruitment round including Mr Clarke].
>
> I would appreciate if you could contact Leeann Doherty..to confirm that you are satisfied with the content of the reports".

The wording of that email was not composed by Ms Doherty but was generated automatically by the Pulse system. Accordingly little weight can be placed on the wording

of the email as evidence as to who precisely had received references or whether prior to the sending of the email the pursuer had formed a view that the references were satisfactory. I accept Ms Doherty's evidence that the email might not have been generated by her and that anyone in her team could have ticked the box generating the email.

[54] Mr Buick replied by email on Monday 28 March 2011 at 8.55am stating "I can confirm that I am happy with the content of all the references"

[55] By letter dated 1 April 2011 the pursuer wrote to Mr Clarke making a conditional job offer. The letter did not state what the offer was conditional upon. Enclosed with the letter was a Statement of Particulars of Employment with job title Land and Environmental Driver 2 with a date of appointment of 5 January 2011.

[56] By application form dated 13 September 2011 Mr Clarke applied for a position with the pursuer as a Land and Environmental Driver 3 (Nightshift) driving gritting vehicles. His application was successful. On 29 November 2011 he was issued with a Statement of Particulars of Employment with job title Land and Environmental Driver 3 (N/S) (Temporary) with a date of appointment of 10 November 2011 and a date of commencement with current employer and of continuous employment of 5 January 2011. The Statement of Particulars was sent under cover of a job offer letter which offered the job subject to completion of a medical assessment, and asked him to complete a medical questionnaire.

[57] On 30 November 2011 the pursuer's HR department referred Mr Clarke to Occupational Health for a driver medical assessment. The referral form stated:

> "Mr Clarke is currently at work however, he has advised his manager that he has received his DVLA reminder regarding his licence. His licence expires on 9 January 2012.
>
> He has had no sickness absences.
>
> Please arrange a drivers medical for him and advise me of the details."

[58] Mr Clarke was seen by the pursuer's occupational health doctor Dr Joanne Willox on 6 December 2011 at BUPA premises. Dr Willox reported to the pursuer that Mr Clarke was suitable for the post. She completed a D4 medical report for the DVLA in respect of renewal of his license in good faith and had no reason to consider that Mr Clarke was other than in good health at that time. Mr Clarke did not disclose to her that he had fainted in April 2010. If he had, she would have investigated further and written to his GP and also advised the pursuer that he ought to be temporarily removed from driving until further information had been obtained.

[59] On 13 April 2012 the pursuer wrote to Mr Clarke confirming that due to the winter gritting exercise being complete, with effect from 10 April 2012 he would revert back to his substantive temporary post of LGV Driver/Labourer (CRC) within Commercial Collection SE driving bin lorries and that his contract would be reviewed again on 25 May 2012. On 29 May 2012 the pursuer wrote to Mr Clarke confirming that a temporary extension had been agreed until 26 June 2012. On 17 August 2012 the pursuer wrote to Mr Clarke confirming an extension of his temporary contract from 22 July 2012 to 22 October 2012. On 11 October 2012 the pursuer decided to offer a permanent contract to Mr Clarke and he accepted a verbal offer on 12 October. On 11 December 2012 the pursuer wrote to Mr Clarke confirming that his temporary post had been made permanent with effect from 11 October 2012 and he was issued with a Statement of Particulars of Employment with job title LGV Driver/Labourer with a date of appointment of 11 October 2012 and a date of commencement with current employer and of continuous employment of 5 January 2011.

[60] The incident in George Square took place on 22 December 2014.

[61] On 25 February 2015 the Crown Office and Procurator Fiscal Service issued a public statement renouncing the right to prosecute Mr Clarke. The reason given was:

> "As the driver was unconscious at the time he was not in control of the vehicle and did not have the necessary criminal intention, unless it could be proved that it was foreseeable that he would lose consciousness whilst driving that day …
>
> Crown Counsel considered that there was insufficient evidence that it was foreseeable that he would lose consciousness whilst driving that day".

[62] Mr Clarke resigned on 30 October 2015 immediately prior to a disciplinary hearing that was due to be held that day to consider allegations that:

(1) When completing a BUPA pre-employment questionnaire in December 2010 Mr Clarke failed to disclose all periods of absence in the preceding two year period, including a period of absence relating to an alleged blackout or fainting episode on 7 April 2010 when employed by the defender.

