SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2020] SC GLA 2

CA6-18

NOTE BY SHERIFF JOHN NEIL McCORMICK

in the cause

KENNETH SINCLAIR ON BEHALF OF C.J.C. MEDIA (SCOTLAND) LIMITED

Pursuer

against

GARY CLARK

First Defender

and

CJC MEDIA (UK) LIMITED

Second Defender

Pursuer: A MacKenzie; Harper Macleod LLP
Defenders: P Davies; Lefevres

Glasgow, 20 December 2019

The Sheriff, having resumed consideration of the pursuer's motion No 7/5 of process, grants same insofar as finds the company C.J.C. Media (Scotland) Limited, a company incorporated under the Companies Acts (Registered Number SC238575) and having its registered office at Suite 2, 674 Pollokshaws Road, Glasgow, G41 2QE liable (a) to pay all legal expenses incurred and to be incurred by the pursuer in respect of or in connection with these derivative proceedings, on an agent and client, client paying basis, so far as those expenses are incurred up to and including the diet of proof before answer allowed; (b) to indemnify the pursuer against all awards of expenses made against him in the said proceedings up

until the said hearing, unless and to the extent that the court otherwise orders, on an application by the company in these proceedings prior to the said hearing; reserving to the company the right to apply in these proceedings for an order as aforesaid in the event of a material change of circumstances; and (c) reserves to the pursuer the right to apply in this action for a similar order in respect of subsequent stages of the derivative proceedings; continues consideration of expenses incurred by the pursuer's motion No 7/5 of process and continues consideration of the motion by counsel for certification of the preparation for and attendance at the hearings on 6 November 2019 and on 3 December 2019 as suitable for the employment of junior counsel, to the second pre-proof hearing previously assigned for Monday, 13 January 2020 at 9.15 am to proceed by telephone conference call before Sheriff McCormick.

NOTE:

Background

[1] This is a derivative action. Here the pursuer, Mr Sinclair, owns fifty per cent of the shares of C.J.C. Media (Scotland) Limited ("the company") on behalf of which he has leave to raise these proceedings. The first defender, Mr Clark, has, since 5 March 2013, been the sole director of the company and owns the remaining fifty percent of the shares.

[2] It is averred that the first defender, Mr Clark, has breached his obligations as a director of the company. Read short, it is averred that Mr Clark is also the sole director and shareholder of the second defender CJC Media (UK) Limited which he incorporated on 8 October 2013 and which (put shortly) it is averred, provides the same services to the same customers on the same or similar platforms as the company had. There are averments of passing off.

[3] This action is for account and reckoning to the pursuer on behalf of the company, C.J.C. Media (Scotland) Limited, of all profits made by the defenders, jointly and severally, from 8 October 2013 arising from the conduct of certain business activities; failing which for payment of £810,951.00.

[4] The pursuer's motion is for an order for indemnity from the company, C.J.C. Media (Scotland) Limited, for his legal expenses in connection with these derivative proceedings. C.J.C. Media (Scotland) Limited had been insolvent but currently has assets of £60,000.

[5] In terms of section 266(1) of the Companies Act 2006 derivative proceedings may be raised by a member of a company only with the leave of the court. The pursuer obtained leave to raise these proceedings in January 2018. In terms of section 266(4)(c) the company is entitled to take part in the further proceedings on the application for leave.

[6] The hearing on this motion raised competency, locus to appear, timing and procedural issues alongside the merits of the motion itself. I will refer briefly to Court of Session procedure because it featured in the submissions before me. In the Court of Session two stages are required, namely, a petition for leave to raise the proceedings and, where leave is granted, the proceedings themselves.

[7] In the Sheriff Court derivative proceedings proceed within the one process in terms of chapter 46 of the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993.

[8] The leading case in relation to indemnity or relief from a company in respect of which expenses have been incurred is *Wishart* v *Castlecroft Securities Ltd* 2010 SC 16 where, at paragraph [62] Lord Reed stated, relating to Court of Session proceedings:

> "The question therefore arises whether the appropriateness of an indemnity should be determined in the derivative proceedings or in the leave proceedings. It appears to us that in principle the latter is more appropriate. In the first place, the scope of an appropriate indemnity need not necessarily be confined to judicial expenses in the derivative proceedings. Since the

