FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 36
CA56/23

Lord President
Lord Pentland
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Reclaiming Motion

in the cause

SCOTLAND GAS NETWORKS PLC

Pursuer and Respondent

against

QBE UK LIMITED and Others

Defenders and Reclaimers

Pursuer and Respondent: D Thomson KC, A McKinlay; Addleshaw Goddard LLP
First Defender and Reclaimer: Howie KC; TC Young LLP (for the Building Law Practice, Glasgow)
Third to Fifth Defenders and Reclaimers: Paterson KC; Kennedys Scotland

24 October 2024

Introduction

[1] The pursuer is the statutory successor of the Scottish Gas Board. It owns and operates more than 27,000 kilometres of gas mains and gas transport media in Scotland. One of its gas pipelines runs adjacent to Cowdenhill Quarry, near Kilsyth. Between October 1999 and November 2011 the quarry was leased by its owner to and worked by a company

("Skene") known as D Skene Plant Hire Limited until 9 March 2000, as Skene Group Limited from 9 March 2000 to 8 November 2016, and as Macrocom (1052) Limited from 8 November 2016 until its dissolution on 8 January 2020.

[2] The pursuer avers that in the course of an aerial inspection of the pipeline on 29 June 2011, it was observed that there had been a landslip at the quarry. It was discovered that Skene had undertaken quarrying operations beyond the permitted working area, in the direction of the pipeline. Blasting work undertaken as part of these operations had fractured the rock between the face of the quarry and the pipeline, and also underneath the pipeline, rendering it unable in future to maintain its own integrity in consequence of the removal of its adjacent and subjacent support.

[3] In about 2015 the pursuer raised an action in this court against Skene, concluding for payment of £3,000,000 by way of damages for loss caused by Skene's lack of care and commission of nuisance in the operation of its quarrying business resulting in the pipeline suffering a loss of support. In that action the pursuer averred that the pipeline could not be operated at its then location within a proper margin of risk. It could not be inspected, maintained and repaired routinely. The face of the quarry was likely to collapse in the medium term. Had it done so with the pipeline still in place, the pipeline would probably have buckled or ruptured, risking a major escape of gas with severe consequences for life and limb and for the maintenance of the gas supply to customers served by the pipeline. The pursuer had averted those risks by diverting the pipeline away from the quarry. Skene called its blasting sub-contractor as a third party and the pursuer subsequently directed a case against the third party as a second defender. On 14 June 2017 Skene went into liquidation.

[4] On 15 November 2017, Skene (and its liquidators) failed to appear or be represented at a by order hearing. The Lord Ordinary, under reference to Rule of Court 20.1, granted decree by default for payment by Skene to the pursuer of the sum of £3,000,000 in full satisfaction of the summons, with expenses. No attempt has ever been made to reclaim the Lord Ordinary's interlocutor or to reduce the decree.

[5] The defenders in the present action were, collectively, Skene's public liability insurers during the policy years 2009-10, 2010-11 and 2011-12. In each year, 21% of the liability was insured by the first defender, with the balance being insured by the third defender in 2009-10, by the fourth defender in 2010-11, and by the fifth defender in 2011-12. The pursuer believes and avers that Skene's liability was incurred at some point during policy year 2010-11 or, if not, during policy year 2009-10 or, if not, during policy year 2011-12 when Skene renounced its lease. The pursuer seeks payment by the defenders of sums amounting to £3,000,000, founding upon rights conferred upon it by the Third Parties (Rights against Insurers) Act 2010. The defenders contend that liability for the purposes of the 2010 Act has not been established by the decree by default granted against Skene, and that the action against them is accordingly irrelevant. Following a debate, the commercial judge held that the pursuer's case was relevant for proof and refused the defenders' motion for dismissal of the action. The defenders now reclaim (appeal against) that decision.