(2) When completing a DVLA D4 form in December 2011 Mr Clarke failed to disclose the alleged blackout or fainting episode on 7 April 2010.

(3) When completing BUPA health questionnaires on 1 and 6 December 2011 Mr Clarke failed to disclose the alleged blackout or fainting episode on 7 April 2010 and subsequent period of absence.

[63] The fatal accident enquiry determination was issued on 7 December 2015.

[64] A number of claims were intimated to the pursuer by those injured and the families of those killed. The pursuer instructed senior counsel and a consultation was held on 10 February 2016. On 24 May 2016 Mr Miller met with the pursuer's chief executive and the pursuer's finance director Lynn Brown to obtain their input into how to deal with the claims. It was accepted by them that the pursuer would have to pay out at some stage. It

was high profile incident. There was also a recognition that from a political point of view it was the right thing to do.

[65] The pursuer's insurers, QBE, wanted to settle the claims and pursue the defender later on. The pursuer was liable up to its excess of £750,000 and its insurer was liable beyond that.

[66] On 21 June 2016 Mr Miller sent an email to the pursuer's chief executive, finance director and the pursuer's director of governance and solicitor Carole Forrest, setting out three options, namely (1) go back to the defender in the hope of persuading it to discuss matters; (2) force the claimants to litigate and then bring in the defender as a third party; and (3) settle the claims and reserve the right to recover from the defender at a later date. The deputy director of finance Morag Johnston supported option 3. In an email dated 22 June the chief executive said that the practical and appropriate way forward would be to go with option 3 and review the position with the defender later. The claims were settled and the pursuer's rights against the defender were subrogated to the insurer, QBE.

[67] Relatives of certain of the victims of the George Square incident brought an application for a private prosecution by bill of criminal letters. The bill was refused by the High Court of Justiciary on 9 December 2016 (*Stewart* v *Payne, McQuade* v *Clarke* 2017 JC 155).

[68] The High Court stated:

> "A person who falls unconscious at the wheel is, on the face of it, no longer driving voluntarily. However, if the driver is aware that he has a medical condition liable to render him unconscious whilst driving, he may be precluded from relying on that condition as a basis for maintaining that his acts were involuntary. The driver would, however, need to know that he had such a condition". (para [83])

The court did not consider that the Crown had erred in its assessment of the evidence (para [97]) and stated:

> "[99] In the case of Clarke the Crown considered it a very significant factor that the previous loss of consciousness occurred four and a half years prior to the fatal accident, and that there was no evidence of any further incidents when driving, despite the respondent being a professional driver who drove almost daily. The Crown assessed that reliable conclusions could not be drawn as to the nature of the 2010 incident. The respondent had disclosed the incident to several doctors, and told one of them that he had been at the wheel of a bus at the time. Insofar as he did misrepresent the circumstances, the Crown considered that it could not be concluded that he did so deliberately and in any event his reasons for doing so were speculative."

[69] No defence of automatism or that Mr Clarke's actions were involuntary was advanced by the pursuer in respect of the civil claims against it by the victims and their families. The claims were settled on a full liability basis.

**The best evidence rule**

[70] The attempt by the pursuer to prove that a reference was given and what it said runs into an immediate problem as the reference has not been produced in evidence.

[71] Despite extensive searches of its records, both paper and electronic, the pursuer has been unable to locate a reference from the defender or any copy of it. Normal practice would be that the reference would have been kept in Mr Clarke's physical personnel file but the file contained no such form. Searches of the pursuer's electronic records and Pulse system have not produced the reference.

[72] The defender objected to the leading of other evidence as to the existence and wording of the reference on the basis of the best evidence rule.

[73] Senior counsel for the defender submitted that parole evidence as to the contents of documents which have not been produced is excluded by the best evidence rule (*Scottish and Universal Newspapers* v *Gherson's Trustees* 1987 SC 27, Dickson on *Evidence* paragraphs 209, 216, 217, 220,236, 237, 241). The pursuer had not established any exception to the best

evidence rule, and had not shown that the reference was lost without fault by the pursuer. The reference was the *de quo* of this case. The defender had been prejudiced in having to deal with this case as an exercise in the reconstruction of a document of which there was no trace and of which none of its employees has any recollection of completing many years after the event.