> parties to the leave proceedings are the shareholder and the company, it should be possible, ordinarily at least, for all issues arising in relation to the derivative proceedings to be determined, as between those parties, in the leave proceedings. It is in those proceedings, in particular, that an assessment can best be made of whether there has been a material change of circumstances since leave was granted, such that it has ceased to be reasonable that the derivative proceedings should be continued at the company's expense. The judge in the leave proceedings can discuss more freely the merits of the derivative proceedings while those proceedings are ongoing, and can take into account matters, such as an offer in settlement, to which the judge in the derivative proceedings could only have regard after those proceedings had been concluded. It is also possible to conceive of circumstances in which it might be appropriate to make an order in relation to an indemnity which was not related to any award of expenses, or any specific procedural step, in the derivative proceedings: the shareholder might, for example, run out of funds and require to be indemnified in order to continue (eg *Wallersteiner* v *Moir* (No 2) [1975] QB 373; *McDonald* v *Horn* [1995] 1 All ER 961)."

[9] Again, in *Wishart* at paragraph [63] Lord Reed, in delivering the opinion of the court went on to say:

> "In principle, therefore, we accept that the court can competently order the company to indemnify the shareholder in respect of expenses incurred by him, or awarded against him, in the derivative proceedings. We also accept that such an order can competently be made in the leave proceedings. The court's jurisdiction to make such an order derives from its inherent jurisdiction to deal with expenses, and is an extension, to the case of a shareholder bringing derivative proceedings, of a principle which is already well established in relation to other person's bringing proceedings in what might be described as a representative capacity."

[10] The pursuer had earlier submitted a motion in similar terms but which sought to dispense with intimation on the basis that the motion would be granted in chambers. That motion was returned.

[11] It was against the above factual and legal background that the pursuer's motion No 7/5 of process was enrolled and intimated. The motion was opposed by the company and by both defenders.

The motion

[12] I heard parties on 3 December 2019. The motion follows the terms of the interlocutor, as revised by the Inner House, in *Wishart* (at para [72]). It is in comprehensive terms. The motion reads as follows:

> "1 to find the Company liable:
>
> (a) to pay all legal expenses incurred and to be incurred by the pursuer in respect of or in connection with these derivative proceedings, on an agent and client, client paying basis, so far as those expenses are incurred up to and including the diet of proof before answer allowed;
>
> (b) to indemnify the pursuer against all awards of expenses made against him in the said proceedings up until the said hearing, unless and to the extent that the court otherwise orders, on an application by the Company in these proceedings prior to the said hearing; reserving to the Company the right to apply in these proceedings for an order as aforesaid in the event of a material change in circumstances; and
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> (c) to reserve to the pursuer the right to apply in this action for a similar order in respect of subsequent stages of the derivative proceedings."

[13] I am grateful to parties for their written submissions in advance of the hearing on 3 December 2019 and for the lists of authorities. I observe that the name of the company in the instance is C.J.C. Media (Scotland) Limited which differs slightly from how it appears within the written submissions (CJC Media (Scotland) Limited). The authorities referred to during the hearing were as follows:

1. *Wishart* v *Castlecroft Securities Ltd* 2010 SC 16;
2. *Meekison* v *Uniroyal Englebert Tyres Ltd* 1995 SLT (Sh Ct) 63;
3. *Halle* v *Trax BW Ltd* [2000] BCC 1020;

4. *Mohammed Aqeel Alam & Tahir Shah on behalf of ICU (Europe) Limited* v *Saquib Ibrahim, ICU (Secure) Limited & Sadia Ibrahim,* unreported, dated 13 August 2019 by Sheriff Alayne Swanson, Glasgow Sheriff Court;
5. The Companies Act 2006;
6. The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015, (S.I. 2015 No. 17);
7. The Company and Business Names (Miscellaneous Provisions) Regulations 2009, (S.I. 2009 No. 1085);
8. Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, Chapter 46.

Submissions for the pursuer

1. This motion is a matter which in the Court of Session falls to be dealt with in the context of the leave proceedings; see *Wishart* v *Castlecroft Securities 2010* SC 16, in particular paragraph 62 (at page 42).
2. Unlike in the Court of Session, where the leave proceedings are a separate action to the derivative proceedings, in the Sheriff Court both proceedings form part of the same action as provided for in Ordinary Cause Rule 46.
3. That being so, it is respectfully submitted that the leave proceedings remain live throughout this action notwithstanding the grant of leave. That is consistent with the approach outlined by the Inner House in *Wishart* at paragraph 68 (at pages 44 and 45) and the Court's interlocutor at paragraph 72 (pages 46 and 47). It is respectfully submitted that it cannot be the case that a litigant pursuing a derivative action in the Court of Session can be in a substantively different position from a litigant pursuing the same action in the Sheriff Court.

