SHERIFF APPEAL COURT

[2024] SAC (Civ) 39
HAM-A269-21

Sheriff Principal D C W Pyle

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in the appeal in the cause

FOREFRONT SCAFFOLDING HIRE & SALES LIMITED

Pursuers and Respondents

against

PRO GLOBAL FREIGHT SOLUTIONS LTD

First Defenders

and

ZL GROUP LTD

Second Defenders

and

JOINT VENTURE SCAFFOLDING LTD

Third Defenders

and

THE CHIEF CONSTABLE OF POLICE SCOTLAND

Third Party and Appellant

Third Party and Appellant: Niven; Morton Fraser Macroberts LLP
Pursuer and respondent: MacDougall, Adv; Kingsley Wood & Co

15 August 2024

Introduction

[1] This appeal arises in an action which *prima facie* began life as a straightforward claim by the alleged owners of scaffolding who agreed that another party store it for them. They asked for it back. That was refused. They commenced proceedings in order to recover the scaffolding and to seek damages arising from the refusal.

[2] The action was first raised in June 2021. Since then it has meandered through Hamilton Sheriff Court at a glacial pace with, eventually, a debate taking place before the sheriff who decided that a proof before answer should be allowed. That decision was appealed by the first defenders but they withdrew it after the pursuers amended their pleadings. But the Chief Constable who had been introduced into the action by way of third party procedure maintained that the action in so far as directed against her should be dismissed.

[3] One other feature of this action is the poor standard of written pleading in the cases of the pursuer and the first and third defenders with obvious errors and contradictory averments still persisting despite extensive amendment opportunities.

History of the action

[4] To understand the grounds of appeal by the third party, it is necessary to consider in some detail the history of the action.

[5] In the initial writ there were three defenders: Pro Global Freight Solutions Limited ("the first defenders"), ZL Group Limited ("the second defenders") and Joint Venture Scaffolding Limited ("the third defenders"). All three defenders have the same registered office. After service, the third defenders lodged a notice of intention to defend. They then lodged a motion (remarkably) to allow the notice of intention to defend by the

first defenders to be allowed to be received late. Be that as it may, the sheriff granted the motion. No appearance was made by the second defenders.

[6] In the initial writ the pursuers' first crave was for declarator that they owned the goods which were uplifted by the first defenders in terms of a contract between the parties dated 10 February 2020. They also craved for delivery of the goods, failing which for payment of the sum of £85,000. A further declarator was craved: that the pursuers are not liable to pay for the storage of the goods from a specified date. The reason for that crave is not obvious. The same can be said about the first crave. It is true, as counsel for the pursuers submitted before this court, that as the first declarator is not to decide a hypothetical it is competent, but it is unclear why it was thought necessary to seek a declarator when the circumstances averred and the law said to apply would of themselves necessitate only a crave for delivery with ancillary claims arising from failure to deliver following decree. But more important criticisms can be made. The first declarator states in terms that the goods were uplifted by the first defenders, but then goes on to state that the goods are stored by the first defenders "and/or" the second defenders "and/or" the third defenders. That of itself suggests that the pursuers aver alternative states of play: the first is that all of the defenders have possession of the goods; the second is that the first defenders do not possess them at all, but that they are possessed by the second defenders and so on with the third defenders. It might be thought that when looking at the averments in the condescendence consideration should be given to the weaker alternative rule in determining relevancy. But those averments have other difficulties: all that is averred is that the goods were owned by the pursuers, that they were transported by the first defenders to Righead Court, premises which are the registered office of the first defenders, as well as the other defenders. No contract is averred. An invoice from the first defenders to the pursuers is

incorporated into the pleadings, dated 9 February 2021 and in respect of storage charges from 10 November 2020 to 9 February 2021. For obvious reasons, that period sits uneasily with a declarator crave which identifies 10 February 2020 as the date of the (subsequently unspecified) contract. The pursuers go on to aver that since 9 February 2021 they "have attempted to arrange to uplift the goods from the [first defenders] and has [sic] repeatedly tried to make arrangements to collect same and to make payment of the storage charges due thereunder". They then aver: "Despite repeated requests [all three defenders] refuse to release the goods to the pursuers". No averment is made about requests for release being made to either the second or third defenders. No averment is made that either of them possesses the goods or, if they do, how that came to pass. The reader is therefore left to ponder why the second and third defenders are in the action at all. There is further confusion in the pleas-in-law which proceed, not on the alternative that the goods might be possessed solely by one of the defenders, but on the assumption that they are possessed by all three.