[74] Counsel for the pursuer submitted that the failure to produce the document was a matter of weight (*Stirling Aquatic* v *Farmocean (no. 2)* 1996 SLT (N) 456; *Stirling* v *Brinkman* 2020 CSOH 79). He sought to distinguish *Scottish and Universal Newspapers* on the ground that in that case the documents were lost after commencement of the action, were the *de quo* of the case, and no reasonable explanation was provided for their loss.

[75] In my view the best evidence rule, in so far as relevant to the circumstances of this case, can be summarised in the following propositions from Dickson on *Evidence*:

> (a) "An important branch of the rule which requires the best evidence is that the terms of documents which may be produced must be proved by the documents themselves, and cannot be proved by parole evidence" (para 204);
>
> (b) The best evidence rule is "founded on the presumption that one who tenders the less trustworthy of two kinds of proof within his reach, does so in order to produce an impression which the better proof would not create; for, if they would lead to the same result, he would probably not select the less convincing of them (para 195)
>
> (c) "primary evidence, whenever it is in the power of a party to produce it, must be produced" (para 203).
>
> (d) However, "secondary evidence is admitted to prove the contents of documents which are withheld by an opponent, or have been destroyed or lost without fault in the party founding on them. In such cases the adducer leads the best evidence in his power; and it is not to be presumed that he tenders the secondary evidence improperly, in the belief that the original would not support his case" (236).
>
> (e) "When the loss of a document has occurred when it is in the hands of the party founding on it, the Court will hesitate to admit secondary proof of its contents; as such cases are usually attended with suspicion. They will probably require the party to show a special *casus amissionis* not attributable to any fault on his part" (237).

(f) The party "must show that he has in bona fide used every means which prudence would suggest as likely to recover it"

[76] In England, the best evidence rule "long on its deathbed, has finally expired" (*Masquerade Music Ltd* v *Springsteen* [2001] EWCA Civ 563 at para [85]). Where a party seeks to adduce secondary evidence of a document, that evidence is admissible and it is a matter for the court as to what weight to give to that evidence (*Masquerade* Ltd at para [85]; *Promontoria (Oak) Limited* v *Emanuel* [2020] EWHC 104 (Ch))

[77] Scots law has not yet reached that stage and the best evidence rule remains part of the law. That is clear from *Scottish and Universal Newspapers* which is binding on me. In that case the pursuer sought to found on financial documents which were lost after the action had been raised and defences lodged. The court applied the best evidence rule and excluded proof of the documents. It held that the pursuer was at fault in the sense that it had failed in its duty to take all proper steps or to use all due diligence to see that the records were preserved and remained accessible for use in the proof.

[78] In the current case, the circumstances of the loss (ie *casus amissionis*) are different. Assuming for the moment that the reference did exist, it was lost long before this case was brought, and indeed long before anyone had an inkling that it might be necessary to produce it in legal proceedings.

[79] In the days following the George Square incident, Miss Ham looked out the paperwork and other records relating to the recruitment and employment of Mr Clarke and ascertained that his personnel file did not contain copies of his reference. That may demonstrate fault by the pursuer in a general sense, in that it was in breach of its practice of keeping the references in the file. However it does not demonstrate fault in the sense referred to in Dickson and exemplified by *Scottish and Universal* ie fault giving rise to a

suspicion. As the absence of the reference from the file pre-dates the occurrence of the incident giving rise to the legal proceedings concerning the reference (such as this case or the fatal accident enquiry or possible criminal proceedings) then the pursuer is not in breach of any duty to preserve it for use in these proceedings.

[80] In this case I am satisfied that the reference was lost in circumstances which do not give rise to a suspicion that the pursuer is seeking to produce an impression which the document would not create. I am also satisfied that the pursuer has bona fide searched for it. I repel the objection.

[81] The effect of that is that I will admit secondary evidence of the reference and its wording.

