OUTER HOUSE, COURT OF SESSION

[2023] CSOH 71

CA6/23

OPINION OF LORD BRAID

In the cause

LIVINGSTON FOOTBALL CLUB LIMITED

Pursuer

against

NEIL HOGARTH

Defender

Pursuer: Forsyth; Blackwater Law Limited
Defender: D Thomson KC; Shoosmiths LLP

13 October 2023

Introduction

[1] In this action, the latest in a series of litigations arising out of the financial travails of Livingston Football Club (LFC), LFC is suing Mr Hogarth for payment of two sums which it avers he misappropriated from it: £74,000 and £50,000, which are the sums respectively first and second concluded for. The action called before me for debate on the adequacy of LFC's pleadings. In brief, Mr Hogarth's position is that the pleadings are so lacking in specification that they are irrelevant, and that in any event they fail to give fair notice of the case against him, such that the action should be dismissed. LFC disputes that, and moves

for a proof before answer to be fixed, so that the court can hear evidence before deciding how much, if anything, is owed to LFC by Mr Hogarth.

[2] The case throws into sharp focus the manner in which cases are, and ought to be, pled in the commercial court, a theme to which I will return.

Procedural history

[3] It is necessary to say something of the procedural history, to explain how the action came to be in the commercial court of the Court of Session, and why it would not be appropriate to give LFC any further opportunity to clarify its pleadings. The action began life in Livingston Sheriff Court. In its original incarnation the initial writ in that action sought payment of £74,000 from Mr Hogarth on the basis that as a director of LFC he had drawn a cheque in his own favour for £74,000, to which he was not entitled. Subsequently, LFC sought to increase the sum sued for to £148,000, averring that the pursuer had twice paid himself £74,000 to which he was not entitled, albeit the basis on which the second £74,000 was sought was, on the pleadings, unclear (and has since been departed from). Thereafter, LFC sought leave to amend to introduce a much larger claim, in excess of £609,000, on the ground that Mr Hogarth had breached fiduciary duties owed to LFC by him as a shadow director, and that he had committed a fraud against the club. That led to the action being remitted to the Court of Session under section 92(5) of the Courts Reform (Scotland) Act 2014, in light of its (ostensible) complexity and the sum now sought.

[4] As I think counsel for LFC accepted at the time, the pleadings when the case arrived from the sheriff court were not the easiest to follow. After sundry case management hearings, further adjustment by LFC of its pleadings, complaints by senior counsel from the defender that he was still unable to understand what LFC's case was, and exhortations from

the court to LFC to clarify its pleadings, a diet of debate was fixed on the relevancy of all branches of LFC's case. After hearing from senior counsel for Mr Hogarth, counsel for LFC sought and was granted an overnight adjournment to consider his position; and when the case called on the following day, he informed me that the averments of breach of fiduciary duty and fraud were to be deleted and that the action, was to continue only insofar as it related to the claim that the sums of £74,000 and £50,000 had been misappropriated.

[5] The rather unsatisfactory result is that the basis upon which the action was remitted to this court has been swept away, but the court is nonetheless left to adjudicate on an action which does not now raise any difficult or novel questions of law but in which the sole question for determination, at this stage, turns on the quality of LFC's pleadings.

The background

[6] To understand the criticisms made of the pleadings, it is necessary to say something of the undisputed factual background. LFC has from time to time experienced financial difficulties and has twice entered administration. Various individuals, including Mr Hogarth, Gordon McDougall (a former director and chairman of the club), Neil Rankine (who is currently involved in litigation of his own against LFC, in which he is suing for payment of sums allegedly due to him: that litigation is being defended by LFC and a proof has now been fixed) and Gerard Nixon, have from time to time advanced money to the club to assist it through periods of financial difficulty. Mr Nixon's loan was itself the subject of previous litigation in this court in 2015, before Lord Tyre, the outcome of which was that Lord Tyre held that the loan was not repayable on demand ([2015] CSOH 43). Mr Nixon was found liable in expenses to LFC, which he paid. After deduction of sums owed to LFC's solicitors, Harper Macleod, the net amount of those expenses held by Harper Macleod in its

client account for LFC, as at May 2016, was £74,000 (the Nixon expenses). In 2016, Mr McDougall also raised an action against LFC, in the sheriff court, in which he sought payment of sums due to him under an agreement between him and LFC entered into in 2013, the detail of which it is unnecessary to go into for present purposes.