4. A challenge has been taken to the competency of the present motion on the basis that the Company is not a party to the action. It is respectfully submitted that this position is misconceived. As outlined above, this motion is properly dealt with in the context of the leave proceedings. The Company is a party to the leave proceedings and entitled to take part in those proceedings in terms of section 266(4)(c) of the Companies Act 2006.

5. The motion has been intimated on the Company. The Company has now lodged opposition to the motion and shall have the opportunity to be heard on the motion. The Company is, in any event, undoubtedly a party to the action given that is brought on its behalf. Any ultimate decree for payment in the action will be a decree for payment to the Company.

6. The pursuer therefore respectfully submits that the motion to find the Company liable is competent and entirely consistent with the approach of the Inner House in *Wishart*.

7. Separately, as the motion is properly dealt with as part of the leave proceedings, it is respectfully submitted that the defenders do not have an interest which should be recognised in the motion per *Wishart* at paragraphs 19 to 26), in particular paragraphs 19 (at pages 27 and 28) and 21 (at page 27):-

> "The fundamental issue which the court has to determine is whether it should interfere in the management of the company by overriding the decision of those responsible under the company's articles for the management of its affairs, so as to permit proceedings to be brought on its behalf, by the member, in order to enforce the company's rights. The provisions do not have in view the interests of third parties. The directors have no interest in the proceedings as individuals (other than in the most general sense), by reason of being intended defenders in the derivative proceedings. The court is not being asked to determine any issue affecting their rights or obligations as individuals. Nor does any third party who might be convened as a defender in the derivative proceedings ordinarily have an interest in the leave

> proceedings: no legal liability will attach to them in consequence of the grant of leave….."

8. It is that lack of interest which allowed the first defender, as the sole director of the Company, to instruct Lefevres to lodge opposition to the motion on behalf of the Company without breaching his duty to avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict with the interests of the Company in terms of section 175 of the Companies Act 2006.

9. It is the same lack of interest which allowed Lefevres to accept those instructions without breaching the Law Society of Scotland Rules regarding conflict of interest. It is therefore respectfully submitted that the defenders, having no interest which should be recognised in the motion, have no locus to oppose the motion.

10. With regards to the merits of the motion, this is an action brought on behalf of, and seeking a remedy for, the Company. The Court has granted leave for these derivative proceedings to be brought. The pursuer is therefore, in principle, entitled to be indemnified by the Company for his expenses and liabilities.

11. The matter was dealt with in some detail by the Inner House in *Wishart* at paragraphs 59 to 71, in particular:-

> "[59] A shareholder who is given leave by the court to raise derivative proceedings under sec 265 does so 'in order to protect the interests of the company and obtain a remedy on its behalf'. ….. Since the shareholder is seeking a remedy on the company's behalf, he ordinarily falls within the scope of the general principle which we have discussed, and is entitled to be indemnified by the company in respect of liabilities and expenses reasonably incurred in the interests of the company….
>
> …[61] In general, however, we have no difficulty accepting that a shareholder who is the pursuer in derivative proceedings is, for the purposes of expenses, in an analogous position to that of a trustee or an agent, and that the court should therefore, in appropriate circumstances, order that he should be indemnified by the company in respect of his own expenses, to the extent that they are not recovered from other parties to the derivative proceedings, and

> in respect of any awards of expenses which may be made against him in favour of other parties to those proceedings…..
>
> ...[71] As we have explained, the rationale of indemnification in respect of the expenses of litigation, as between trustees and the trust estate, or other fiduciaries and those on whose behalf they are acting, is that the party who has incurred the expense has not been acting for his own benefit but for the benefit of the estate or person in question. A minority shareholder who brings derivative proceedings on behalf of the company is ordinarily entitled to indemnification because the same rationale applies. We can understand that, on the facts of cases such as *Mumbray* v *Lapper* or *Halle* v *Trax BW Ltd*, the view may be taken that derivative proceedings are inappropriate, on the basis that the shareholder is in substance acting for his own benefit rather than for the benefit of the company and should therefore pursue an alternative remedy. Where however the court has decided that a shareholder should be allowed to bring proceedings in the interests of the company and on its behalf, it appears to us to follow that the shareholder is in principle entitled to be indemnified by the company in respect of his expenses and liabilities (subject to the qualifications which we have previously mentioned), and that his personal interest in the outcome, as a shareholder, is not a good reason for denying him that indemnity."