[7] The record was eventually closed in January 2022 and a debate fixed on the preliminary pleas of the first and third defenders. Before the diet of debate - in March 2022 - the sheriff sisted the cause on the first and third defenders' opposed motion to allow an action of multiplepoinding to be raised.

[8] In that record the pursuers' craves remained the same. They now averred that all three defenders were part of the same business providing different services therein. This was admitted by the first and third defenders. The pursuers went on to aver in article 3 of condescendence the circumstances which led them to purchase scaffolding from two different parties - MJ Builders and Stepup Scaffolding UK Limited - and that the scaffolding became mixed up. In their respective answers to that article the first and third defenders

averred that "First Scaffolding were the owners of the scaffolding". In article 4 of condescendence the pursuers averred the circumstances which led to the goods being stored. Still no precise date of contract was averred and certainly none which related back to the date in the first crave. But matters are even more confused in that the pursuers now averred that it was the third defenders, not the first defenders, who had agreed to uplift and store the goods and that they had duly uplifted them. In their answers both the first and the third defenders averred that the pursuers did not have title to the goods. Reference was made to a letter from First Scaffolding Limited to the pursuers in which the former claimed title to various items of scaffolding which were part of the goods uplifted and stored. The first and third defenders averred that the police had told them that a complaint had been registered with the police that some of the scaffolding was owned by another company, Step-Up Limited. They also averred that they were under a specific order from the police officers not to release the goods to the pursuers. In article 5 of condescendence the pursuers averred that conversations took place between them and the "defenders" about the uplifting of the goods and that they had concluded with "the defenders" refusing to release them. They went on to aver that "the defenders" issued an invoice "for the transport and storage of the Pursuers' Stock [sic]". Reference was then made to an invoice which was incorporated into the pleadings. The invoice was not issued by "the defenders"; it was issued by the first defenders. The pursuers averred that they had paid the invoice but were still refused access to the goods for uplifting, despite an agreement between the pursuers and "the defenders" that on payment being made the goods would be released the next day. These averments were met with a general denial by both the first and the third defenders. Despite that, in answer 8 the first defenders averred that the goods were uplifted and stored by them. They could not be released because of an order by the police to the "third

defenders". They admitted that the invoice was issued by them and was paid by the pursuers and in that context averred "[the pursuers] had previously requested that [the first defenders] store the goods" which appears to be an admission of a contract. Answer 8 for the third defenders was in exactly the same terms as answer 8 for the first defenders. The pursuers' pleas-in-law which implied that the goods were in the possession of all three defenders remained untouched.

[9] By this time, the first defenders had lodged a counterclaim for payment of storage charges on an averment that they were storing scaffolding which they averred they "continue to retain subject to order of Police Scotland". They averred that they "have intimated their entitlement to charge for storage while Police Scotland confirm who is the legal owner of the scaffolding". They incidentally referred to the pursuers having previously "placed the scaffolding in the [first defenders] custody" for storage, although nothing was averred about a contract. In their first plea-in-law the first defenders pled entitlement to reparation for the pursuers' "breach of contract".

[10] By August 2022, the pursuers had decided that they wish to recall the earlier sist. The sist was duly recalled and at a hearing on 31 August 2022 on the pursuers' unopposed motion the third party procedure against the Chief Constable was commenced by the sheriff granting a warrant for the service of a copy of "the writ, as amended". Curiously, the sheriff also opens up the record and allows the pursuers seven days "during which [they] may amend" followed by a further seven days "during which the defender [sic] may amend" and that "[t]hereafter, of new, the record shall be closed". On 7 September 2022, the pursuers lodged a minute of amendment which included in it calls upon Police Scotland despite the Chief Constable not yet being a party to the action. The pursuers also state, again curiously, that depending upon the answers to these calls:

> "it may be that the Pursuers' remedy for the sum fourth craved [being a claim for loss of income due to alleged unlawful refusal of the 'defenders' to release the goods] is against Police Scotland. However, the merits of such a claim cannot be assessed until Police Scotland answer the various calls…"

Notably, the minute did not include any reference to a potential right of relief against the Chief Constable for the sum counterclaimed by the first defenders. On the same date, the pursuers lodged the third party notice, it not having been lodged at the time that the sheriff granted the warrant for service. With that was also lodged an amended record, although there is no record of an interlocutor allowing the record to be opened up, amended in terms of the minute of amendment and closed of new (presumably because the parties were proceeding on the basis of the obviously incompetent interlocutor of 31 August). The third party notice is not in proper form, in that all that it states is that the pursuers are claiming a total sum against the three defenders. No mention is made of the counterclaim.