[7] At this point, Mr Hogarth enters the story. Although the circumstances leading up to it are not agreed, it is not disputed that Mr McDougall granted him an Assignation and Waiver dated 31 May 2016 and 3 June 2016 whereby Mr McDougall agreed to assign his claims against LFC in return for payment of £125,000; it was further agreed that payment of that sum was to be funded by (a) a payment of £20,000 already made; (b) a payment of £80,000 (£6,000 by personal cheque, and £74,000 by the transfer of that sum from the client account of Harper Macleod to the client account of Mr McDougall's solicitor (in other words, the Nixon expenses)); and (c) a balancing payment of £20,000.

[8] One might ask how the Nixon expenses, a sum which was being held for LFC, could be used to fund, in part, an acquisition of a debt by Mr Hogarth for his own benefit, not least as the debt in question was owed by LFC in the first place. That is explained by a letter of 23 May 2016, written by LFC to Harper Macleod, signed by Mr Robert Wilson, an LFC director. That letter instructs Harper Macleod to pay the sum of £74,000 to Mr McDougall's solicitors, that payment being made to reflect and implement the following transactions:

(i) repayment of loans of up to £74,000 by LFC to Neil Rankine;

(ii) a loan of £74,000 by Mr Rankine to Mr Hogarth;

(iii) payment of £74,000 by Mr Hogarth to Mr McDougall.

The effect of the letter of 23 May 2016 was of course that the Nixon expenses were being used not to fund the acquisition of the debt but, on the instructions of LFC, to repay a loan

owed by LCF to Mr Rankine. It should be noted that LFC does not seek to impugn or reduce either the Assignation and Waiver, or the letter of 23 May 2016.

[9] It is also not in dispute that Mr Hogarth has made payments to LFC totalling £74,000, nor does Mr Hogarth dispute that in 2019 he drew a cheque in his own favour for that sum. Thereafter, little if anything is agreed and it is now appropriate to turn to the pleadings to see what the basis is for LFC's claim against Mr Hogarth.

LFC's pleadings

[10] It is convenient to take the pleadings out of order, for a better understanding of LFC's case. The starting point is the alleged misappropriation of £74,000 by cheque, alluded to above, averments about which now appear in article 7 of condescendence ("the pursuer" being LFC, and "the defender" Mr Hogarth):

> "On or around 3 December 2019 the pursuer's employee, Karen White discovered a debit in the amount of £74,000 in the pursuer's online banking system. At the time, she thought it was a fraudulent transaction. She investigated further and discovered that the transaction had been made using a cheque from an old cheque book belonging to the pursuer. The cheque book was kept in a back office and thought by the pursuer's staff to have been empty. The cheque number of the cheque in question was 011845. The cheques either side of the cashed cheque were from 2016. Cheque 011844 was dated 23 May 2016 and cheque 011846 was dated 15 June 2016. The cheque stub of cheque 011845 was originally made out to 'Harper McLeod' in the sum of £4,210.00. Both the name of the payee and the sum had been scored out."

The averments are elaborated upon in article 8:

> "The pursuer's David Martindale then phoned the defender to request that he contact the bank to investigate why the cheque had been cashed. A short time later, the defender came to Mr Martindale's office and explained that he had cashed the cheque. He stated that he had taken the money in settlement of his loan account. The defender at that time had no repayable loan account in that sum. The funds taken by the defender belonged to the pursuer and was not the defender's to take. The defender's misappropriation of the funds has caused the pursuer loss and damage. But for the defender's misappropriation of the funds, the pursuer would not have sustained loss and damage. The amount of such loss and damage is £74,000 as first

> concluded for and £50,000 as second concluded for which are sums taken by the defender."