Rights of third parties against insurers of insolvent policyholders

[6] Section 1 of the Third Parties (Rights against Insurers) Act 2010 provides *inter alia* as follows:

> "**1 Rights against insurer of insolvent person etc**
>
> (1) This section applies if—

> (a) a relevant person incurs a liability against which that person is insured under a contract of insurance, or
> (b) a person who is subject to such a liability becomes a relevant person.
>
> (2) The rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred (the 'third party').
>
> (3) The third party may bring proceedings to enforce the rights against the insurer without having established the relevant person's liability; but the third party may not enforce those rights without having established that liability.
>
> (4) For the purposes of this Act, a liability is established only if its existence and amount are established; and, for that purpose, 'establish' means establish—
> (a) by virtue of a declaration under section 2 or a declarator under section 3,
> (b) by a judgment or decree,
> (c) by an award in arbitral proceedings or by an arbitration, or
> (d) by an enforceable agreement…"

[7] In terms of section 6(2) of the Act, a body corporate is a "relevant person" if, *inter alia*, it is being wound up either voluntarily or by the court. It is common ground in the present action that Skene is a relevant person.

[8] The 2010 Act repealed and replaced the Third Parties (Rights against Insurers) Act 1930. The main purpose of the reform, which implemented recommendations made by the Law Commissions in their 2001 Report on "Third Parties – Rights against Insurers" (Law Com no 272; Scot Law Com no 184), was to enable the third party to issue proceedings against the insurer without first having established the liability in proceedings against the insolvent policyholder. So far as Scotland is concerned, that purpose is achieved by section 3 of the 2010 Act, which applies where the third party claims to have rights under a contract of insurance by virtue of a transfer under section 1 (above) but has not yet established the insured's liability which is insured under that contract. In these circumstances, the third party may bring proceedings against the insurer for declarator as to the insured's liability and/or the insurer's potential liability to it. If declarator is granted, the effect is to render the

insurer liable to the third party and the court may grant decree against the insurer. Section 2 contains equivalent provisions for England and Wales.

[9] It follows, as is pointed out in the Explanatory Notes to the 2010 Act (at paragraph 7), that the third party now has the choice of using either the new method of single proceedings created by the Act or the existing method of first establishing the liability of the insolvent policyholder before initiating proceedings against the insurer.

The commercial judge's decision

[10] The commercial judge identified three issues between the parties:

(i) What was the legal effect in terms of section 1(4) of the 2010 Act of the decree by default granted on 15 November 2017?

(ii) Was the pursuer's claim against Skene excluded by the terms of the relevant policy of insurance?

(iii) Had the pursuer pled a relevant case against the third to fifth defenders? (This issue, which arose out of the uncertainty as to the policy year in which the damage occurred, was not pursued in the reclaiming motion and need not be addressed in this opinion.)

[11] On the first issue, the commercial judge observed that the questions for determination were, firstly, whether the decree by default established Skene's liability to the pursuer for the purposes of section 1(4) and, secondly, if so, whether the defenders were entitled to challenge Skene's liability to the pursuer notwithstanding the existence of the decree. He considered that the key to resolving both questions lay in the proper construction of section 1, and in particular of section 1(4). That subsection expressly addressed the issue of establishing liability for the purposes of the Act and therefore, by

implication, not more broadly. Establishment of liability had two elements: the existence of the liability and its amount. Some form of the word "establish" appeared four times and it would be surprising if it were not to be given the same meaning each time it was used. There seemed to be no reason to depart from the word's normal meaning, ie to settle or fix; to place beyond dispute. Finally, the reference to a decree in paragraph (b) was unqualified, as indeed were the references in paragraphs (c) and (d) to an arbitral award and an enforceable agreement.

[12] Against that background, the commercial judge was satisfied that the decree by default fell within section 1(4). Its terms set up both the existence and amount of Skene's liability. There was no basis for imposing an additional element into the definition of "establish", namely a degree of consideration of the merits of the claim. Such an interpretation would impose on the word "establish" a particular meaning in each instance where it appeared, including the first "…a liability is established…". None of paragraphs (b), (c) or (d) necessarily carried with them the notion of a consideration of the merits. Moreover, the defenders' argument would introduce uncertainty as to how much consideration required to be given to the merits in order for liability to be established.

