FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 43
CA137/14

Lord President
Lord Brodie
Lord Malcolm

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion

in causa

PROSPECT HEALTHCARE (HAIRMYRES) LTD

Pursuers and Respondents

against

KIER BUILD LTD

Defenders and Reclaimers

Defenders and Reclaimers: Lord Davidson QC, DM Thomson; Shepherd & Wedderburn LLP
Pursuers and Respondents: Currie QC, M Hamilton; Harper MacLeod LLP

19 June 2018

Introduction

[1] This is a reclaiming motion against an interlocutor of the commercial judge, dated 15 June 2016, in relation to expenses following the pursuers' abandonment of the cause shortly before a proof. The issue is whether the judge correctly refused the defenders' motion to recover, from the pursuers, expenses subsequently taxed at £2.1 million, for which they had been found liable to a third party, against whom the pursuers had not directed a case.

Background

[2] The background is set out in the Opinion of the Court ([2017] CSIH 70) which dealt with the competency of the reclaiming motion. In short, the pursuers sued the defenders for breach of contract in respect of what was alleged to be defective pipework in the construction of Hairmyres Hospital. The defenders introduced a third party (Carillion Construction Ltd) claiming relief from them in the event that the pursuers succeeded. The pursuers did not direct a claim against the third party. Shortly before the proof, the pursuers abandoned the action, using the procedure to ensure dismissal, rather than absolvitor, under RCS 29.1(1)(b); their expert having changed his mind on the central issue of whether the pipework constituted a "structural defect".

[3] The third party moved for an award of expenses against the defenders. This motion was opposed by the defenders on the basis that the pursuers should be liable for all the expenses, including those of the third party. The defenders sought a direct award of the third party's expenses against the pursuers or an alternative finding that the pursuers should pay to the defenders "a sum equivalent" to those expenses of the third party for which the defenders were found liable. The defenders proposed a third option whereby there would be a finding that some of the third party's expenses, such as those caused by the discharge of earlier proof diets, should be the subject of a direct award against the pursuers.

[4] By interlocutor dated 15 June 2016, the commercial judge, on the pursuers' unopposed motion, allowed the pursuers to seek dismissal of the action in terms of RCS 29.1(1)(b) on condition that they paid "full judicial expenses" to the defenders. The pursuers were found liable to the defenders in those expenses. The interlocutor records that: (para 2) the motion to find the pursuers liable to the defenders in the expenses (or any part thereof)

which the defenders would require to pay to the third party, was refused. There was no separate treatment of any motion for a direct finding of liability for the third party's expenses against the pursuers; (para 3) the defenders were allowed to "abandon" the action against the third party, and to seek dismissal only, on condition that the defenders pay full judicial expenses to the third party. The defenders were found liable to pay these expenses; and (3) the finding that the defenders were liable to the third party was on the unopposed motion of the defenders "made at the bar"; albeit that it had initially been the third party's motion.

[5] By interlocutor dated 14 July 2017, the commercial judge dismissed the action and the third party claim; the respective accounts of expenses having been paid. The third party's expenses had been taxed at a somewhat astonishing £2.1 million.

The commercial judge's reasoning

[6] The commercial judge was not persuaded that granting relief to the defenders against the pursuers was necessary in order to do substantial justice between them. *Albert Bartlett & Sons (Airdrie)* v *Gilchrist & Lynn* [2010] CSIH 33 had provided (at para [12]) recent guidance. The defenders had acknowledged that there was no authority which supported the existence of a right of relief in the circumstances, even if the general rule in England may be to allow such relief (*LE Cattan* v *A Michaelides & Co and others* [1958] 1 WLR 717 at 720). It had been the defenders, and not the pursuers, who had caused the third party to litigate. The pursuers had not directed any case against the third party. The judge did not consider that the normal rule, as set out in *Albert Bartlett & Sons*, had, as the defenders had suggested, a chilling effect on the use of third party procedure. On the contrary, a rule such as that suggested in *L E Cattan* may discourage prospective pursuers from litigating because of a

risk of incurring liability for the expenses of third parties against whom they had directed no case.