Thus, LFC's position, on these averments, is that the defender paid himself £74,000 which he justified as being in settlement of his loan account, but that he had no repayable loan account "in that sum", without stating what the true balance was. While that explains, to an extent, the sum first concluded for, it is unclear why cashing a cheque for £74,000 which was not due would have caused loss of £50,000, as the averments would have it.

[11] I now turn to the averments which appear earlier in the summons. Article 3 begins by referring to the debt owed to Mr McDougall, and the court action raised by him against the club. The averments then continue:

> "In or about May 2016 Mr David Martindale negotiated a settlement of the dispute whereby in return for payment of £125,000 lump sum the McDougall debt would be entirely extinguished. The consideration was to be provided by the pursuer via *inter alia* a release of an arrestment in relation to the same case. Such a course of action would have been in the best interests of the pursuer. The agreement was to settle and extinguish the McDougall debt...The settlement of the McDougall debt was agreed to be with the pursuer. This is what was negotiated and understood by Mr David Martindale the pursuer's football manager who negotiated the settlement of the McDougall debt for £125,000."

Pausing there, these averments give rise to at least three difficulties. First, there appears to be an oblique suggestion that Mr Hogarth diverted the benefit of an agreement between Mr McDougall and LFC to himself, but standing the fact that LFC is challenging neither the Assignation and Waiver, nor LFC's subsequent instruction to Harper Macleod as to disbursement of the Nixon expenses of £74,000 it is unclear what relevance, if any, these averments could ever have. The second, more concerning, difficulty is that in a passage of pleading deleted by adjustment, LFC previously gave further specification of the averment about Mr Martindale's supposed understanding by reference to an email from Mr Martindale dated 20 May 2016 in which he stated:

> "Neil Hogarth is purchasing Gordon McDougall's full outstanding loan account balance as per the club's audited accounts 30 June 2015. The purchase price as previously agreed will be £125K minus any monies that Mr McDougall has received in regards towards this account."

Presumably the reference to that email was deleted because it does not support the general averment that Mr Martindale believed that the settlement was agreed to be with LFC but the deletion does not save the inadequacy of the pleadings in this passage. The averment which remains about Mr Martindale is not only irrelevant, but also hopelessly lacking in specification, since no particularisation is given of how he reached his understanding, even if his understanding was relevant. Standing the email it seems that there is no proper basis for making the averment; at any rate, no explanation is offered by LFC of the apparent discrepancy. The third difficulty is that these averments appear (or at least, appeared before the debate) to have more relevance to the fraud case which was previously, but is no longer, advanced against Mr Hogarth; and it is likely that they are a throwback to that case.

[12] The next material passage of averment is also in article 3:

> "When John Ward a director made an inquiry in November 2016 as to the provenance of payments into the pursuer from the defender including £41,200 in August 2016 he was informed by the company secretary by email dated 12 November 2016 'Memory tells me that this was an amount that Neil deposited as part of the [Nixon] court costs award. £30,000 contra for cash put in previously, £2,800 paid by Neil's personal cheque to me to pay SFA fine. I paid it to meet SFA deadline and £41,200 was the balance. Think it was paid via Neil's bank account. Total balance £74,000…….'. That sum amounted exactly to the net expenses in the Nixon case...The defender and Mr Neil Rankine had the £74,000 Nixon expenses diverted to Mr McDougall's solicitor rather than being paid first into the pursuer's bank account. A balance of 74,000 was paid in 2016 to balance the account in 2016 and was held out as payment of the Nixon costs as condescended upon."