[13] As to the consequences of the decree establishing Skene's liability, the defenders had argued, on the basis of case law on the 1930 Act, that it remained open to them to dispute that there was any such liability. The commercial judge rejected this argument which appeared to treat section 1(4) as an additional hurdle in the way of an injured person. The pre-2010 Act cases were distinguishable. Once the liability of an insured to an injured third party had been established in terms of section 1(4), that matter was resolved, albeit that the injured party still required to demonstrate, when enforcing its rights against the insurer, that

the liability so established fell within the scope of the policy. It remained open to the insurer to dispute that point, as had been done in the present case.

[14] On the second issue, the defenders had advanced two lines of argument. The first was that the default by Skene which resulted in the grant of decree was not an insured risk covered by the defenders' policies. The commercial judge found this argument to be overly artificial. Inherent to a decree was the cause in which it was pronounced: the decree did not exist and could not be considered in isolation. Here the decree had been granted in the cause brought by the pursuer against Skene and was a legal liability to pay damages "as a result of" damage. The fact that decree had passed following a default by Skene did not alter that. The commercial judge also rejected an alternative argument (not pursued in the reclaiming motion) that the decree effected a judicial novation on the parties' underlying rights and liabilities.

[15] The second line of argument was that no relevant case of damage or denial of access (the insured risks of public liability cover) had been averred. The remedial measures taken by the pursuer to avoid damage to the pipeline were properly to be characterised as pure financial loss, which was expressly excluded from the scope of the policy. The commercial judge was satisfied that the pursuer had pled a relevant case for proof, having averred *inter alia* that the pipeline was damaged. He rejected the defenders' construction of the policy exclusion of pure financial loss, observing that if the relevant clause were construed as contended for, it would be difficult to give any content at all to the indemnity of liability for denial of access.

[16] For these reasons, the commercial judge rejected the defenders' motions for dismissal. By interlocutor dated 19 March 2024, he sustained the pursuer's first preliminary plea to the extent of excluding certain of the defenders' averments from probation, found the

defenders liable to the pursuer for the expenses of the debate, and granted leave to the defenders to reclaim.

Grounds of appeal

[17] The first defender contends that the commercial judge erred in declining to dismiss the action in so far as it was based on the default decree rather than on the matters pleaded in the action against Skene. Section 1(4), purposively construed, required the liability imposed on an insurer to be established by a decree granted after a consideration of the merits of the action rather than mere non-compliance with the rules of court. Alternatively, the case could be viewed as one where the decree founded upon for the purposes of the Act related to something that fell outwith the scope of the policies, namely Skene's failure to comply with the rules of court when sued by the pursuer. The grounds of appeal on behalf of the third to fifth defenders are in broadly similar terms. A joint note of argument was submitted on behalf of the first and third to fifth defenders.

Arguments for the parties

Defenders and reclaimers

[18] On behalf of the defenders it was submitted that a decree by default was not a relevant basis for establishing liability for the purposes of the 2010 Act. It had been granted in pursuance of rules of court conferring a discretion on the court. That was not an insured peril under the policyholder's contract of insurance. Section 1(1) stated that the section applied if a relevant person incurred a liability against which that person was insured under a contract of insurance. If that condition was not met it was unnecessary to go further. Where the policyholder's liability did not arise out of an insured peril, there was nothing to

transfer to the third party. The commercial judge had erred in beginning his analysis with section 1(4). The purpose of section 1(4) was merely to indicate places where establishment of the liability could be found.

[19] In the case of decree by default, the commercial judge erred in treating the cause as inherent to the decree pronounced. The underlying fact was that a party had not appeared at a peremptory hearing; that was what the decree was declaring. It had nothing to do with the merits of the cause. Given the fact that the legislation was directed to the circumstances in which an insurer may be required to pay for the wrongdoing of someone else, Parliament must be taken to have intended that decree has followed upon a consideration of the merits of the case. English cases under the 1930 Act had referred to the establishment of liability and the amount of loss being ascertained in the context of contested proceedings. Similar language had been used in the Law Commissions' Report. It should be taken that the conceptions of "establish" and "ascertain" were not altered when they were adopted in the 2010 Act. Properly analysed, decree by default did not require payment of damages by the defender: rather, it was a penalty imposed by the court. It was not suggested that liability for such a penalty was an insured risk under the policyholder's contract of insurance.