[11] The Chief Constable, as third party, duly lodged answers after service of the notice. In it she avers that a police officer had made contact with the third defenders and "asked if they could retain the scaffolding pending the outcome of the [police] investigation".

[12] At an options hearing on 15 February 2023, the sheriff "[repelled] third defenders defences, Reserving the position in respect of third defender meantime". It is unclear what that was supposed to mean, although it presumably followed upon an earlier communication from the third defenders' agents intimating that they were withdrawing from acting due to the third defenders having entered into liquidation.

[13] On 1 March 2023 the sheriff closed the record and fixed a diet of debate on the parties' preliminary pleas. By this time, the first defenders had introduced an averment that they believed and averred that the goods were owned by "Step-Up Limited" or "Step Up Limited" - the pleader cannot decide which to use. Reference is made to a production which

is incorporated into the pleadings purporting to be a claim of ownership in a document headed up with a company said to be StepUp Scaffolding UK Limited.

[14] Before I turn to the sheriff's judgment after debate, the following general points can be made about the conduct of this litigation to that point:

1. Despite over two years of opportunity, the pursuers are seeking a declarator in relation to a contract which on any view cannot have been formed on the date stated;
2. The declarator still proceeds on an "and/or" basis, despite the later averments;
3. The pursuers' averments remain contradictory about who entered into the contract, be it potentially the first defenders or the third defenders. If it be the first defenders, which they proceed at one point to deny and at others to admit, it is difficult to understand why the second and third defenders are in the action in the first place;
4. In any event, the averments of when and how the contract was entered into remain inadequate;
5. The pursuers' pleas-in-law are inconsistent with the averments of fact;
6. The first defenders' and the third defenders' averments are confused and contradictory, one example being that the first defenders still cannot decide what is the proper designation of the limited company that they say might own the scaffolding;
7. Doubtless encouraged by the parties' representatives, the allowing of amendment by the sheriff has at points been confused, as has the manner in which the third party procedure was commenced.

Sheriff's judgment

[15] At one point, the sheriff states that the first and third defenders are represented by the same solicitor, but it does not appear that the third defenders were represented before him. The rule 22 notes of the basis for the preliminary pleas are lodged on behalf of the pursuers, the third party and the first defenders. There is no indication in the process that any formal steps in the action have been taken by the liquidator (on the assumption that one was appointed) for the third defenders, although as noted there is an earlier interlocutor which purports to deal with the third defenders' pleadings.

[16] Various matters were raised before the sheriff by the third party. Not all of them are relevant for this appeal. Again, various issues were raised as preliminary matters as between the pursuers and the first defenders. However, there is a curiosity in the basis upon which the sheriff allowed a proof before answer. In his interlocutor, he repelled the pursuer's sixth plea-in-law. That is the pursuers' only preliminary plea. In order to allow a proof at all, that plea by definition had to be repelled given that it was a plea not to remit to probation. The sheriff went on to repel pleas of "the defenders". That appears to proceed on the basis the sheriff narrated as follows (at para [4]):

> "The pursuers' averments, which for the purposes of this debate I must take at this stage *pro veritate*, disclosed the following factual background. The pursuers are a company who provide the hire and sale of scaffolding for construction projects. In the course of this business they purchase new and second hand materials. There are in terms of the pleadings three named defenders. I understand however that all of the defenders are in fact constituents [sic] bodies of the same business, albeit providing different services in each of these constituent companies. The first and third named defenders have lodged defences in similar terms and they are represented by the same solicitors. For the purposes of this debate I have proceeded on the basis that the three named defenders are the same company and that they share a common interest in this matter. I intend therefore to simply refer to the defenders in the course of this judgment."

For the sheriff to reach that conclusion may have been because of the manner in which the debate was conducted by the parties (other than the third party). But it still makes no sense. On the face of the process, the third defenders were no longer involved, albeit the basis upon which their case had been dismissed or otherwise repelled is obscure, as is the question of whether or not they were in liquidation and, if so, what was the position of the liquidator in respect of these proceedings. Moreover, at no point have the second defenders entered the process. The sheriff appears just to accept that because of the connection between each of the companies in some way they can be treated as one party, when for obvious reasons that cannot be so unless there are grounds for lifting the corporate veil. And it also ignores the confusion in the overall pleadings about exactly who contracted with whom.