12. Mr Sinclair is not litigating in his own interest. The pursuer seeks a remedy on behalf of the Company. The first defender is the sole director of the Company, and Mr Sinclair has no control whatsoever over its affairs. Mr Sinclair is litigating in the interest of the Company and it is appropriate and equitable that he be indemnified by the Company in that respect.

13. Neither the Company nor the defenders have produced evidence in relation to its want of means. The Company has recently received payment from Mr Sinclair in the sum of £60,000 following the settlement of the proceedings in the Court of Session. That sum is likely to be more than sufficient to cover any indemnity. The reasons for that payment are entirely irrelevant to the motion before the court.

14. The pursuer has a strong *prima facie* case against both defenders, backed up by extensive documentary evidence, which has been allowed to proceed to a lengthy

diet of proof. It is very difficult to see how the defenders can hope to resist the crave for accounting given that.

15. In the unreported decision of Sheriff Swanson in the cause *Alam & Shah on behalf of ICU (Europe) Limited* v *Ibrahim & ICU Secure Limited* given on 13 August 2019, the Sheriff held that the incorporation by Mr Ibrahim of ICU Secure Limited, at a time when he was a director of ICU (Europe) Limited, with a view to ICU Secure Limited providing the same services to customers as ICU (Europe) Limited was, in and of itself, a breach of Mr Ibrahim's duties in terms of sections 172 and 175 of the Companies Act 2006 (paragraphs 95 and 96 of the findings in fact and law of the decision). Mr Ibrahim and ICU Secure were ordained to account to ICU (Europe) Limited for all profits made from the conduct of the business of providing those services (paragraphs 105 and 106 of the findings in fact and law of the decision). That is entirely analogous to the present circumstances.

16. Indeed, on the Defenders' averments, it is clear that in incorporating the Second Defender, the First Defender was putting his own interests ahead of those of the Pursuer. At Answer 5, the Defenders aver:-

> "In or about October 2013 the first defender took the view that if he was to rebuild a business on his own and in particular one which might be in competition with T M, it was not reasonable or practical for him to do it through a company jointly owned with Mr Sinclair. As a result the second defenders were incorporated and the first defender sought new business."

That is plainly a narration of the first defender putting his own interests before those of the Company.

17. It is similarly difficult to see how the Defenders can hope to resist the passing off element of the claim. The Second Defender has taken over the Company's website and social media accounts, as is vouched by voluminous productions. It has

presented itself as CJC Media, and represented that it has been in business continuously since the late 90s. Even the names CJC Media Limited (subsequently CJC Media (Scotland) Limited) and CJC Media UK Limited are so similar as to easily lead to confusion.

18. In that regard, it is worth noting that the reason for the change of name from CJC Media Limited to CJC Media (Scotland) Limited, came about when the Company was restored to the register after being struck off and dissolved in 2016. The Company had to change its name upon restoration as CJC Media Limited and CJC Media (UK) Limited are considered to be the same name in terms of section 66 of the Companies Act 2006 and the Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015.
19. It is reasonable that Mr Sinclair be indemnified in respect of the substantial costs of bringing and continuing these proceedings in the name of the Company. Given the stage the action has reached, the Court has a very good idea of the procedure that shall be required and the reasonableness of that.
20. The awards made against Mr Sinclair were made when he was acting reasonably pursuing the proceedings on behalf of the Company and with the advice of counsel. It is respectfully submitted that it is reasonable and appropriate that Mr Sinclair be indemnified in relation to these expenses.
21. It is appropriate that the order is granted at this stage to allow Mr Sinclair to have the assurance of a prospective order in advance of incurring the substantial expenses of proceeding to proof on behalf of the Company. The order is appropriate at this stage where the Court has a clear idea of the future procedure that will be required.

Submissions on behalf of the defenders and CJC Media (Scotland) Ltd

1. The defenders and CJC Media (Scotland) Limited ("the Company") submit that the pursuer's motion for indemnification of costs should be refused.

Competency

2. It is well established that the court has no power to make an award of expenses against a person who is not a party to a litigation except in the case of a *dominus litus* or a law agent. (*Meekison* v *Uniroyal Englebert Tyres Ltd*, 1995 SLT (Sh Ct) 63 at p66A-B and p67L).
3. In *Wishart* v *Castlecroft Securities Ltd*. 2010 SC 16 the Inner House held that it was competent for the court to order a company to indemnify a shareholder in respect of expenses incurred by him in derivative proceedings where the shareholder is acting in a representative capacity for other shareholders. Any application for indemnity, however, was to be made in the petition for leave to bring proceedings to which the company was a party (para [63]) or in separate proceedings between the shareholder and the company (para [62]).
4. In the present proceedings, no application was made at the stage leave was granted in relation to indemnity for expenses and the Company have not been called as a party to this process. Accordingly, it is submitted that the motion for indemnity is not competent in this process.