[20] The mischief addressed by the 2010 Act was the requirement under the 1930 Act that the third party establish the policyholder's liability before issuing proceedings against the insurer. The purpose of the 2010 Act was restricted to removing that precondition. The statutory assignation was not altered. The case law on the 1930 Act clearly established that the insurer was entitled to raise issues (such as contributory negligence) against a claimant even if they had not been canvassed in the action against the policyholder. In the present case the pursuer had raised a separate action against the policyholder, and was in no better

position than it would have been under the 1930 Act. It still had to establish its claim against the insurer.

[21] The commercial judge had determined that the decree was "a legal liability to pay damages 'as a result of' damage". If that was so, and liability had been established for the purposes of section 1(4) and thus under the relevant contract of insurance, it was difficult to understand what remained to be determined at a proof before answer. The pursuer would be seeking to prove that which, on the commercial judge's analysis, had already been established. Similarly, the commercial judge's determination that the third party still required "to demonstrate… that the liability so established falls within the scope of the policy" could not be reconciled with sections 1 and 3, which were concerned with whether liability "which is insured under that contract" had been established by the decree in question. On the commercial judge's analysis, such a liability had been established, and there was nothing left to be determined at proof.

[22] On behalf of the third to fifth defenders it was further contended that it was impossible to reconcile the commercial judge's determination that the decree established liability for the purposes of section 1(4) (and thus under the relevant contract of insurance) with his decision to permit the pursuer to proceed against the defenders with cases pled in the alternative *quoad* the dates of the alleged actual damage. On the one hand, the pursuer asserted that liability was established; on the other hand, it accepted that it did not know, and had not established, when that liability arose. In truth, the reason why the pursuer sought to prove the year in which the damage occurred was because Skene's liability had not been established.

Pursuer and respondent

[23] The pursuer moved the court to refuse the defenders' reclaiming motions and to adhere to the interlocutor of the commercial judge. In order to succeed against an insurer under the 2010 Act, a pursuer required to prove two things: (i) that the policyholder was under a liability to him; and (ii) that that liability was insured under a contract of insurance between the policyholder and the insurer. For point (i), the 2010 Act adopted the concept of that liability being "established", which did not feature in the 1930 Act. Section 1(4) detailed four routes by which the insured's liability could be established, the second of which was "by a judgment or decree". The decree in favour of the pursuer against Skene satisfied that requirement.

[24] The defenders' interpretation of section 1(4) had no basis in the statutory language. There was no reason to depart from the normal meaning of "establish": to settle or fix; to place beyond dispute. If Parliament had intended only some types of decree to be sufficient, it would have made express provision to that effect. As a matter of substantive law, the decree established a liability of Skene to the pursuer against which Skene was insured under its contracts with the defenders. The decree, although by default, was a decree pronounced *in foro* which conclusively established the liability of a defender.

[25] It would be surprising if the word "establish" was not to be given the same meaning each time it was used in section 1(4). The defenders' interpretation required a gloss to be put on some but not all those uses. It would introduce uncertainty regarding the application of section 1(4)(b). To what extent would the court require to consider the merits of the claim? For example, would summary decree be sufficient, or a decision in the pursuer's favour at debate? Other routes by which the insured's liability could be established, such as "an enforceable agreement", might not involve a consideration of the merits of the claim.

[26] The defenders' contention that even if the decree was sufficient to establish Skene's liability to the pursuer, it did not bind the insurers was also unfounded. The cases under the 1930 Act relied upon by the defenders showed that under that Act it had been possible for insurers to take issue with whether liability had been established, even after a proof between the pursuer and the policyholder. However the 2010 Act operated on a different basis and the prior case law was of limited assistance. Subsection 1(4) of the 2010 Act specified what was required to establish liability "[f]or the purposes of this Act". In context, that reference had to be taken to include how to establish the policyholder's liability for the purpose of the pursuer's claim against insurers. It followed that once section 1(4) had been satisfied, there was no scope for the insurer to dispute whether or not liability had been established. Decree by default was no different in that regard.