Submissions

Defenders

[7] The defenders submitted that the commercial judge had: erred in failing to exercise his discretion; misdirected himself in law; and reached an unreasonable decision. The judge had proceeded on the basis that the pursuers could not be liable to the defenders in respect of the third party's expenses. Such an approach was antithetical to the genuine exercise of his discretion. The judge had considered that his discretion could only be exercised one way; that expenses must be awarded against the person who had caused the party to litigate (*Albert Bartlett & Sons (Airdrie)* v *Gilchrist & Lynn* (*supra*)). The decision was unreasonable, as it penalised the defenders for their successful defence in circumstances in which it was entirely natural that the defenders would wish to have any claim against the third party determined in the same process. The pursuers had not opposed the introduction of the third party. The fact that they had not adopted a case against them was neither here nor there.

[8] A discretionary decision had to be taken in accordance with recognised principles and relevant considerations (*Scottish Power Generation* v *British Energy Generation (UK)* 2002 SC 517 at 524). The starting point was to recognise that the essential point of an award of expenses was to achieve substantial justice (*Howitt* v *Alexander & Sons* 1948 SC 154 at 157). What amounted to substantial justice required to be assessed in each case. The court could not proceed simply on the basis that, because the defenders had introduced the third party and the pursuers had not directed a case against them, the defenders therefore must be

liable to the third party for their expenses. The court had a broad discretion (*Europools* v *Clydeside Steel Fabrications* 2001 SLT (Sh Ct) 91 at 92).

[9] The difficulty of liability for expenses in "chain contracts" was not unique to Scotland. The English courts had a solution, as described in *LE Cattan* v *A Michaelides & Co* (*supra* at 720). This was to recognise that a defender would inevitably convene its sub-contractor in order to resolve the claims in the most expeditious and cost-effective manner. It was undesirable for separate actions to proceed when a dispute could and should be resolved in one action. The approach in *LE Cattan* was necessary to achieve substantial justice between the parties (see also *Edgington* v *Clark* [1964] 1 QB 367 at 383; *Johnson* v *Ribbins* [1977] 1 WLR 1458; *Fraser* v *Bolt Burdon* [2010] All ER (D) 211; *Greenwich Millennium Village* v *Essex Services Group* [2014] TCLR 4 at paras 130-133; and, generally, Keating on *Construction Contracts* (10th ed) 146). The logic and fairness of the English cases was sensible, even if not explained, and a longstanding tradition in that jurisdiction. There was no reason for Scots law to be different and thus to produce a chilling effect on the introduction of third parties. *Albert Bartlett & Sons* (*supra*) could be distinguished on the basis that it was a case of contribution and not relief. In that case, the defenders and third party had pooled their resources in defending the action, notwithstanding a resolution of the dispute between them. If it could not be distinguished, it required to be overruled by a Full Bench.

[10] In any event, the judge erred in failing to find the pursuers liable to the defenders in the expenses incurred to the third party which were occasioned by: (i) the discharge of an earlier proof diet due to commence on 21 October 2015; (ii) an amendment procedure instigated by the pursuers; and (iii) the discharge of the ultimate proof diet following the decision to abandon. The expenses in respect of each of those steps had been incurred by

the defenders (and third party) as a result of the manner in which the pursuers had conducted the action.

Pursuers

[11] The pursuer contended that the court could only set aside the commercial judge's decision if it were satisfied that the exercise of his discretion had been based upon a wrong principle, or that the decision was so plainly wrong that he must have exercised his discretion wrongly (*Britton* v *Central Regional Council* 1986 SLT 207 at 208, adopting *G* v *G (Minors: Custody Appeal)* [1985] 1 WLR 647). There was no error of law or principle, and nothing plainly wrong. The judge was guided by *Alfred Bartlett & Sons (Airdrie)* v *Gilchrist & Lynn* (*supra* at para 12). He could find no basis for distinguishing that case. The judge correctly applied the guidance which laid down the general principle applicable to the expenses of a third party.

[12] As a general rule, the cost of litigation fell on the person who had caused it. In relation to third parties, expenses were generally only recoverable against parties who had directed a case against them. There was no difference between claims for contribution or relief (*Buchan* v *Thomson* 1976 SLT 42 at 45). The substantive position was that third party procedure was a substitute for the raising of a separate action. It was a convenient mechanism for defenders (*Findlay* v *National Coal Board* 1965 SLT 328) and not one aimed at disadvantaging pursuers. The judge recognised that there may be cases where the general rule would not apply, such as instances of unreasonable conduct. He acknowledged that the matter was one for his discretion, with the aim of doing substantial justice.