Here, LFC acknowledges that Mr Hogarth paid three sums to it, totalling £74,000. The averment that the defender (Mr Hogarth) and Mr Rankine diverted the Nixon expenses to Mr McDougall's solicitor is subject to the same criticism as I have made of the averments at

the beginning of article 3, namely that no explanation is given as to how it can be reconciled with the Assignation and Waiver and LFC's instruction to its solicitors, and the averment again appears to be no more than a throwback to the now-departed fraud case (indeed there was, until the debate, a passage which immediately followed the foregoing averments, beginning "believed and averred", which purported to explain why the payments were made, namely, to conceal the 2016 transaction). The averments nowhere deal with, or explain away, the basic and fundamental point that using the Nixon expenses to meet a debt due by LFC to Mr Rankine in no way involved "diverting" that sum from LFC. There is nothing wrong with, or sinister, *per se*, in mandating payment of a sum held by one's solicitors to a third party in payment of a debt.

[13] Moving on to article 4 of condescendence, it begins by making a further reference to the use of the Nixon expenses as part consideration for the acquisition of the McDougall debt by Mr Hogarth. The averments continue:

> "The defender paid a balance of £50,000 to Mr Gordon McDougall but opened a loan account in this amount with the pursuer for which he has been repaid. It is understood Mr Neil Rankine paid a balance of £1,000...At about the time and shortly after the transfer of the £74,000 of the Nixon expenses the defender made payments collectively amounting to exactly £74,000 to the pursuer. These payments were not allocated to any loan account of the defender at the time...The payments by the defender in 2016 were not loans but intended and allocated to cover the diversion of the £74,000 of pursuer's funds to Mr Gordon McDougall's solicitors."

As will be seen, these averments contain a further reference to the supposed diversion of funds, which is subject to the same criticisms as made above. It will also be noted that no specification is given as to how, or when, the £50,000 was repaid to Mr Hogarth. Indeed, the suggestion that Mr Hogarth never made a loan of £50,000 to LFC (because it is said to have been a payment to Mr McDougall) is inconsistent with the averment that the loan has been

repaid. What is LFC's position: that there was never a loan of £50,000; or that it has been repaid? It cannot be both.

[14] Thus far the averments in articles 3 and 4 all appear designed to make a case that the sum of £74,000 admittedly paid to LFC was not a loan. Thereafter, LFC makes averments about what the position would be on the hypothesis that the £74,000 was a loan:

> "The defender supplied the pursuer with a detailed written breakdown of the sums he claimed he personally loaned to the pursuer and sums he claimed were repayments by letter to Mr Wilson dated 7/1/21."

There then follow detailed averments about what Mr Hogarth claimed in the letter; in brief, that he had made emergency loans totalling £125,000 to LFC. It is averred that three of the payments making up that £125,000, amounting collectively to £50,000, were sums paid by him directly to Mr McDougall by virtue of the Assignation, which could not therefore be sums advanced to LFC. (This may be the £50,000 already referred to, but that is unclear). Mr Hogarth is also said to have claimed, in the letter, that £95,000 of the emergency loans had been returned, which figure included the £74,000 paid by the cheque he drew in his own favour. Although Mr Hogarth's letter is incorporated into the pleadings, LFC does not offer to prove that its contents were true. In what might be seen as the nub of LFC's case, the averments then continue:

> "In fact the accounts of the pursuer regarding sums due even allowing for three payments amounting to £74,000 being loans (which is denied) are grossly overstated. A balance of £25,000 is brought forward as at 30 June 2017 but then double counted in the collective claims of £125,000. A further sum of £10,000 is included as a loan in the accounts ended 30 June 2017 but is unvouched, unclaimed and has no apparent basis. The £125,000 requires deduction of the £51,000 consideration for the private purchase of the McDougall assignation by the defender. Accordingly, the loan balance would have stood at £74,000 at year end 30 June 2018. Thereafter in the next year to 30 June 2019 a further £70,000 is deducted from the defender's loan account representing re-payments and re-allocations to a company called Braidwood. Accordingly, the balance (if any) on 20 June 2019 would have stood at no more than £4,000. As a director the defender would have been well aware of this at the time. Accordingly, upon his own hypothesis (which is denied) that the £74,000 was

> loaned by him in 2016, he has misappropriated at least £70,000 to the loss of the pursuer. *Esto* the sum of £74,000 was due by way of loan in December 2019 no demand for payment had been made. The defender subsequently misappropriated £74,000 on 3 December 2019 as hereinafter condescended upon which is the sum first concluded for. The defender has also misappropriated £50,000 of the pursuer's funds by creating a false loan account which was paid by December 2019 which is the sum second concluded for."