Interest to oppose motion

5. In the pursuer's written submissions it is argued that the defenders have no interest to oppose this motion. This argument would appear to support the above contention

that the motion is not competent, in that the only party with an admitted interest to oppose the motion, the Company, is not a party to the action.

6. In any event, it is submitted that the argument is not correct, because the defenders have the right to oppose any motion enrolled in the present proceedings. Further, the first defender has a direct financial interest in the outcome of the motion. As noted below the pursuer and the first defender are the only shareholders in the Company. The effect of an order for indemnification will be that expenses incurred by the pursuer, including his liability for the expenses of the defenders, will be paid out of the first defender's share in the Company and will result in a direct financial loss to him.

7. The pursuer's argument appears to be based on a passage in *Wishart* at paragraphs 24 to 26 where the court is discussing the interest of the prospective defenders in a derivative action to be called as respondents in a petition for leave to bring such proceedings. Whatever the position in relation to the issue of leave, it is submitted that the issue of indemnification raises other issues in which the defenders have a direct interest.

Merits of Motion

8. Assuming the motion is competent, it is submitted that the motion should be refused for the following reasons.

9. First, the Company is owned 50/50 by the pursuer and the first defender. In *Wishart* the basis on which an indemnity for expenses might be granted was that a pursuer was bringing proceedings on behalf of himself and other shareholders who would

benefit if the proceedings were successful. In those circumstances it might be appropriate for the other shareholders to bear the costs of the litigation.

10. However, in the present case the pursuer is bringing the proceedings solely in his interest and he would be the only shareholder to benefit from the proceedings being successful. Accordingly, he should bear the cost of the proceedings. (*Halle* v *Trax BW Ltd* [2000] BCC 1020 at p1023E-H). It would not be equitable if the pursuer were to lose the present action for the expenses to be borne out of the first defender's share in the Company.

11. It should be noted that the pursuer had alternative remedies to a derivative action. He could have brought a petition seeking orders under section 994 of the Companies Act on the grounds that the Company had been conducted in a manner unfairly prejudicial to his interests. The allegations in this action could have founded such a petition and he could have sought suitable financial recompense. However, he would have had to bear the costs of such proceedings himself. It is not appropriate for a derivative action to be used to try to avoid liability for such costs.

12. Second, the Company has few resources from which to meet any such indemnity. The Company accounts for 2014 to 2016 (see Production 5/1/7-9) show that the Company was insolvent. On the basis of those accounts, in the Court of Session action raised by the Company against the present pursuer, Mr Sinclair sought and obtained orders that the Company lodge caution for his expenses. The only resources which the Company now has come from the award of damages and expenses made against the present pursuer in the Court of Session action. It would not be equitable to allow Mr Sinclair to recover his costs out of that sum.

13. Third, it would not be appropriate to allow Mr Sinclair an indemnity in respect of the awards of expenses already made against him as pursuer. The court has already awarded the expenses of the hearing on interim diligence, the debate, the appeal procedure, the amendment procedure and the hearing on the specification of documents against the pursuer. Those were all unnecessary costs incurred as a result of the pursuer's decisions in this litigation. The effect of the indemnity would be that the Company (and therefore the first defender) would have to bear those expenses. Given that the court has already decided that Mr Sinclair and not Mr Clark should bear those costs, it would not be right or equitable for Mr Sinclair to be indemnified by the Company in relation to those costs.

14. Fourth, it would not be appropriate at this stage for the court to make a judgment as to the likely merits of the action when there are significant disputes as to fact and law between the parties to be determined at proof. Accordingly, the court cannot be in possession to determine the full equities of the position.

15. In the circumstances, it would not be just or equitable for the pursuer to be indemnified by the Company in relation to the expenses of process on an agent and client basis.

Timing of Motion

16. The pursuer is seeking an indemnification against costs yet to be incurred at the proof. As was stated in *Wishart* at para [68] if the court is to make an order in relation to prospective costs:

> "…the court must be satisfied that it is necessary for such an order to be made prospectively, rather than the shareholder's entitlement to

> indemnification being considered after the expenses have been incurred."