[13] The judge was correct to reject the submission based on *LE Cattan*. There was no hint in *Keating* (*supra* at para 19-148) that there was a general rule in England. In that jurisdiction

a particular civil rule (CPR 44.2) applied. There was no authority which supported the existence of a right of relief in such circumstances. If the judge had adopted the *LE Cattan* approach, he would have innovated in a way which was inconsistent with both *Alfred Bartlett & Sons* and longstanding practice. The judge correctly concluded that there had been no unreasonable conduct on the part of the pursuer. This was not a case where the real fight was between the pursuers and the third party (cf *LE Cattan*). The defenders and the third party had elected to run separate defences. If the defenders' argument were correct, the pursuers would be exposed to a liability to pay two sets of expenses.

[14] If the court were inclined to review the judge's decision, it ought to reach the same conclusion. *Alfred Bartlett & Sons* flowed from the general rule that a party who had to vindicate his right was entitled to recover his expenses from the person who had caused him to litigate (McLaren: *Expenses,* 21). In introducing a third party, the defenders assumed the risk in relation to expenses, in the same way as a pursuer assumed the risk when raising proceedings against a defender. The defenders had already raised separate proceedings against the third party. This was reflective of their choice on how to proceed. The making of a choice to introduce a third party was a common one, in which the risks in relation to expenses were well known. There was no anomaly, given the function of a third party notice as an alternative to a separate action. The underlying principle had been long established. It ensured consistency and clarity on where the risk of litigation lay.

[15] *LE Cattan* was distinguishable on its facts. There was a string of identical contracts, where the terms were the same, or substantially the same and the issue for determination was the same. In the present case, there were complex and differing contractual obligations between the pursuers and the defenders on the one hand, and between the defenders and the third party on the other. There had been no joint approach or pooling of resources

between the defenders and the third party. The pursuers had acted reasonably during the course of the proceedings and in ultimately abandoning the action. The pursuers had no locus to take part in the taxation of the third party's account. There was nothing contrary to the requirements of substantial justice about the defenders having no right of relief from the pursuers in respect of their liability to the third party.

[16] The judge had dealt with each of the discrete elements of process in respect of which the defenders claimed relief on a separate basis. The expenses of the discharge of the earlier proof had been the subject of extensive argument at the time. The expenses had been made "in the cause". The defenders had been awarded the expenses of the amendment procedure, albeit that they were initially reserved. There was no basis for interfering with those discrete decisions.

Decision

[17] The general rule is that the cost of litigation falls on the party who has caused it. If a pursuer loses his case, he must normally pay the defender's expenses since he has caused the defender to incur those expenses in vindicating his position. A pursuer's liability is normally limited to the person or persons whom he has convened as defenders. He cannot be liable, at least in ordinary course and in the absence of some unreasonable behaviour, for the expenses of a party whom he has not introduced into the process and against whom he has directed no case. The expenses of third parties are generally only recoverable against the party who has directed a case against them (*Albert Bartlett & Sons (Airdrie)* v *Gilchrist & Lynn* [2010] CSIH 33, Lord Carloway, delivering the Opinion of the Court, at para [12]).

[18] Third party procedure was re-introduced into Court of Session practice in the 1965 Rules (rule 85). It was, and is, intended to be a convenient mode of disposing of issues

arising out of one incident with a view to saving time and expense; the theory being that resolving all the issues in one action, rather than two or more, would achieve that objective. However, a defender is never obliged to call a third party into an action. He can, as the defenders did in this case, raise a separate action. He may proceed with that action in tandem with the principal cause or he can seek to have it sisted, pending resolution of the principal cause, thus incurring minimal expense at least initially. If the defence is essentially the same contention as is made by a third party, a defender can agree with a third party to advance a common position. The third party could undertake to conduct or pay for the principal defence. If successful, the expenses would all be likely to be recoverable from the pursuer, should the action fail.

[19] In this case, the defenders did not adopt any of the expedients which would have minimised their exposure to an award of expenses, in the event (which they themselves advanced as the appropriate outcome) of the pursuers' failure to prove the defective nature of the pipework. They simply called the third party and let the action take its course. That course involved the third party incurring very substantial expense in what was a defence of the case made against them; that case emanating only from the defenders.

[20] The commercial judge's use of his discretion cannot be faulted. He followed the guidance in *Alfred Bartlett & Sons* as correctly setting out the principles to be applied. He reached the view that substantial justice did not require the pursuers to be found liable in the expenses of a party whom they did not convene. He took the view that, rather than having a "chilling effect" on the use of third party procedure, which has certainly not been noticed, the practice advanced by Lord Diplock in *LE Cattan* v *A Michaelides & Co* [1958] 1 WLR 717 (at 720) could discourage pursuers from accessing the courts if they might be found liable in the expenses of multiple parties whom they had not sought to involve.

