SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2024] SC GLA 44

GLW-A741-23

JUDGMENT OF SHERIFF S REID

in the cause

PETER CUSACK PROPERTY CONSULTANCY LTD

Pursuer

against

ANGUS SIMPSON

First Defender

and

THE LAST KNOWN REPRESENTATIVES OF AUDREY SIMPSON (DECEASED)

Second Defender

Pursuer: A Kane; BTO Solicitors LLP, Glasgow
First Defender: A Simpson
Second Defender: Absent

GLASGOW, 5 March 2024

The sheriff, having resumed consideration of the cause:

1. Sustains the first defender's preliminary plea (plea-in-law number 10);

2. Repels the pursuer's preliminary pleas (pleas-in-law numbers 2 & 3);

3. Grants decree of dismissal in favour of the defenders, whereby Dismisses the action;

4. Finds the pursuer liable to the first defender in the expenses of the action (from the date on which it was appointed to proceed as an ordinary action), as taxed; Allows an account thereof to be given and Remits the same, when lodged, to the auditor of court to tax and to report; *quoad ultra* Finds no expenses due to or by any party.

NOTE:

Summary

[1] The pursuer is the property factor of subjects known as the Skyline Apartments, Finnieston Street, Glasgow. It was appointed on 5 December 2017. The defenders are said to be the owners of a flat within the subjects.

[2] The action started life as a simple procedure claim. Following an amendment, it was then appointed to proceed as an ordinary action. The sum now sued for is £6,156.

[3] In broad terms, the sum craved falls into three discrete categories: (i) legal expenses said to have been incurred by the pursuer in the pursuit of this action; (ii) Common Charges that are said to be due *on account* each month; and (iii) late payment charges. The legal expenses claim is the largest element. Copy invoices have been lodged by the pursuer that pertain to each of these charges.

[4] After a protracted procedural history, the case finally called before me at a diet of debate on 25 January 2024 on the parties' preliminary pleas. For the reasons more fully explained below, I have sustained the defender's preliminary plea (plea-in-law 10), repelled the pursuer's preliminary pleas (pleas-in-law 2 and 3), and dismissed the action.

[5] In summary, firstly, the claim for monthly Common Charges on account is irrelevant because the pursuer fails to aver that the requisite preceding "written notice" was issued by it in the format prescribed by the Deed of Conditions and in respect of the sums now craved. Secondly, the claim for legal expenses is irrelevant (and incompetent) because the proper mechanism to recover such expenses is by way of an award of taxed judicial expenses in this process, not by way of a substantive crave for payment of a supposed pre-existing "debt". Thirdly, the claim for "late payment charges" is irrelevant because the pursuer fails to aver

any contractual or statutory basis to entitle it to apply any such charge. Fourthly, the action so far as directed against the second defender ("the last known representatives" of the late Audrey Simpson) is *ex facie* incompetent (*Kay* v *The Representatives of the late John Morrison* 1984 SLT 175). The second defender, as originally designed, having died while the action was in dependence, the pursuer should have sought, by minute, to have the action transferred against the deceased's *named* next of kin, so far as known; and should have sought decree against those named next of kin *cognitionis causa tantum*, in order to constitute its claim against the deceased's estate (Ordinary Cause Rules 1993, rule 25.2; *Davidson Pirie & Co* v *Dihle's Representatives* (1900) 2F 640; *Smith* v *Tasker* 1955 SLT 347; *Stevens* v *Thomson* 1971 SLT 136; *Garland* v *Fairnington* 1993 SLT 711).

Procedural history

[6] The action has a protracted history. The pursuer lodged a simple procedure claim form on 17 January 2022. At that point, the claim was for payment of factoring services that were said to have been "supplied" between around "1 January 2021 and 18 November 2021". The claim was defended by the first defender. (The second defender never entered appearance. She subsequently died.)