[17] The sheriff repelled the first defenders' fifth and seventh pleas-in-law. They are the first defenders' only preliminary pleas, the former being a plea to relevancy and the latter being, in effect although it is not stated, a plea to competency. Thus, as between the pursuers and the first defenders, there was no preliminary plea left to warrant a proof before answer.

[18] The sheriff repelled the third party's first and third pleas-in-law in the principal action. The sheriff decided that the third party's submissions on competency had no substance. Yet, he left untouched the second plea-in-law. That should have also been repelled. The consequence would be that, again, there would be no preliminary plea to warrant a proof before answer.

[19] The sheriff repelled the third party's first and third pleas-in-law in the counterclaim. They are preliminary pleas, but as in the principal action the second plea relates to competency and ought to have been repelled.

[20] What is left then are the pleas-in-law for the pursuers in the counterclaim. The sheriff does not discuss them, despite number three being a plea that the first defenders' averments should not be remitted to probation. It is not at all clear from the sheriff's judgment that the pursuers specifically addressed the pleas-in-law in the counterclaim. The rule 22 note for the pursuers appears merely to be a complaint about recent averments added by the first defenders, as well as an issue about multiplepoinding. The conclusion in the note is merely a motion to "strike from the record" (whatever that is supposed to mean) these averments. On the other hand, the issue the pursuers raised about the new averments would by implication affect the counterclaim.

[21] This is a guddle, like so much else in this action. The appeal before this court relates only to the third party. It is therefore inappropriate for this court to seek to resolve the many problems which arise for further procedure as between the pursuers and the first defenders. The first defenders appealed the sheriff's interlocutor but following an agreed amendment by the pursuers the first defenders abandoned their appeal. The amendment fails to address many of the problems in the pleadings. It might be a forlorn hope anyway that the representatives of the pursuers and the first defenders would be capable of addressing them. Perhaps they have an understanding of what the dispute is truly about and will conduct the proof accordingly, but it creates a real difficulty for the sheriff who will preside over it. Issues of competency are *pars judicis*.

Submissions by the third party

[22] The third party has three grounds of appeal.

Competency

[23] The action is fundamentally incompetent as against the third party. The action is principally one of declarator of ownership of moveable property. The third party has no claim of ownership over the moveable property in question. She ought not to have been convened as a party to these proceedings and, indeed, was convened by an incompetent third party notice. The third party ought not to have to sit through proof in an action about ownership of property when it has no interest in the property in dispute. That would be entirely unfair, unreasonable and contrary to the interests of justice. It would result in the third party incurring huge expense for no reason. In an action of declarator relating to moveable property, the test of competency is whether the party convened as defender/third party could have raised an action of multiplepoinding. The third party has no title to raise a multiplepoinding in respect of the property because she does not possess it and has no proprietary interest in it (*Allgemeine Deutsche Credit Anstalt and Others* v *The Scottish Amicable Life Assurance Society* 1908 SC 33).

[24] In any event, the sheriff was plainly wrong to hold as he did that a declaratory action such as the present one is a competent way of determining ownership of moveable property. A plea to the competency ought to be sustained where some process alone is appropriate to the circumstances. Where there are competing claims on moveable property, the appropriate cause is an action of multiplepoinding (Macphail, *Sheriff Court Practice*, 4th ed, paras [9.130] and [21.19]). That rule is for good reason. In a multiplepoinding, the pursuer has to serve the proceedings on all parties with an interest and requires to place an advertisement inviting claims. This means that the action is brought to the attention of all parties having an interest in the property. In a declaratory action, there are no such requirements. Accordingly, the action will not necessarily come to the attention of all

parties with claims. If the pursuer fails to cite all parties with potential claims ownership of the property will never be adequately determined by the court. Indeed, even if the pursuer cited all parties with an interest in the property, ownership of that property would only be determined in the event that the pursuer was successful. If the defenders are successful, then absolvitor would be granted and ownership of the property would remain an open question. Effectively, if the present proceedings are allowed to run their course, they will cost the parties huge expense without ever successfully or competently determining the ownership of the property in dispute. The pursuers raised an action of multiplepoinding, which is currently sisted. Had the pursuers concluded that action in the usual way, the present action could have been avoided.