[21] The court has considerable respect for the system of justice in England and Wales. The practices in that jurisdiction will, no doubt, be well known to those litigating there. However, this court should be very cautious before attempting to understand just what the practice is. It should be reluctant to do so on the basis of *ex parte* statement. Whilst it may be that in cases involving a "string of contracts in substantially the same terms", the practice is to find unsuccessful pursuers liable to all the parties in the string (*LE Cattan* v *A Michaelides* (*supra*), Diplock J at 720), this is not immediately clear from the passages on costs quoted from Keating on *Construction Contracts* (10th ed) (or from Lord Blackburn's remarks in *Witham* v *Vane* (1883) 32 WR 617 cited in *Edgington* v *Clark* [1964] 1 QB 367 (Upjohn LJ, delivering the opinion of the court, at 383). All that is said in Keating is that an unsuccessful claimant *can*, in the exercise of the court's discretion, be ordered to pay the third party's costs (para 19-148). At least in some of the cases cited (eg *Johnson* v *Ribbins* [1977] 1 WLR 1458, Goff LJ, delivering the judgment of the court, at 1464), the fact, that the third party would be unable to recover the expenses were it not for an order against the pursuer, may have played an important part in the exercise of the discretion.

[22] Be that as it may, just as the practice in England and Wales may be well known in that jurisdiction, so it is that in Scotland the general rule is equally transparent. Parties will make their decisions on the basis that the general rule will usually apply in the absence of circumstances meriting a different result. A degree of certainty is important in this area. The commercial judge has understood and applied the correct principle. He has taken into account the relevant circumstances. He has reached a reasonable decision in applying that principle, within his overarching discretionary power, to these circumstances.

[23] The reclaiming motion should accordingly be refused.

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OPINION OF LORD BRODIE

in the Reclaiming Motion

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19 June 2018

[24] I am grateful to your Lordships for giving me the opportunity to consider your respective opinions. I agree that this reclaiming motion should be refused for the reasons given by your Lordship in the chair. There is little that I can usefully add.

[25] As your Lordship in the chair has explained, the general rule, or objective, in Scotland is that judicial expenses should be borne by the party who has wrongly brought another party into court, whether the other party has been obliged to pursue his rights or to defend them. It is not necessary for us to determine what the practice in England is, but,

agreeing with Lord Malcolm, although that practice has now been codified within the Civil Procedure Rules (CPR Parts 44 to 48), I am by no means satisfied that, in the result, it is very different from that in our jurisdiction.

[26] In *Johnson* v *Ribbins* [1977] 1 WLR 717 Goff LJ emphasised that "costs follow the event". While that may be to beg the question when the issue is whether a defendant who has successfully maintained his defence against a claimant can recover his costs against a third party whom the defendant has convened, the underlying principle seems to be much the same as that which is applied in Scotland.

[27] Counsel for the reclaimers relied heavily on the observations by Diplock J in *LE Cattan* v *A Michaelides* [1958] 1 WLR 717 which are quoted by Lord Malcolm. I do not consider that they bear the weight that counsel sought to place upon them. In particular, I question whether Diplock J had in mind all possible combinations of inter-related contracts and sub-contracts and the claims that might be made under them, when he used the expression "a string of contracts in substantially the same terms." Where there truly is such a string then, depending upon the way in which the litigation is conducted, it may well be appropriate that an unsuccessful claimant should bear the costs that a defendant has incurred in convening a third party (or "Part 20 party", to use the language of the CPR as comprehending all parties who are made subject to what the Part describes as "additional claims"). The point is spelled out in Zuckerman *on Civil Procedure* (2013) at para 27.43. The author posits the example of the purchaser of a motor car making a claim against the hire purchase company which supplied him with the vehicle, alleging some mechanical defect. The hire purchase company then brings in the distributor and the distributor then brings in the manufacturer each of them seeking relief from any award of damages made against them consequent on the car having the specified defect. Zuckerman continues:

> "If the purchaser's claim is dismissed the costs of each successful defendant pass up the line to the principal defendant. Thus the manufacturer will be entitled to look for his costs to the distributor. The distributor will be entitled to recover his costs including those he incurred towards the manufacturer from the hire purchase company which will normally be entitled to pass all its costs to the unsuccessful claimant."