In other words, LFC's position is that Mr Hogarth misappropriated at least £70,000; but also that the sum misappropriated was £74,000; and that he misappropriated £50,000. There is also a suggestion, not developed in the pleadings, that even if Mr Hogarth had advanced a loan of £74,000 to LFC it could not be due for repayment because no demand had been made. I deal with adequacy of these averments below.

[15] Finally there are these somewhat confusing averments in article 5 of condescendence:

> "The defender purported to assign his interest in the McDougall debt to Mr Neil Rankine...by assignation dated 11 November 2019...The assignation provided for repayment of the £50,000 by Mr Neil Rankine to the defender which he had already been 'repaid' by the pursuer"

It is unclear from this passage what is "the" £50,000 referred to; in what sense, and how, that had already been "repaid" by LFC, (and why that word is in quotation marks); or indeed why having been paid £50,000 by Mr Rankine should affect in any way Mr Hogarth's entitlement to receive £50,000 from LFC, if such entitlement there was, or indeed, whether this is the same £50,000 referred to elsewhere, or a different £50,000.

Submissions

[16] Senior counsel for Mr Hogarth acknowledged that the court would be slow to dismiss an action in the commercial court on pure specification points but submitted that the pleadings were so lacking in specification as to be irrelevant and they did not allow Mr Hogarth to understand what the case against him was. There were three broad strands

to senior counsel's submission. First, to the extent that LFC pled that the £74,000 admittedly paid to it by Mr Hogarth was not a loan, but had a different purpose, that case was not adequately explained or set up: in particular, there were no averments explaining the contradiction between that alleged position, and the instruction given by LFC to its solicitors as to how to disburse the Nixon expenses and for what purpose. Second, although LFC was offering to prove that Mr Hogarth's loan account was overdrawn, it was not offering to prove what the true position on the loan account was. The single averment about misappropriation of the £50,000 was also wholly lacking in specification. Third, LFC placed reliance on Mr Hogarth's letter, without offering to prove that what he said was correct. Overall, LFC's position in substance was that Mr Hogarth had stolen money from it. Mr Hogarth was entitled to fair notice of why that was so, which he did not have. LFC ought to be able to aver how much money had been advanced to it by Mr Hogarth; how much he had been repaid; and how much it was due; but this it had not done.

[17] Counsel for LFC began by taking me to various documents: first to Mr Hogarth's letter referred to in the pleadings, in an attempt to show that the £74,000 paid by Mr Hogarth to the club was "allocated to the Nixon expenses" (which I take to mean, paid to cover up the fact that the Nixon expenses had been used, on LFC's version, to pay for the McDougall assignation); and to explain why the total sum of £125,000 referred to by Mr Hogarth in the letter could not have been a loan to LFC; and, second, to a letter by Mr Wilson setting out a different position as to what the balance of the loan account was. In relation to the £50,000 counsel stated, as I have him noted, that LFC did not accept that Mr Hogarth received £50,000 from Mr Rankine. He then attempted to explain how the liability to pay £50,000 had arisen: the fault may be mine, but I found the explanation as baffling as the pleadings. (One point which counsel made repeatedly, which I did follow,

was that £51,000 of the £125,000 was part of the consideration which was paid to Mr McDougall, and therefore could not have been a loan to LFC; but that does no more than explain why Mr Hogarth was repaid only £74,000 rather than £125,000, and does not advance LFC's case.) Overall, counsel for LFC submitted that the averments made LFC's position sufficiently clear as to justify a proof before answer, and that the court could decide how much was due by Mr Hogarth only after hearing evidence.