17. In the present case it is neither necessary nor appropriate for a prospective order to be made at this stage. The pursuer did not seek such an order at an earlier stage in the proceedings and it is not suggested that there has been any material change in circumstances which has made the order appropriate at this time. It is not suggested that the pursuer requires to be indemnified in order to be able to proceed with the action, and, in any event, as noted the Company has limited resources with which to meet any such indemnification.
18. Further, as noted above, the court is not in a position at this stage to make judgments about the likely merits or outcome of the present case, nor would it be appropriate for it to do so.
19. It is submitted that any order for indemnification can only properly be considered when the outcome of the proof is known and the court is in a position to consider the full equities of the case and to determine the amount or extent of any indemnification to be allowed to the pursuer.

Competency

[14] I deal first with the issue of competency. The first issue is whether the company, C.J.C. Media (Scotland) Ltd on behalf of which the pursuer has raised these proceedings, is entitled to be heard or represented at this stage in relation to an indemnity. For the reasons outlined in *Wishart* at paragraph [63] it is quite apparent that the company is entitled to be heard on the issue of an indemnity. In the Court of Session this can take place when leave is

sought at the petition stage but it is also competent in the Court of Session for the issue of expenses to be dealt with during the derivative proceedings themselves.

[15] In this case the pursuer seeks an indemnity for his past and his prospective expenses. In my opinion, that is a motion in which the company has an interest. The company is entitled to be heard on the issue of leave and on the issue of an indemnity for expenses in a derivative action. The pursuer is acting in what might be described as a representative capacity (*Wishart* at para [63] and Companies Act 2006 section 266(4)(c)).

[16] It follows that in light of *Wishart*, I reject the submission on behalf of the company, that it is not competent for the court to make an order for expenses against the company although the company is not a party to the proceedings.

[17] While correct that a company in derivative proceedings is not a party to the action, it is clear that the company has an interest in proceedings conducted on its behalf with leave. It has a right to be heard on the issue of leave and a right to be heard on a motion for indemnity for expenses. I conclude this with reference to paragraph [71] of *Wishart*:

> "Where however the court has decided that a shareholder should be allowed to bring proceedings in the interests of the company and on its behalf, it appears to us to follow that the shareholder is in principle entitled to be indemnified by the company in respect of his expenses and liabilities (subject to the qualifications which we have previously mentioned) and that his personal interest in the outcome, as a shareholder, is not a good reason for denying him that indemnity."

[18] The company on behalf of which the pursuer has raised these proceedings, C.J.C. Media (Scotland) Limited, will be the beneficiary in the event that the action is successful. Conversely, it may require to indemnify the pursuer in relation to part or all of his expenses (and conceivably awards of expenses against him) in the event that the case is unsuccessful.

[19] For the foregoing reasons, I conclude that a company against which there is a potential for liability for expenses within the context of a derivative action, does have a locus

to appear to make whatever representations appear to it to be appropriate. An example would be where a company resists an indemnity on the basis that an offer to settle the case had been unreasonably refused by the shareholder seeking the indemnity. Such submissions may require to be made before a sheriff not allocated to hear the proof.

[20] Conversely, the defenders merely have an entitlement to be represented at the hearing on the motion for indemnity. This right derives solely because the defenders are parties to the ongoing action in the Sheriff Court (as opposed to the leave petition in the Court of Session).

[21] However, the competing interests for the purposes of the motion are confined to a pursuer and the company on behalf of which he or she is acting. Defenders have no interest (in a legal sense) to make representations in support of or in opposition to the motion. The defenders are entitled to be represented at the hearing on an indemnity solely because they are parties to an ongoing litigation within a sheriff court process. No more.

[22] To explain, I am mindful of the detailed remarks within *Wishart* at para [19] quoted supra and summarised at para [21]:

> "Contrary to a contention advanced before the Lord Ordinary, the fact that the application contains allegations of breaches of duty on the part of proposed defenders does not give those defenders any interest to be heard."

The principle, on the issue of an indemnity, within a sheriff court process is the same. Indemnity is a matter between the pursuer and the company. The decision may be important to the parties, but that is a separate issue.

[23] Indeed, there may be circumstances where a defender (perhaps a second or a third defender anticipating success) might tacitly – by not lodging a notice of opposition – support a motion by a pursuer for indemnity from the company in anticipation that a company (on

behalf of which a pursuer is acting) is better able to meet that liability than an individual shareholder. Again, such considerations are not relevant.