All parties not called

[25] The sheriff erred in repelling the third party's plea of all parties not called. His reasoning is unclear. Both the pursuers and first defenders expressly refer in their written pleadings to a third party with an interest in the property (Step-Up Limited) which is not a party to the current action. The third party avers that Step-Up Limited has expressly told her that it owns the property. It is clear from the averments of all parties to the action that Step-Up Limited has, or may have, an interest and has not been called as a defender. In reaching his decision, the sheriff relied on *Lang* v *Ure* 1994 SLT 1235. That case was not cited by any of the parties at the debate and none of the parties had the opportunity to address the sheriff on the case or its relevance to the current dispute. By failing to allow the parties to make submissions on it, the sheriff erred in law (Macphail, op cit, para [17.14]). In any event, the conclusion drawn by the sheriff as a result of the case, to the effect that the existence of third party procedure effectively precludes a plea of all parties not called, is

plainly wrong. The court held that the plea was based on prejudice and that such prejudice no longer existed as a result of the introduction of third party procedure. The case is authority for the proposition that where there are several people who are jointly and severally liable for a debt and not all of them are cited as defenders, third party procedure provides those who are cited with a remedy. The present case does not concern jointly and severally liable defenders. In the present circumstances, a plea of all parties not called remains relevant as in *Wilson* v *Independent Broadcasting Authority* 1979 SC 351, in which Lord Ross explained (at p 356):

> "The plea of all parties not called can only be sustained if all parties have not been called whose appearance or failure to appear is necessary to have the question at issue effectively disposed of".

The sheriff ought to have asked himself whether on the basis of the parties' pleadings there was any party with a potential proprietary interest in the property who had not been cited as a defender and whose appearance was necessary to determine ownership of the property in question. Had he done so, he would have concluded that Step-Up Limited ought to have been a defender and dismissed the present action.

Relevancy and specification

[26] The sheriff erred in law by failing to uphold the third party's plea to the relevancy and specification of the action. While the pursuers have amended their case in that regard since the appeal was marked, these amendments do not cure the problem. Fundamentally, the pursuers' case is that an unlawful order given by the officers of Police Scotland to the first defenders meant that they retained the scaffolding when they otherwise would not have done. Given that any instruction given by such officers was admittedly given to the first defenders, there is no legal basis upon which such a claim by the pursuers can be

founded. The third party could not have been undertaking any duty of care or assuming responsibility to the pursuers in respect of any instruction given to the first defenders. The relationship between the pursuers and the third party was not sufficiently proximate to found a relevant claim. *Global Resources* v *Mackay* 2009 SLT 104 does not assist the pursuers. Per Lord Hodge at para [17] the components of that delict are (in relation to the present case): (a) an intention to cause economic harm to the pursuers; and (b) the use of unlawful means in relation to the first defenders which affect the first defenders' freedom to honour their contract with the pursuers. It is not sufficient that harm to the pursuers is a foreseeable consequence of the third party's actions. The pursuers would have to aver and prove that the third party, by police officers giving the first defenders an allegedly unlawful order, intended to harm the pursuers by causing it economic loss. There are no averments to that effect.

[27] In the grounds of appeal, the third party also submitted that there is no competent basis to be found in rule 20 of the Sheriff Court Ordinary Cause Rules 1993 for a pursuer to serve a third party notice other than where it seeks relief against a third party in relation to the counterclaim raised against it by the defender. Accordingly, the use of the third party procedure in this case was incompetent. During the hearing, the solicitor for the third party advised that this ground was no longer being maintained.

Submissions for the pursuers

Competency

[28] Clearly, the third party has no proprietary interest in the scaffolding. Declarator of ownership only forms a part of the action. The part that the third party has been convened for relates to the losses which the pursuers and the defenders claim to have incurred that

may have been caused by the "order" or "request" given by Police Scotland. If the pursuers and defenders can prove these losses the third party may be liable for them depending upon the evidence. These are matters that can only be determined after proof.