Decision

The function of written pleadings

[18] The function of written pleadings is to explain what a party's case is about, as a matter of basic fairness to the other party and to allow the court to know what case it has to adjudicate: *D* v *Lothian Health Board* 2018 SCLR 1, Lord Brodie at para [32]. It is a minimum requirement of pleadings that they are intelligible and give proper notice of the line to be taken and main facts founded on: *Tods Murray WS* v *Arakin Ltd* 2011 SCLR 37, Lord Woolman at para [127] (referring to defences, but the principle applies equally to a pursuer's pleadings).

Pleadings in commercial actions

[19] In a commercial action, the circumstances out of which the action arises should be "summarised" (RCS 47.3(2)(c). The rule applicable to averments in an ordinary action do not normally apply with the same rigour: *Marine & Offshore (Scotland) Ltd* v *Hill* 2018 SLT 239, per Lord President Carloway at 143. Nonetheless, fair notice must still be given, and it must still be possible to discern from the pleadings what each party's case is (even if that might involve some "clearing of the narrative mist" created by pleadings which serve

"largely to obscure rather than clarify the facts" as the Lord President put it in *Marine & Offshore (Scotland)*). Paragraphs 13 and 14 of Practice Note no 1 of 2017 explain that pleadings in a traditional form are not normally required or encouraged in a commercial action, but that is an exhortation of brevity and conciseness, not prolixity. Parties to a commercial action may, in their pleadings, make more use of extraneous documents, such as expert reports or Scott Schedules, than in a "traditional" action, but the purpose of that relaxation is to enable the written pleadings to be shorter, not to enable a party whose pleadings are unintelligible to argue that the case should nonetheless be allowed to go to proof in the hope that a relevant case might be divined from documents.

LFC's pleadings

[20] It will be apparent from the comments I have already made on LFC's pleadings that I consider them to be deficient in a number of respects. In summary, they are diffuse, lengthy, disjointed, contradictory, lacking in specification and, to an extent (in relation to the equivalence of the Nixon expenses, and the sums paid to LFC by Mr Hogarth) rely on innuendo. Overall, the averments tend to obfuscate rather than clarify what the issues in the case are. Although the case did not originate in the commercial court, LFC was given the opportunity, in effect, to start again, when the case was remitted here; and short focussed paragraphs, set out in a logical order without repetition would have done much to improve the clarity of its case.

[21] However, it does not necessarily follow that the action falls to be dismissed. If a relevant case can be discerned through the narrative mist, in other words if the key facts can be gleaned from the pleadings, and if Mr Hogarth has fair notice of the case against him, then the court could properly fix a proof before answer.

[22] Applying this approach, and dealing first with the second conclusion for payment of £50,000, neither LFC's pleadings, nor the documents referred to by counsel for the pursuer, nor the explanation tendered by him in the course of submissions (even if it were legitimate to have regard to that in deciding whether a relevant case is pled), give fair or intelligible notice to Mr Hogarth, or for that matter the court, as to how that liability is said to arise. The averment that Mr Hogarth misappropriated £50,000 of the pursuer's funds by creating a false loan account which was paid by December 2019 is hopelessly lacking in specification. Although senior counsel for Mr Hogarth submitted that that was the only reference to the defender having misappropriated £50,000, which is strictly correct, there are other references to that sum, to which I have drawn attention above. However, these tend to obfuscate rather than clarify LFC's position: for example, the averment that £50,000 was misappropriated and the averment that it was a loss which arose from the encashment of the cheque for £74,000 are mutually inconsistent. The averment that there never was a loan of £50,000 is inconsistent with the averment that it has been repaid. The averment in article 5 does nothing to clarify matters. I therefore have little difficulty in holding that the averments in support of the second conclusion are so hopelessly lacking in specification as to be irrelevant, and that the action falls to be dismissed as regards that conclusion.

[23] The position is less clear-cut when one turns to the first conclusion, and the averments in support of it. This branch of the case falls to be considered in two stages, namely in relation to LFC's primary case that Mr Hogarth did not make a loan of £74,000 to it; and its secondary case that even if he did, he has received repayment of more than that sum (or, perhaps, just £70,000).