[27] The commercial judge had been correct to reject the defenders' contention that the action was irrelevant because they had not agreed to insure against the risk of Skene failing to comply with the rules of court and decree by default being awarded. The right of indemnity which the pursuer sought to enforce was that provided for in the policy terms. The decree did not exist in isolation; it was granted "in full satisfaction of the summons". The significance of the decree was that it represented the means by which the pursuer established Skene's liability, as required by section 1.

[28] The difference between the parties' analyses was that the defenders argued that there was only one thing to be established (liability against which the policyholder was insured) whereas the pursuer contended that there were two: that there was a liability of the policyholder to the third party, and that it was an insured risk. It remained open to the defenders to argue at proof that the loss sustained by the pursuer was an economic loss and

not therefore an insured risk. The issue of which of the third, fourth and fifth defenders was liable along with the first defender was also a matter to be determined at proof.

[29] The pursuer's construction of section 1 did not produce an unfair result. Insurers were still protected by the terms of their policies. If there was any suggestion that a policyholder had gone about matters in a wrongful way, it would be open to an insurer to avoid the policy. Further, as illustrated by the present case, the insurers had an opportunity to conduct the defence of proceedings against the policyholder. Here the insurers had initially assumed conduct of Skene's defence but subsequently opted not to maintain it. The pursuer understood that they took that decision on the basis that (in their estimation) policy exceptions applied. The decision to withdraw from conducting Skene's defence had been a matter for the insurers.

Decision

[30] The issue for determination is one of interpretation of section 1 of the 2010 Act in circumstances where, as here, the pursuer has not utilised section 3 to bring proceedings against the insurer without having established the insolvent policyholder's liability to it (the pursuer) in separate proceedings. We find it convenient to address the following questions in turn:

(i) Leaving aside the fact that the decree with which this case is concerned was a decree by default, does it remain open to the insurer, in proceedings against it by the third party, to dispute the liability of the policyholder to the third party?

(ii) Does it make a difference in the present case that the decree was granted by default?

Although the Act uses the term "insured" for the person with rights under a contract of insurance, we use the word "policyholder" for easier comprehension.

(i) Right of insurer to dispute policyholder's liability

[31] The structure of the 2010 Act differs significantly from that of the 1930 Act. As well as introducing the procedure whereby the third party may bring proceedings against the insurer seeking declarator of the policyholder's liability and/or the insurer's potential liability to it, the 2010 Act includes provisions with no counterpart in the previous legislation in relation to "establishment" of liability. Section 1(3) lays the foundation for sections 2 and 3 by providing that the third party may bring proceedings to enforce the transferred rights against the insurer without having established the insolvent policyholder's liability. The subsection also, however, states that "the third party may not enforce those rights without having established that liability". It follows logically from that part of section 1(3) that where the third party *has* established the liability, it may enforce the transferred rights against the insurer. That is the context in which section 1(4) defines "established" to include establishment by a judgment or decree.

[32] In support of their submission that it remained open to the insurer to contest the policyholder's liability, notwithstanding the granting of a decree in favour of the third party in its proceedings against the policyholder, the defenders founded upon observations by Flaux J at first instance and by Christopher Clarke LJ on appeal in *AstraZeneca Insurance Co Ltd* v *XL Insurance (Bermuda) Ltd & Anor* [2013] 1 CLC 478; [2013] 2 CLC 1029. That case was not concerned with a claim under the 1930 Act; it was a dispute between an insurer and a reinsurer. The main issue was whether the reinsurer was liable to indemnify the insurer

where the insurer had settled the claim without the establishment of actual liability. The court held that it was not. Christopher Clarke LJ stated:

> "16. Under English law a liability policy is, generally speaking and in the absence of wording to the contrary, a policy which indemnifies the insured in respect of actual liability. That means that, in order to recover from his insurer the insured must show that he was liable to the person who claimed against him. Liability cannot be determined in a legal vacuum. Hence the need to assume, for this purpose, a correct application of the law governing the claim in question to the facts properly found.
>
> 17. In the event of dispute the existence of liability has to be established to the satisfaction of the insurer, or, failing that, by the judge or arbitrator who has jurisdiction to decide such a dispute. It is not, therefore, necessarily sufficient for the insured to show that he has been held liable to a claimant by some court or tribunal or that he has agreed to settle with him. In practice the fact that this has occurred may cause or persuade the insurer to pay, but, if it does not, the insured must prove that he was actually liable…"

Christopher Clarke LJ acknowledged at paragraph 18 that this principle was "very inconvenient for insureds".

[33] In the circumstances addressed by the 2010 Act, ie claims against insolvent policyholders, that inconvenience has been removed. The effect of section 1(2)-(4) is that once the existence and amount of the policyholder's liability have been established by one of the methods listed in subsection (4), that liability may be enforced against the insurer without any need to establish it all over again to the satisfaction of the insurer or the judge or arbitrator hearing the claim against the insurer. The rights of the policyholder under the contract of insurance are transferred to the person to whom the liability was incurred.

[34] Senior counsel for the insurers placed emphasis on the words "a liability against which that person is insured" in section 1(1)(a). If the liability is not one against which the insolvent policyholder was insured, there are no rights under the contract against the insurer capable of being transferred to the third party. In this regard we agree with the analysis proposed by the pursuer: the third party has two separate matters to prove. The

first is the establishment of the policyholder's liability to the third party. The second is that that liability was one against which the policyholder was insured under a contract of insurance with the insurer. In the action by the third party against the insurer, it remains open to the insurer to contest the second of these matters by arguing that the loss sustained by the third party was not an insured risk and hence no rights have been transferred to the third party despite the establishment of liability of the policyholder to the third party.

[35] Applying the foregoing analysis to the circumstances of the present case (and subject to the "decree by default" point still to be addressed), the existence and amount of Skene's liability to the pursuer have been established in the proceedings against Skene. The effect of the Act is that it is not open to the defenders to require either the existence or the amount of that liability to be proved in the present action, or to found upon points that could have been but were not presented by way of defence in the previous action. On the other hand, it remains open to the defenders to dispute that the liability was an insured risk, which indeed they seek to do. In answer 8 the first defender avers:

> "Explained and averred that the said policy was subject to a number of terms and conditions, including exclusions which restricted the scope of the indemnity afforded. 'Damage' was a defined term, and depended for its application on tangible property being lost, destroyed or damaged. Pure financial loss was the subject of an exclusion in the policy. The claim advanced by the pursuer is one for pure financial loss as that phrase is used in the said policy of insurance. The circumstances of the instant case involve neither liability for bodily injury nor a legal liability on the part of Skene to pay damages for 'damage' within the meaning accorded that word in the several policies of insurance issued as aforesaid."

A similar averment is made by the third to fifth defenders. These matters cannot be resolved without proof.

[36] In the course of the hearing, the court's attention was drawn to the Second Supplement to the 15th edition of *MacGillivray on Insurance Law* (March 2024), which adds a new paragraph to paragraph 28-026 of the principal work, noting the decision of the

commercial judge in the present case. The author submits that the commercial judge's conclusion must be open to doubt on the basis of the pre-2010 case law to which reference has been made. For the reasons set out above we regard this criticism as unfounded, and we observe that the commentary fails to draw a clear distinction between the liability of the policyholder to the third party and the liability of the insurer under the policy.