[7] Multiple procedural hearings then followed. This culminated in an order dated 7 July 2023 which allowed the pursuer to amend and increase the sum sued for to £6,156. As the sum sued for then exceeded the permitted limit for simple procedure actions, the action was appointed to proceed as ordinary action.

[8] By the same interlocutor the pursuer was granted authority to serve an initial writ upon "the last known representatives" of the late second defender.

[9] On 8 November 2023, the record was closed, and a diet of debate was allowed on the pursuer's preliminary pleas. On 25 January 2024, the action called before me at the diet of debate.

[10] Over the 2 year history of the action, the pursuer has now lodged no fewer than 21 inventories of productions, comprising 356 separate documents.

The pleadings

[11] The pleadings are poor on both sides, but tolerably intelligible.

[12] There is a single crave. It seeks decree against both defenders, jointly and severally, for payment of the sum of £6,156 with interest at the judicial rate from 3 February 2022. The second defender is designed as "the last known representatives of the [sic] Audrey Simpson (deceased)", but the pursuer avers (in article 1 of condescendence) that the last known representatives are unknown. This raises competency issues to which I shall return below.

[13] Article 1 of condescendence purports to set out the ground of jurisdiction. It states that "the sums sought arise from heritable property at Flat [*address redacted*], Glasgow". Of itself, that is not an intelligible ground of jurisdiction in terms of the Civil Jurisdiction & Judgments Act 1982. Nevertheless, since jurisdiction does not appear to be in dispute, and since it could competently have been founded upon the domicile of the first defender, I shall say nothing further on the matter.

[14] In article 2, the pursuer avers that it was appointed as residential factor of the defenders' property at Flat [*address redacted*], Glasgow. The appointment is averred to have been made at a meeting of the owners on 5 December 2017, pursuant to clause 4 of the Deed of Conditions referred to in the defenders' title sheet (Title Number GLA198254). A copy of the title sheet is produced at 5/176 of process (eleventh inventory of productions for the

pursuer, item 176) and incorporated for the sake of brevity. The pursuer avers that, upon becoming owners, the defenders became parties to the contract between the pursuer (as factor) and the owners of the development in which the defenders' flat is situated.

[15] In article 3, the pursuer avers that "conform to the defender's [sic] instructions" the pursuer supplied "factoring services" to the defenders "in accordance with the standing instructions of the co-proprietors", which are said to be shown and specified in "the Property Management Financial Report for Skyline Infinity Building for the coming year". I pause to observe that this "Property Management Financial Report for Skyline Infinity building for the coming year" is not averred to have been lodged, nor are its terms incorporated into the pleadings. However, in submissions at debate, the pursuer's agent identified that report as being item 5/172 of process (pursuer's tenth inventory of productions, item 172), being a document entitled "Annual Forecast for Skyline/Infinity Building for the period 1 January 2021 to 31 December 2021". Article 3 then seeks to incorporate into the pleadings a decision of the First Tier Tribunal dated 27 October 2021 (item 5/175 of process; pursuer's eleventh inventory of productions, item 175), as well as three further documents: (i) a "Financial Management Report", (ii) a "Service Charge Expense Report" and (iii) an "Activity Report of the defenders' account". In addition unspecified "third party invoices" are also purportedly incorporated into the pleadings *brevitatis causa*. No substantive averments are made in relation to any of these "incorporated" documents to identify their pertinent sections. The pursuer's agent helpfully clarified in his oral submission that the "Financial Management Report", the "Service Charge Expense Report" and the "Activity Report of the defenders' account" (which do bear to be incorporated in article 3) are the documents which are produced as items 5/172 and 5/173 of process (pursuer's tenth inventory of productions, items 172 and 173).

[16] In article 4, the pursuer avers that the defenders have refused to pay Common Charges in accordance with their title. Then there is a key averment. The pursuer avers:

> "The factor operates the provision of services on a service charge on account method. Each property which is liable to contribute to the common charges is advised of the monthly payment, which is required to meet the common charges planned and budgeted for in the coming year… The on-charge account method allows the factor to collect fixed amounts each month from the defender to forward fund monthly costs in lieu of a float".