[29] It is well established that an action may be incompetent if "some other process is alone appropriate to the circumstances" (Macphail, op cit, para [9.130]). That being so, an action will only be incompetent if there is only one procedure apt to determine it. The circumstances of the alleged "competing claims" in the present action is far removed from a paradigm case of multiplepoinding. Rather, the defenders have pled competing ownership as a defence to the pursuers' claim. The proposition that there are genuine competing claims is a complete fiction. The present action was sisted and the defenders raised an action of multiplepoinding. That action was intimated upon all parties that the defenders alleged had intimated a competing interest in the scaffolding. The fact that no appearance was entered by any party other than the pursuers is, as the sheriff records, "indicating that they were not in fact seeking to make competing claims on the property". The action of multiplepoinding was thereafter sisted to await the outcome of the present action. Even if an action of multiplepoinding did have merit (which it self-evidently does not) it would not be the only process that could determine the outcome of the parties' dispute. The defenders introduced the proposition of there being competing claims as a defence to liability. The onus of proof lies upon the party that requires to prove a positive in order to succeed. It is not incumbent upon the pursuers to prove the negative that no other party owns the scaffolding. If the defenders wish to prove that another party owns the scaffolding they are free to do so on the basis of their own evidence or by sisting the party they say owns it.

All parties not called

[30] There are no parties with a competing interest in the scaffolding. The pursuers' position is that they bought some of the scaffolding from Step-Up Limited. That being so, their interest in the scaffolding would have been brought to an end at the point of sale. In any event, the point is now moot: the multiplepoinding action was served upon Step-Up Limited and no appearance was entered. Any alleged interest of Step-Up Limited pled on record has been introduced as a defence. The defenders would be able to invoke third party procedure to bring in any party they allege has an interest. However, it is not incumbent upon the pursuers to bring in any party the defenders allege has an interest to prove they do not. The sheriff correctly identified and applied the case law.

Relevancy and specification

[31] If after hearing evidence the court takes the view that the third party intentionally and unlawfully induced the defenders to breach their contract with the pursuers then liability could attach. The pursuers rely on the first form of action identified by Lord Hodge in *Global Resources* v *MacKay* .

Decision

[32] Rule 20 of the Ordinary Cause Rules provides as follows:

> "Application for third party notice
> 20.1. (1) Where, in an action, a *defender* claims that-
> (a) he has in respect of the subject-matter of the action a right of contribution, relief or indemnity against any person who is not a party to the action, or
> (b) a person whom the pursuer is not bound to call as a defender should be made a party to the action along with the defender in respect that such person is-
> (i) solely liable, or jointly or jointly and severally liable with

the defender, to the pursuer in respect of the subject-matter of the action, or

(ii) liable to the defender in respect of a claim arising from or in connection with the liability, if any, of the defender to the pursuer,

he may apply by motion for an order for service of a third party notice on that other person in Form O10 for the purpose of convening that other person as a third party to the action.

(2) Where-

(a) *a pursuer against whom a counterclaim has been made*, or

(b) a third party convened in the action,

seeks, *in relation to the claim against him*, to make against a person who is not a party, a claim mentioned in paragraph (1) as a claim which could be made by a defender against a third party, he shall apply by motion for an order for service of a third party notice in Form O10 in the same manner as a defender under that paragraph; and rules 20.2 to 20.6 shall, with the necessary modifications, apply to such a claim as they apply in relation to such a claim by a defender.

Averments where order for service of third party notice sought

20.2. (1) Where a defender intends to apply by motion for an order for service of a third party notice before the closing of the record, he shall, before lodging the motion, set out in his defences, by adjustment to those defences, or in a separate statement of facts annexed to those defences-

(a) averments setting out the grounds on which he maintains that the proposed third party is liable to him by contribution, relief or indemnity or should be made a party to the action; and

(b) appropriate pleas-in-law.

(2) Where a defender applies by motion for an order for service of a third party notice after the closing of the record, he shall, *on lodging the motion*, lodge a minute of amendment containing-

(a) averments setting out the grounds on which he maintains that the proposed third party is liable to him by contribution, relief or indemnity or should be made a party to the action, and

(b) appropriate pleas-in-law,

unless those grounds and pleas-in-law have been set out in the defences in the closed record.