[82] However, the pursuer still faces formidable challenges in proving its case. Where, as here, a pursuer's case turns on the precise wording of a document which is not produced, then clear and cogent evidence will be required that the document exists and what the wording said. Even if such evidence is available, there are obvious difficulties in assessing that evidence as it is not possible for the evidence of the pursuer's witnesses as to the wording of the reference to be tested against the document itself.

**Witness evidence on the existence and wording of a reference**

***Pursuer's witnesses***

[83] Geraldine Ham was 100% sure that the pursuer sought references from previous employers before employing Harry Clarke. The App7 form was the only way that references could be submitted. In her initial witness statement she said categorically that in terms of the pursuer's normal processes you can't start a job with the pursuer unless it has the references. In a subsequent witness statement she changed her position saying that it

was very rare to start someone without references, and gave an example of occasions where one reference had been received. She would expect all the questions in the App7 to be answered. It would have been the task of the recruiting manager (Mr Buick) and her assistant Jean Walker from HR to review the App7 forms. There are occasions where the applicant may tender a reference which is not in App7 format and providing it is authentic and contains all the information requested in the App7 form, Miss Ham would accept this and if not then the App7 form would be issued to the referee. Her assistant Jean Walker was responsible to ensure compliance in relation to Mr Clarke and once Mrs Walker was satisfied she would have presented the pack to Miss Ham to sign off. Miss Ham would have signed off on the pack for Mr Clarke's recruitment as there was nothing flagged as untoward. If the defender had provided true and accurate answers to the questions on the App7 form Mr Clarke would not have been employed, or would have been subjected to disciplinary procedures by the pursuer.

[84] Jean Walker gave evidence about the pursuer's general procedures. She had not seen a reference from the pursuer in respect of Mr Clarke.

[85] Ms Doherty's evidence was that she had not personally seen a reference for Mr Clarke from the defender. She had made an entry on the Pulse system on 25 March 2011 that "all references now received". She made that entry on the basis of being advised by HR that all references had been received. Her recollection was that she had received an email from Ms Wilson of HR confirming that a reference had been received and that HR were happy with it. She had seen that email when she went to the council's offices to search for emails prior to the FAI. On being referred in the witness box to the Spreadsheet which stated "Received direct from RM" her position was that she had been advised on 25 March that both references were received direct to the recruiting manager. She had no doubt that

she had been advised by HR that the references, including one from the defender, had been received.

[86] Ian Buick was a transport and logistic manager with the council. In 2011 he needed more drivers and he obtained permission from his director and from HR to undertake the 2011 Recruitment Exercise. He was the recruiting manager for the exercise which he undertook in conjunction with the HR department. For example, he would arrange for completed application forms to be collected from HR, decide who would be invited for interview and inform HR who would then contact the applicants. He conducted the interviews. On 11 January 2011 Ms Wilson of HR sent him an email asking him to speak to individuals whose references were outstanding. He thought that HR should deal with that as it was not an operational matter. In all the years he was involved in recruiting he was not involved in references as HR dealt with it all: HR collated all the references and it was only if there were any concerns that they contacted him. He was annoyed as he thought it was bizarre that he was being asked to chase references. He questioned why he should be doing that but ended up phoning the applicants to tell them CBS were chasing him for their references. He did not recall seeing Mr Clarke's references. However, on the basis of his email to Ms Doherty on 28 March 2011 his position was that he had been sent a number of references for various applicants (including Mr Clarke) and the email confirms that he was satisfied with these. He was absolutely sure that he would have scrutinised them properly.

***Defender's witnesses***

[87] Frank McCann was manager of the defender's Parkhead depot, and Mr Clarke's line manager. He had no recollection of completing an App7 for Mr Clarke. He was not aware

of one having been completed for Mr Clarke. He had completed similar forms for other employees in the past.

[88] Robert Donnelly was Mr McCann's deputy. He did not complete a form App7 in relation to Mr Clarke. He did not provide a verbal or written reference. At that time any reference forms had to go to the defender's HR department at their Larkfield depot.

[89] Denise Thompson assisted Mr McCann and Mr Donnelly with administrative matters. She had not seen an App7 prior to giving a statement for this case and was not aware of an App7 having been completed for Mr Clarke.