[24] Here counsel acts for the company and on behalf of both defenders. As I have concluded that the company in respect of which the pursuer has raised the proceedings has an interest and entitlement to be heard in relation to the motion for indemnity and that the defenders were entitled to be represented at the hearing, I now turn to deal with the merits of the motion itself. Accordingly, when I refer to counsel, I now refer to counsel instructed on behalf of the company. I accept that, within the confines of this litigation, the issue may be academic.

The merits of the motion

[25] The starting point is the status of the pursuer. By interlocutor dated 23 January 2018 the pursuer was granted leave to raise derivative proceedings in terms of section 266(1) of the Companies Act 2006. I refer to paragraph [61] of *Wishart* which reads:

> "In general, however, we have no difficulty accepting that a shareholder who is the pursuer in derivative proceedings is, for the purposes of expenses, in an analogous position to that of a trustee or an agent, and that the court should therefore, in appropriate circumstances, order that he should be indemnified by the company in respect of his own expenses, to the extent that they are not recovered from other parties to the derivative proceedings, and in respect of any awards of expenses which may be made against him in favour of other parties to those proceedings."

[26] The issue for me is whether the general rule should be dis-applied in this case. I am not persuaded that it should.

[27] I take into account that the motion for indemnity comes comparatively late in the day and that it covers both past and prospective awards of expenses. This is a case which was raised in January 2018. It has had a chequered history which has included dismissal, an

appeal and amendment procedure. A five day proof before answer on liability to account has been assigned for January 2020.

[28] The pursuer explained that when the action was raised the company was insolvent. There seemed little point in seeking an indemnity against a company which was bereft of funds. However, as a result of litigation in the Court of Session by the company against Mr Sinclair (the pursuer in this action) the company had received £60,000.

[29] Counsel argued that the motion was merely an attempt by the pursuer personally to recover those funds by different means. In my opinion I must ignore the source of those funds. Those funds arise from a separate litigation in a higher court raised on a different basis. The company has £60,000 irrespective of the source. Secondly, at all odds a company which had been insolvent now has assets. That is a change of circumstances. Thirdly, in my opinion, the fact that the company might have been (or becomes) insolvent whether or not as a consequence of an award of expenses, is not of itself a reason to disapply the general rule as outlined in *Wishart*.

[30] Were that the case, an errant director in breach of his duties might deliberately run down a company hoping, or anticipating, that a shareholder might be dissuaded to raise proceedings backed by a worthless indemnity.

[31] On the other hand, while an indemnity might be worthless at the stage it is sought, if an action is successful and funds recovered, the successful pursuer in the derivative action would be in a position to have his expenses paid from the funds recovered.

[32] For obvious reasons, it would be desirable to enrol such a motion at an early stage as it puts all parties on notice of the basis upon which they are litigating in so far as an indemnity is concerned. So, for example, a solvent company on behalf of which a shareholder has sought and obtained leave to raise the proceedings might make provision

for those expenses in its accounts. However, while it is desirable for the indemnity to be sought at an early stage (whether or not the company appears to have the resources to meet such a claim) there is no rule requiring a pursuer to do so.

[33] It is, to say the least, regrettable that the issue of indemnity is being raised at this stage. There are, as I understand it, five awards of expenses against the pursuer at various stages in this litigation. Issues of expenses have consequences not only for the parties involved but also for advisers to those parties. Lines of enquiry might or might not be pursued or resisted depending on the prospects of a successful recovery of expenses. On the other hand, a party who is indemnified might think that he or she may proceed with impunity in relation to expenses. That has to be guarded against.

[34] It also has to be remembered that the first call in relation to expenses rests with the parties. The value of an indemnity depends on the ability of the company to pay the party indemnified.

[35] Counsel referred me to *Halle* v *Trax BW Ltd* [2000] BCC 1020. In *Trax* two members each owned half of the shares of the company (the position here). In *Trax* both the shareholders were directors but they had entered into a shareholders agreement regulating their relationship including that neither should have control over the other. In *Trax* the pursuer had alleged that his co-director was in breach of his fiduciary duties because he had diverted trade opportunities away from a subsidiary company. The pursuer sought an order for an indemnity for the costs of the proceedings out of the subsidiary's assets. In this English case, the Master refused to make such an order. The pursuer appealed.