[24] As regards the former, I agree with senior counsel for Mr Hogarth that LFC's case is, at best for it, inadequately explained, and in the context of such of the background as is

undisputed, they do not give fair notice to Mr Hogarth of the case against him. The averments make repeated insinuations that there is, for want of a better term, a suspicious link between the fact that the Nixon expenses amounted to £74,000 and that Mr Hogarth paid sums of exactly that amount to the club, which I concede may be an unusual coincidence; but, standing the instruction given by LFC to Harper MacLeod which explains the chain of transactions by which that money found its way to Mr McDougall's solicitors, I consider that these averments are all irrelevant at least in the absence of an explanation from LFC as to how it is that Mr Hogarth is said to have diverted the agreement or the expenses for his own benefit and what is the basis in law for the remedy sought. Having accepted that it received sums amounting to £74,000 from Mr Hogarth, it is incumbent upon LFC to aver why those sums were not loans, and this it does not do. There is no purpose in allowing a proof on this issue, since there is no prospect of LFC proving, on its present averments, either that the benefit of the agreement with Mr McDougall was unlawfully diverted for Mr Hogarth's benefit, or that the sums totalling £74,000 paid by him to LFC were not loans. It follows that none of the averments directed towards showing that the £74,000 paid by Mr Hogarth to LFC was not a loan can be admitted to probation.

[25] Turning then to LFC's fall-back case that Mr Hogarth has been overpaid, there is the kernel of a case in article 4 in the passage which I have described in para [14] as being the nub of LFC's case. On one view, these averments could be read as amounting to an offer to prove that of the £125,000 which Mr Hogarth claimed to have loaned to LFC, £25,000 had been double counted; £10,000 was not due because it was "unvouched and unclaimed"; £51,000 was not in fact a loan because it was part of the consideration paid for the McDougall assignation; and that £70,000 which was repaid and re-allocated to Braidwood (a company owned by Mr Hogarth). However, there are difficulties in this

approach. First, it really will not do, in the Court of Session, for LFC to frame its case by reference to what Mr Hogarth stated in a letter which it does not offer to prove was factually accurate (and which he now avers contained errors). Second, the offer to prove that Mr Hogarth's director's loan account was "grossly overstated" is wholly lacking in specification, and leaves it unclear whether it is alleged to have been overstated in ways other than those listed. Third, despite the prolixity elsewhere, no explanation is given in the pleadings of how the alleged double accounting arose; what is the significance of the £10,000 being unvouched and unclaimed; and why payments allocated to Braidwood (apparently a separate entity) should be reallocated to Mr Hogarth. Had the action been at an early stage, doubtless some or all of these points could have been dealt with by the court's extensive case management powers. If LFC claims that what is averred in Mr Hogarth's letter is factually accurate, it could aver that. It could be ordained to give further specification of the various points just mentioned. However, the action is not at an early stage, and LFC has already had every opportunity to set forth its stall. As senior counsel for Mr Hogarth submitted, if LFC's case is that Mr Hogarth has received more than he was entitled to, it ought to have been a simple matter for it to aver what the correct balance of his director's loan account was and how it was arrived at; and what sums he has received.

[26] Accordingly, I have come to the view that it is not appropriate to exercise my case management powers at this stage by affording LFC a further opportunity to rectify the defects in its pleadings. It follows that the entire action falls to be dismissed as irrelevant and lacking in specification. I reach this view in some respects reluctantly, inasmuch as there does appear to be a genuine dispute between the parties as to whether Mr Hogarth might have been overpaid and LFC, if it can plead a relevant and specific case, will now

require to raise a fresh action. On the other hand, my reluctance is assuaged to an extent by the fact that it seems likely that the true value of any claim (leaving the £50,000 out of account) will be less than £100,000 and that the natural forum for this dispute is the sheriff court, where it began.

Disposal

[27] I have sustained Mr Hogarth's first plea-in-law and dismissed the action, reserving all questions of expenses.