[90] Jim Leslie was the defender's human resources manager, based at their Larkfield depot. He had not seen an App7 prior to when his statement was being taken for this case. He was not aware of one having been completed with regard to Mr Clarke. At one stage the defender's system had been that all references were dealt with by the relevant depot manager. However that system changed. The reason for that change was that there had been difficulties for the defender in an employment tribunal situation where a driver who was complaining of unfair dismissal had produced a favourable reference from a member of a depot management team. A decision was taken that (a) depots would no longer issue references, which would only be issued centrally from HR; (b) the references would be in the pursuer's pro-forma and would only confirm the dates of employment and the job; and (c) the defender would not complete forms from those seeking a reference but would only issue pro-forma letters confirming the dates of employment and job. Mr Leslie was not sure when the policy changed. If he had been asked to guess he might have said 2012 or 2013 but when he started to think about the time frame 2011 sounded reasonable. A reference letter for another employee dated 25 July 2011 was produced. Mr Leslie's position was that that -

letter was issued under the new policy and was in the new pro-forma. The letter was in the following terms:

> "To Whom It May Concern
>
> Dear Sir/Madam
>
> Re [name redacted]
>
> It is First Glasgow (No.1) Limited's policy to provide factual references, based on information from the personnel file. I can therefore confirm that the above-named was employed by FirstGroup from [date redacted] to [date redacted].
>
> [Name redacted] worked in the capacity of Part Time Bus Driver.
>
> The information contained in this reference is provided confidentially and in good faith, but on the basis that First Glasgow (No. 1) Limited is under no legal liability in respect of it. It is based on information available to the Company on the date given. The content must not, under any circumstances, be disclosed to a third party. I trust the above is sufficient.
>
> Yours faithfully
> [signature]
> Jim Leslie
> HR Business Partner"

The entry in the pursuer's Spreadsheet to the effect that any requests have to be emailed to Darryl Turner showed that the policy had changed by that time. Mr Turner was an HR assistant in Mr Leslie's department.

[91] Stuart Kennedy was the defender's assistant HR manager, working for Mr Leslie. He had not personally provided a reference for an employee of the defender. In around 2012 or 2013 the process became centralised, and references were directed to a central location, as opposed to the former employee's depot.

**Assessment of the evidence on the existence and wording of a reference**

[92] I am satisfied that the factual witnesses were doing their best to recall what had happened and tell the truth. However, they were trying to recall events in 2010 or 2011. The events were routine and unexceptional at the time and there is no particular reason for the circumstances surrounding the recruitment and reference for Mr Clarke to have stood out in the witnesses' memories. It was not until after the George Square incident that focus was brought to bear on the recruitment of Mr Clarke: even at that time the witnesses were trying to recall routine, unexceptional events that were some four years old. It is therefore important to assess the witness evidence against the contemporaneous documentation.

[93] The pursuer's case is that Mr McCann provided a reference to the pursuer in the form of an App7.

[94] There is no copy of any reference from Mr McCann (or indeed any other employee of the defender) in the paper or electronic records of either the pursuer of the defender. Nor do these records contain any email or letter stating that such a reference is enclosed or attached.

[95] It is a remarkable feature of this case that not a single witness spoke to remembering having seen a reference.

[96] Mr McCann's evidence was that he had no recollection of completing an App7 for Harry Clarke and was not aware of one having been completed for Harry Clarke. His position is supported by contemporaneous evidence from the email of 12 January 2011 and Spreadsheet which record that although initially the pursuer faxed McCann on 8 December 2010 requesting a reference, Mr McCann informed Mr Clarke that requests for a reference had to be emailed to Mr Turner. That contemporaneous documentary evidence is also consistent with the evidence of Mr Leslie, Mr Donnelly and Mr Kennedy that the defender ceased to give references in the new employers' forms from depot managers such as

Mr McCann and instead only gave references in the defender's own pro-forma from the defender's HR staff such as Mr Turner. The record in the email of 12 January 2011 and Spreadsheet of the pursuer having being informed that requests had to be emailed to Mr Turner, and the sample letter in the defender's new pro-forma dated only some three months or so after Mr Clarke's offer letter of 1 April 2011, are strong indicators that the new policy was in operation in respect of Mr Clarke. That is consistent with the evidence of Mr Donnelly and Mr Leslie that the new policy was in existence at the time when a reference was being sought by the pursuer for Mr Clarke. Mr Kennedy was in my view mistaken in putting the date for the change of policy as late as 2012 or 2013.