(ii) Decree by default

[37] The commercial judge considered the defenders' argument that the liability established by a decree by default to be entirely separate from the cause in which the decree was granted as overly artificial. The court agrees. As senior counsel acknowledged, the proposition that a decree by default imposes an obligation to pay a penalty as opposed to damages is unsupported by authority, and we reject it. Such authority as exists is to the contrary effect. In *Forrest* v *Dunlop* (1875) 3R 15, decree of absolvitor was pronounced following the pursuer's failure to deliver copies of the open record to the defender and a subsequent failure to appear. The pursuer did not reclaim but instead raised a second action in identical terms. The Lord Ordinary (Curriehill) sustained the defender's plea of *res judicata* in the second action, observing (page 16):

> "I think that the pursuer must be held as confessed in the former action, and that he cannot now insist in the claim of damages from which the defender was assoilzied in that action…"

The Second Division refused the pursuer's reclaiming motion in the second action. Lord Justice-Clerk Moncrieff regarded the matter as "too clear for doubt", pointing out that a decree by default was a decree *in foro*, which could be taken out of the way by reclaiming or reduction. The inference to be drawn from these observations, especially that of Lord Curriehill above, is that the decree arises out of the cause of action itself and not the

procedural failure which was the immediate reason for the granting of decree by default. It is also difficult to see how, if the decree was properly characterised as a penalty, it could found a plea of *res judicata* in a subsequent action. For these reasons we reject the proposition that the liability to the pursuer did not arise out of an insured peril because it arose out of a procedural default.

[38] More generally, there is no sound reason, when interpreting section 1(4) of the 2010 Act, to restrict the word "decree" to a decree pronounced by the court after consideration of the merits of the case at proof or debate, as submitted by the defenders. The wording of the Act itself provides no support for such a restriction. It would give rise to uncertainty when seeking to apply a test of "consideration of the merits" to various situations, such as decree in absence and summary decree. It fails to acknowledge that there may be sound reasons why a party might be content for decree by default to pass against it, such as an appreciation that its defence was unsustainable and would, if insisted upon, result only in wasted expense and court time. It also fails to take into account the remedies available where the default was inadvertent. As is observed in *Court of Session Practice*, Division K (Decrees and Interlocutors) at paragraph 14:

> "… Where, as often occurs, the defaulting party presents the Division with new information, unknown to the court of first instance, which explains the reason for the default, the court will have regard to all the circumstances in determining where the interests of justice lie. The question of whether the decree should be recalled will become a matter for the discretion of the appellate court…"

[39] Nor does such an interpretation result in any obvious injustice in circumstances falling within the 2010 Act. Where an insolvent policyholder is sued for a loss arising out of an insured risk, the insurer will usually have the right (as we understand to have been the case here) to assume responsibility for the defence of the action against the policyholder. Where, unusually, the insurer does not become aware of the claim until after decree has

been granted against the policyholder, the insurer may be able to put itself in a position to seek one of the remedies available to a defaulting party. In any event it will always remain open to the insurer to contend that the loss sustained did not arise out of an insured risk.

Disposal

[40] For these reasons the reclaiming motion will be refused. The court is satisfied that the case should proceed to proof before answer. Live issues for proof include (i) whether the losses sustained by the pursuer were an insured risk or whether, as the defenders contend, they amount to pure financial loss falling within a policy exclusion; and (ii) when the loss occurred, which will determine which of the third to fifth defenders was an insurer in respect of the material period. A difficulty arises, however, out of the terms of the interlocutor pronounced by the commercial judge. Having heard parties at a by order hearing, the commercial judge excluded certain of the defenders' averments from probation but did not proceed to allow proof before answer. In *McCluskey* v *Scott Wilson Scotland Ltd* [2024] CSIH 26, the court emphasised (paragraph [41]) that issues such as exclusion of averments from probation ought normally to be addressed by parties at the debate itself and not left for discussion at a subsequent by order hearing. Further confusion has been created by the fact that the interlocutor excluded from probation "those of the defenders' averments marked in yellow in the version of the record tendered at the bar, no 39 of process". This formulation does not afford a satisfactory specification of the excluded averments. The interlocutor also failed to make any order for further procedure. In particular, there was no allowance of proof, as there ought to have been.

[41] The court will accordingly pronounce an interlocutor refusing the reclaiming motions, allowing proof before answer, and excluding from probation the defenders' averments as specified in the interlocutor.