(3) A motion for an order for service of a third party notice shall be lodged before the commencement of the hearing of the merits of the cause…" [italics added]

The rule is clear. It is a procedure available to a defender. The only circumstance in which it can be deployed by a pursuer is where a counterclaim has been lodged - in effect changing

the status of the pursuer to a defender for that purpose. The rule is also clear that where there is such a counterclaim it is in respect of that claim alone. As described above, the pursuers did not follow the correct procedure for amendment of the pleadings, although that appeared to be encouraged by the sheriff who granted the motion. But the minute of amendment when lodged, albeit after the order for service, made no mention of the counterclaim. Instead, it referred to a potential claim in respect of the monetary craves in the principal action. It appears that at some point after that minute of amendment the pursuers have added in by way of adjustment or amendment a plea-in-law for a right of relief against the third party for the counterclaim, but the competency of the third party procedure has to be considered at the point it was deployed. If I am wrong on that, it still means that use of the procedure cannot be made for alternative monetary claims in the principal action. The proper course for the pursuers if they wished to crystallise an alternative claim against the third party was to introduce her as an additional defender. It does not matter that this point did not form part of the third party's submissions before me. Questions of competency are *pars judicis*. I should add that the pursuers could derive no assistance from the third party notice itself. It is plainly not in proper form, although I also accept that of themselves the omissions do not make it incompetent, given that the style rule allows for adaptation to reflect the individual circumstances.

[33] In any event, in my opinion the pursuers' averments are irrelevant. Per Lord Hodge's analysis in *Global Resources* v *MacKay* (at para [11]):

> "A commits the delict or tort of inducing a breach of contract where B and C are contracting parties and A, knowing of the terms of their contract and without lawful justification, induces B to break that contract. When that occurs, B is liable to C for breach of contract and A is liable to C for the delict of inducing that breach."

He then sets out the five characteristics of the delict, the second of which is as follows:

> "Secondly, for A to be liable for inducing breach of contract, he must know that his acts will have that effect. A is not liable if he ought reasonably to have known that the act which he was inducing B to perform involved a breach of contract by B if in fact he did not know that. I noted in para 9 above that there was a suggestion that Scots law and English law differed as to the circumstances in which A will be treated as having sufficient knowledge. Although it is not necessary to decide the point in this case, in which the defender was aware of the terms of the contract between the pursuers and GDP as he signed the agreement on behalf of the latter, it respectfully appears to me that if A consciously decided not to inquire into the terms of the contract between B and C in the knowledge that there was a contract and that his actions were likely to induce a breach of that contract, that knowledge and the wilful turning of a blind eye as to the details of the contract would be sufficient knowledge. Lord Mayfield in *Rossleigh Ltd* at 1987 SLT, p 360, left open the possibility of liability arising in such circumstances in which the court could treat the turning of a blind eye as tantamount to an intention that the contract be broken."

At its highest, the pursuers' case against the third party is that police officers gave an order to the first defenders (or other defenders) not to release the goods to the pursuers. That is in the context of a criminal investigation where, founding upon the averments of the first defenders, upon which for the *esto* case the pursuers also have to rely, there are other claimants to the title of the goods, on the basis in part of alleged fraudulent activity which might be criminal in nature. It cannot be said that in those circumstances the third party has turned a blind eye to the details of any contract between the pursuers and the first defenders (or other defenders). In any event, the circumstances in which the delict has been developed in the authorities are in the context of private contractual rights, which is far removed from the alleged circumstances of this case where police officers are exercising their public duty to investigate crime and, perhaps, to preserve evidence.

[34] For completeness, I should add that in my opinion the other grounds of appeal have no merit. Where an action is competent, there is no rule of law that a party must pursue his remedy by other means even if such means might be better suited to the circumstances. In any event, there is force in the pursuers' position that this is a straightforward claim for delivery of goods belonging to them.

[35] Nor do I accept that all parties have not been called. The circumstances in this appeal are similar to those in *Lang* v *Ure* in that it is the first defenders, not the pursuers, who aver that a third party has title to the goods and, adapting the reasoning of Lord Milligan at p 1236, "where, to the best of the [pursuers'] belief, [they have] no sound right of action against any proposed additional defender." While I have no difficulty with the expression of principle by Lord Ross in *Wilson* v *Independent Broadcasting Authority*, the circumstances in that case are quite different from the present one.

[36] The appeal is allowed. In the principal action, I shall repel the third party's first plea-in-law, being the plea of all parties not called, sustain her second and third pleas-in-law and repel the pursuers' fifth plea-in-law. In the counterclaim, I shall in similar manner repel the third party's first plea-in-law, sustain her second and third pleas-in-law and repel the pursuers' fifth plea-in-law. The sheriff reserved expenses. Parties were agreed that expenses should follow success. I shall accordingly find the pursuers liable in the expenses of the third party in respect of the whole proceedings.