[97] Miss Ham had not seen a reference for Mr Clarke either. She spoke only of the general practice of the pursuer in respect of references. Her position was that in terms of the pursuer's normal processes you can't start a job with the pursuer unless it has the references. However, general practice as to the obtaining a reference is an unreliable guide as to whether a reference was actually obtained for a particular individual. Indeed, it was undoubtedly the case that the general practice was not followed in respect of Mr Clarke as in January 2011 he started his job without references having been received.

[98] Nor had Ms Doherty seen a reference for Mr Clarke. Although her 25 March email said "We have now received all Reference Reports" this did not mean that she personally had seen a reference for Mr Clarke: the wording of the email was generated automatically by the Pulse system. Ms Doherty had not personally seen a reference for Mr Clarke from the defender but instead relied on information provided by Miss Wilson of the pursuer's HR department. There are two problems with that. Firstly, Miss Wilson was not led as a witness. The court therefore does not have the benefit of having heard from one of only two persons (the other being Mr Buick) who on the pursuer's evidence might actually have seen

the reference. Secondly, the email from Miss Wilson on which Ms Doherty relied was not produced, despite it being, according to Ms Doherty, available and in existence at the time the pursuer was searching for and preserving evidence after the George Square incident. In these circumstances the evidence of Ms Doherty that a reference had been received for Mr Clarke from the defender can be given very little weight.

[99] Mr Buick, too, had no memory of seeing a reference from the defender for Mr Clarke. His evidence was that he could not remember looking at the references. The high point of his evidence was that he must have done so and been happy with them or he would not have sent the email of Monday 28 March 2011 at 8.55am stating "I can confirm that I am happy with the content of all the references". So there is no specific evidence from him that he remembered seeing a reference for Mr Clarke, or that it was in the form of an App7, or whether questions 4 and 7 were answered at all, or what the wording of any such answers was. The references which his email refers to have not been produced. There is no email, paper or Pulse trail showing receipt from the defender of a reference which was then seen by Mr Buick. His evidence amounts to nothing more than speculation as to why he might have written that email.

[100] In my opinion, the evidence of Mr Buick's email of 28 March is outweighed by the clear contemporaneous record in the email of 12 January 2011 and Spreadsheet that Mr McCann declined to give a reference and indicated the request should be sent Mr to Mr Turner instead, which is supported by the evidence of Mr Leslie as to the defender's change of reference policy, which in turn is supported by the documentary evidence of the sample pro-forma reference of 25 July 2011. There was no evidence at all before me that having initially declined to give a reference Mr McCann changed his mind and decided to

give one on an App7 after all. Weighing the evidence as a whole, I find that on the balance of probabilities Mr McCann did not provide a reference to the pursuer.

[101] That finding raises the question of whether a reference was provided to the pursuer by Mr Turner. The pursuer's position was that Mr Turner was never requested to provide the reference. In my view that position is correct. There was no evidence from the Pulse system, Spreadsheet, emails or any other source that anyone from the pursuer had acted on the information received from Mr Clarke that a reference would require to be requested from Mr Turner rather than Mr McCann, and emailed or otherwise contacted Mr Turner requesting a reference. There was no evidence of a reference having been received from Mr Turner. Mr Turner was not a witness in the case. I find that no reference was received from Mr Turner.

[102] Even if I am wrong in that, and a reference was provided by Mr Turner, that does not advance the pursuer's case. Due to the change in the defender's practice on giving references, the reference would not have been in the form of the pursuer's App7 but would have been in the form of the defender's pro-forma as used in the sample reference letter of 25 July 2011. That pro-forma was in short form and does not encompass the misrepresentations on which the pursuer founds its case, and in any event contains an express disclaimer of liability.

[103] As I have found on the facts that the defender did not provide a reference to the pursuer for Mr Clarke, the pursuer's case fails.

**Order**

[104] I shall uphold the defender's second plea in law and grant decree of absolvitor. I reserve all questions of expenses in the meantime.