[36] The basis for dismissing the appeal included the fact that the pursuer was not a minority shareholder and that his co-director was not in control of the company. The corporate structure and shareholders agreement had been designed to prevent either party

controlling the other. In delivering the decision of the court, Sir Richard Scott said, at page 1023F:

> "The critical feature of the present case in my judgment, is the relationship in the company of Mr Halle and Mr Bressington. Mr Halle is not a minority shareholder. The defendant, Mr Bressington, is not in control of the company. Neither is a minority shareholder and neither is in control of the company. The corporate structure was designed to prevent either of those things from being the case."

[37] At first blush this case might appear to support the position as advanced by counsel, namely, that the motion should be refused. However, there are three matters which distinguish *Trax* from the present circumstances. Firstly, while both Mr Sinclair and Mr Clark each own fifty per cent of the company, there is no shareholders agreement regulating the management or control of the company. Secondly, and perhaps more importantly, in *Trax* both shareholders were directors. Here Mr Clark is the sole director and it is alleged that he has breached his obligations as such.

[38] Thirdly, in reaching the decision in *Wishart*, the court had regard to the decision in *Trax*. I refer to paragraph [71] of *Wishart*:

> "We can understand that, on the facts of cases such as *Mumbray* v *Lapper* [2005] EWHC 1152 or *Halle* v *Trax BW Ltd*, the view may be taken that derivative proceedings are inappropriate, on the basis that the shareholder is in substance acting for his own benefit rather than for the benefit of the company and should therefore pursue an alternative remedy. Where however the court has decided that a shareholder should be allowed to bring proceedings in the interests of the company and on its behalf, it appears to us to follow that the shareholder is in principle entitled to be indemnified by the company in respect of his expenses and liabilities (subject to the qualifications which we have previously mentioned), and that his personal interest in the outcome, as a shareholder, is not a good reason for denying him that indemnity." (My emphasis)

[39] Here the pursuer was granted leave to raise derivative proceedings on behalf of the company in January 2018. The pursuer is not a director of the company. The company is in the control of the first named defender, Mr Clark, who, it is admitted, is both the sole

director of the company, C.J.C. Media (Scotland) Limited, and the sole director (and shareholder) of the second defenders.

[40] As such, *Trax* can be distinguished from the situation before me and, in any event, had been taken into account when *Wishart* was decided.

[41] Counsel submitted that the true position here is that two shareholders are warring for their personal benefit in various litigations. That may be true but it does not follow that either is not entitled to proceed as he has.

[42] I enquired of counsel to whom any funds recovered would be paid in the event that the pursuer was successful in his current litigation. Counsel conceded that any funds recovered would be paid ultimately to the company, not to the pursuer. Accordingly, irrespective of the pursuer's motives for raising these derivative proceedings, he has the sanction of the court to do so and any benefit will ascribe to the company.

[43] On a more general and practical note, parties suggested that motions for an indemnity might be dealt with by a different sheriff to the one allocated to hear a proof because issues such as offers to settle might require to be considered. I agree that that may well be appropriate in order to discuss more freely the merits of the proceedings and to take into account matters, such as an offer in settlement (*Wishart* at para [62]).

[44] Here, for example, the pursuer's solicitor had invited me to consider a documentary production. Unsurprisingly counsel objected partly on the basis that the production had only been lodged on the day and that he had not had time to consider it but also because I might be invited to take a preliminary view of the merits of the pursuer's averments. In *Wishart* the prospective merits were taken into account but before me the pursuer's motion to consider the productions was not insisted upon. Here there was no suggestion that a different sheriff should hear either the motion for indemnification or the proof.

[45] With reference to The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015, Schedule 3(5)(2)(t) and The Company and Business Names (Miscellaneous Provisions) Regulations 2009, Schedule 3(4)(2)(v) the pursuer's solicitor observed that as a matter of law the first defender, Mr Clark, could not now incorporate a company, such as the second defender, having a name so similar to C.J.C. Media (Scotland) Limited. I need not express a view on that issue as the law changed in the interim.

[46] Finally, counsel suggested that an appropriate course would be to refuse the motion *in hoc statu* or to continue it to the conclusion of the proof before answer on liability to account. I decline to do so. There has been a change of circumstances in the sense that the company now has funds and the pleadings have focused the issues between the parties.

[47] Furthermore, an indemnity for expenses is, if granted, an important consideration to the parties; to the company in respect of which the pursuer has received leave to raise these proceedings and to their respective advisers. In my opinion, the issue of indemnity should be considered at an early stage or when raised and generally not deferred (*Wishart* at para [62] where the court opined that it is preferable that expenses be dealt with within the leave proceedings). Parties and the company should know where they stand.

[48] I propose to grant the motion.