The pursuer avers that the charges are reconciled annually, with any credit or debit being refunded or carried forward. The pursuer then makes a further important averment as follows (article 4): "In any event the work has been carried out to the benefit of the defender and his co-proprietors and he is liable to meet his share thereof".

[17] The pursuer states that the defenders previously raised "service complaints" against the pursuer. The pursuer avers that those complaints were adjudicated upon by the First Tier Tribunal in favour of the pursuer. There is said to be "no factual basis" to justify the defenders in withholding payment of management and Common Charges.

[18] Further, the pursuer avers that "management reports" lodged in process are "effective notice under clause 5.6.1" of the Burdens Section of the defenders' title. In his oral submission, the pursuer's agent again identified the "management reports" as being item 5/172 of process (tenth inventory of productions for the pursuer, item 172), namely the "Annual Forecast" for the period 1 January 2021 to 31 December 2021.

[19] In article 5, the pursuer refers to, and incorporates, a "Statement of Account" dated 12 July 2023 (covering the period from 11 March 2021 to 1 July 2023). The pursuer avers that this document "details the sums due monthly and the sums paid in". The sum alleged to be due for factoring services is £6,156. The pursuer avers that the defenders' indebtedness "includes late payment charges lawfully charged, legal costs incurred and factors

management fee" all of which are said to be recoverable from the defenders in accordance with clause 5.15 of the defenders' Title Deed.

[20] The pursuer has a single substantive plea (plea-in-law number 1) founding the defenders' alleged indebtedness in contract. Pleas-in-law numbers 1 and 2 for the pursuer are preliminary pleas to relevancy and specification. Plea-in-law number 4 is not a preliminary plea at all. It is directed at the factual basis of the first defender's answers.

[21] In summary, the pursuer avers an entitlement to payment from the defenders either "on account" (that is, in advance) by way of monthly payments for services *to be rendered;* or, in any event, it asserts an entitlement to payment for services actually rendered (article 4). The defenders' indebtedness is averred to include late payment charges, legal costs and factor's management fees (article 5). Details of the sums due are said to appear in the "Statement of Account dated 12 July 2023", the terms of which are incorporated in the pleadings (article 5). The terms of seven lengthy documents are also purportedly incorporated into the pleadings (namely, items 5/172, 173, 175, 176 and 247 – 249 of process).

[22] Turning to the first defender's averments in answer, they are irregular in form (no doubt, due to his lack of legal representation). In answer 2, the first defender avers that no further sums are owed by him; he avers that no "contract" exists between him and the pursuer (or any of his co-proprietors); and he denies any liability to the pursuer. In answer 3, he denies any liability to the pursuer. In answer 4, he denies having refused to pay Common Charges or management fees in accordance with his title. He complains that no evidence has been provided for the pursuer's expenditure or calculation of budgets. He disputes the calculation of the "forward funding" asserted by the pursuer and the extent of the claim. Reference is made to a one-off "float" of £350 in the Title Deeds. In answer 5, he avers that no sums are due "monthly". He disputes any legal basis or justification for the

monthly demands. He avers that his liability for factoring services has been paid and that there is no sum outstanding. He disputes having received any calculation of the sum sued for. He disputes having been provided with evidence to support the claim.

[23] The (unamended) record contains nine supposed "pleas in law" for the defender, all of which are *ex facie* inept. None of the supposed "pleas" reflects the style or form of a recognisable plea-in-law. Instead, they merely repeat or summarise the content of the first defender's averments.

[24] Lastly, 10 further pages are attached to the record (after the pleas-in-law) which purport to be a "Statement of Facts" for the defender and answers for the pursuer. They are not in proper form. They do not form part of the pleadings. They merely serve to confuse matters. I have ignored these 10 pages (numbered 12 to 22). The true pleadings are as set out in the record comprising pages 1 to 11.