Agreeing with Lord Malcolm, I would find it unremarkable if a Scottish court took the same approach in a simple case of that character, by which I mean a case where the issue between the various parties in the contractual chain is essentially the same and where that issue has been litigated with due economy as between the two parties best placed to litigate it. This, on the other hand, as is apparent from the Opinion of your Lordship in the chair, is not a simple case of that character.

[28] Counsel for the reclaimers sought support for the proposition that what Diplock J had said about "string contracts" was of more general application and, in particular, applied to much more complex cases of inter-related construction contracts and sub-contracts, by referring to Keating *on Construction Contracts* (10th edit) where, at para 19-148, there is this:

> "The court will normally order the defendant to pay the costs of a successful Part 20 party. But when a defendant has reasonably joined a Part 20 party, an unsuccessful claimant can, in the exercise of the court's discretion, be ordered to pay the Part 20 party's costs, either by adding them to the costs it has to pay to the defendant or direct to the Part 20 party. Given the broad discretion conferred on the court by CPR r. 44.2 it is thought that, in appropriate circumstances, the court may make such an order under the CPR."

That passage is very far from setting out a practice generally followed in England in relation to construction (or other) contract disputes. As your Lordship in the chair points out, the paragraph is concerned only with the competence of making such an order where the court, in exercise of what is a broad discretion, considers it appropriate to do so. Again, a court in Scotland might make such an order in relation to expenses "in appropriate circumstances". Here the commercial judge did not consider that the circumstances made such an award of

expenses appropriate. It simply cannot be said that that was not a proper exercise of his discretion.

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Lord President
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OPINION OF LORD MALCOLM

in the Reclaiming Motion

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PROSPECT HEALTHCARE (HAIRMYRES) LTD

Pursuers and Respondents

against

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19 June 2018

[29] I agree that the reclaiming motion should be refused. I offer the following observations in support of the reasoning of your Lordship in the chair. In particular I consider that a consideration of some of the cases cited demonstrates that the submissions have exaggerated any differences in practice and approach in England and Wales as compared with north of the border.

[30] In *LE Cattan* v *A Michaelides & Co* [1958] 1 WLR 717 the issue arose in the context of an unsuccessful claim by a purchaser of cotton yarn that it was not of the required quality.

The seller convened his supplier (the third party) who in turn convened his supplier (the fourth party). An arbitrator disallowed the purchaser's claim. The third party was ordered to pay the fourth party's costs. The seller was ordered to pay the costs incurred by the third party inclusive of those payable to the fourth party. The buyer, the unsuccessful claimant, was ordered to pay the seller's costs, but excluding those payable by the seller to the third party. The court was moved to set aside the arbitrator's award so far as costs were concerned in that the buyer "set the train of actions in motion", yet the seller was unable to recover from the buyer the costs of the third and fourth parties.

[31] When quashing the order, Diplock J described the decision not to award all the seller's costs against the buyer as "very remarkable" and "an injudicial exercise of discretion". At page 720 his Lordship made the following observations about the way in which costs should be dealt with where third, fourth, fifth or sixth parties have become involved in "string contract cases which are very common."

> "... in the ordinary way, where damages are claimed for breach of contract on one contract in a string of contracts, and the seller brings in his immediate seller as a third party, and that party brings in his immediate seller as a fourth party, then, provided that the contracts are the same, or substantially the same, so that the issue as to whether the goods comply with the description is the same, in the normal way the defendant ... if successful should recover against the plaintiffs not only his costs but any costs of the third party which he has been ordered to pay; the third party in like manner should recover from the defendant his own costs and any costs of the fourth party which he has been compelled to pay, and so on down the stream. That is the normal way in which costs should be dealt with in this kind of action where there is a string of contracts in substantially the same terms. In saying that I am not excluding the possibility that there may be special reasons for departing from that normal practice. Whether it was reasonable for the defendant to bring in a third party at all is always a question to be considered."

[32] Diplock J was dealing with cases where any proven liability is passed down a contractual chain to the truly responsible party. In such circumstances it would be expected that only one party, perhaps usually the last in the chain, would undertake the task of

defending and defeating the claim. In such a case, on the face of it, it would be unfair if an unsuccessful claimant's liability in expenses stopped at the perhaps nominal expenses of the party originally convened, who then had to pay the costs incurred in defeating the claim. Having regard to the above general observations of Diplock J, in similar circumstances I would expect a similar approach in a Scottish court. In the described case it can reasonably be said that the unsuccessful claimant caused the expenses incurred in defeating the claim. If for whatever reason multiple sets of expenses were incurred, that may well be "a special reason for departing from (the) normal practice."

[33] *Edginton* v *Clark and another* [1963] 1 QB 367 concerned the procedural rules then extant in England and Wales. It was held that they did not inhibit the discretion of the court in a third party action to award expenses as the justice of the case required. The judgment of the court was read by Upjohn LJ. At page 384 his Lordship explained the decision as follows:

> "In the circumstances of this case it is abundantly clear that the real and only fight was between the plaintiff as the alleged owner by adverse possession and the true owners, the third parties, and, accordingly, we should have been prepared to order that the plaintiff should pay their costs directly. However, the defendants' notice of appeal only asks that they may be at liberty to add the costs which they have been ordered to pay to the third parties to the costs which the plaintiff should pay to them. We therefore allow their appeal and order accordingly."

In a similar case I consider that a Scottish judge could act in a similar manner. In the string cases mentioned by Diplock J in *LE Cattan* one would expect that the "real and only fight" would take place between only two parties, and thus the loser will incur no more, or at least not much more, than his and one other party's expenses.

[34] In *Albert Bartlett & Sons (Airdrie) Ltd* v *Gilchrist & Lynn Ltd and others* [2010] CSIH 33, the defenders admitted liability to pay damages to the pursuers for breach of a contract concerning the design and construction of a roof over a processing plant. The defenders and

the third parties reached an agreement on apportionment of liability as between themselves. A proof took place restricted to quantification of damages. Two of the third parties remained in the action. While they and the defenders were represented by the same counsel, they retained separate agents. The commercial judge decided that the pursuers should be liable for the expenses of the proof. His intention was to find them liable for only one set of expenses, as if the pursuers had been litigating against a single defender. However, since two of the expert witnesses, who were of considerable assistance to the court, had been instructed by the third parties, he made an award of expenses against the pursuers in favour of not only the defenders but also the third parties. The judge explained that he was avoiding an undeserved windfall benefit to the pursuers and an undue penalty on the third parties simply because of the happenstance that the experts were instructed by them rather than the defenders. In a reclaiming motion it was submitted that since the pursuers had made no case against the third parties, the expenses award should have been limited to one against the defenders.

[35] The Extra Division questioned why the third parties remained in the action, and observed that the defenders and the third parties could have come to an arrangement whereby the defenders accepted responsibility for the fees of the experts. The general rule in expenses was that the cost of a litigation falls on the person who caused it. At paragraph 12 it was stated that:

> "At least in the ordinary course, the pursuer could not be liable for the expenses of a party whom he has not introduced to the process and against whom he has directed no case. The expenses of third parties are generally only recoverable against the party who has directed a case against them." (emphasis added)

In allowing the reclaiming motion it was stressed that the third parties' interests were indistinguishable from the defenders. There was no good reason for the third parties

remaining in the process. Had they withdrawn there would have been no question of an award of the expenses of the proof in their favour. It is clear that this particular feature of the case was influential in the outcome of the reclaiming motion. With regard to the full terms of paragraph 12, I do not consider that the Extra Division intended to limit the possibility of such an award to cases where there had been unreasonable behaviour.

[36] Be all that as it may, I am in agreement that there is no good reason to interfere with the commercial judge's decision in the present case. It is not akin to those involving a chain of substantially the same contracts where only two parties have a direct stake in the proceedings and the outcome. It is not a case where the real battle was between the pursuers and the third party. The pursuers were concerned only with the claim against the defenders. The defenders did not require to introduce the third party whose involvement was by no means inevitable. They were of course entitled to obtain permission to convene the third party and then to do so. This having been done, separate issues emerged between them; issues in respect of which the pursuers had no interest. There could never be any question of the pursuers being found liable in respect of the costs related to the discrete dispute between the defenders and the third party. Over and above that, there was considerable common ground between the defenders and the third parties. However, if they chose not to combine and co-operate, that was a matter for them. Whatever else, there can be no justification for the pursuers paying more than one set of expenses in relation to those matters. The pursuers should not be penalised because the defenders and third parties decided to maintain their own separate and independent defences. All of this is in accordance with the general rule that where a claimant convenes only one party, in the event that he is unsuccessful he should be liable in only one set of expenses. The English cases are to a similar effect.