[25] At the outset of the debate, the first defender sought leave to amend the record by inserting a standard preliminary plea (to relevancy and specification) as a new tenth plea-in-law; that motion was not opposed by the pursuer; and the debate proceeded on the basis of the parties' respective preliminary pleas. In my judgment, this late amendment merely reflects the essence of the first defender's averments in answer, to the effect that he disputed the legal basis on which the monthly and other charges were being levied against him and challenged the adequacy of the disclosed breakdown and calculation of the sum sued for.

The parties' submissions

[26] At the debate, the first defender made the following submissions in support of his preliminary plea. Frequently his submission strayed into issues of disputed fact. In

summary, he insisted that he had never refused to pay any debts lawfully due by him. He had called for supporting paperwork to explain and evidence the breakdown of the sum sued for. He disputed the pursuer's entitlement to charge "on account". He insisted that the co-proprietors in the building had never agreed to such an arrangement. He submitted, with reference to the Title Deed, that the pursuer, as factor, was not entitled to charge any more than £100 per resident, without prior express permission. With reference to the minute of the meeting of the co-proprietors (item 5/174 of process; tenth inventory of productions for the pursuer), the pursuer submitted that it purported to vouch only a proposal to charge £130 per month to each resident (throughout 2018), but that there was no basis on which the pursuer was entitled to charge in excess of £100 per month thereafter. At best, he submitted that the minute referred to the intention to have "a review…during the last quarter of 2018", but disputed that any such review had taken place. He stated that the Residents' Association had been dissolved in 2019.

[27] The first defender submitted that he was not obliged to pay for factoring services that had never been provided. He repeatedly called for disclosure of supporting paperwork to explain the pursuer's alleged entitlement to charge a monthly fee. By his calculation, his share came to no more than £67 per month. He referred to the Title Deed (item 5/176 of process) which specified that there was a £100 ceiling on the charges that could be incurred by the factor. A recurring theme of his submission was the lack of documentation to explain or vouch the breakdown of the charges now being sought. I put to the first defender that the pursuer was relying upon item 5/247 (statement dated 12 July 2023) as the purported breakdown of the sum sued for. The first defender disputed the pursuer's entitlement to charge a monthly fee of £180 or £140 (as set out in that statement), and disputed the

pursuer's entitlement to claim the legal fees incurred by it to its solicitors in the pursuit of the present action.

[28] The first defender also complained about an alleged conflict of interest. He asserted that the pursuer's principal solicitor was conflicted, that she ought to be disqualified from acting in that she had allegedly chaired the meeting of the co-proprietors on 5 December 2017, and that it was therefore inappropriate that she should be "handling this case".

[29] Separately, the first defender asserted that the pursuer was itself "dormant" (according to records at Companies House) when the services, for which payment was now sought, were allegedly provided. He also complained that the pursuer was in breach of the factors' code of conduct by failing to provide original and supporting documentation to vouch the sums sued for.

[30] For the pursuer, the first defender's averments in answer were said to be irrelevant and lacking in specification. The pursuer's written note of arguments was adopted. The pursuer's solicitor helpfully identified that the following documents had been incorporated into the pursuer's pleadings *brevitatis causa*: (i) the Deed of Conditions within the burdens section of the Title Deed to the defenders' property (item 5/176 of process) (per article 3 of condescendence); (ii) the "Annual Forecast" for the period 1 January 2021 to 31 December 2021 and appended "Service Charge Expense Report" for the period 1 January 2021 to 21 April 2022 (being items 5/172 and 5/173 of process, respectively), which was identified as the "Property Management Financial Report" in article 3 of condescendence. (These same documents are also referred to as "Financial Management Report", "Service Charge Expense Report" and "Activity Report" towards the end of article 3.); (iii) the decision of the First Tier Tribunal dated 27 October 2021 (item 5/175 of process (eleventh inventory of productions for the pursuer, item 175) (per article 4 of condescendence)); (iv) the Statement

of Account dated 12 July 2023 (item 5/247 of process; seventeenth inventory of productions for the pursuer) (per article 5 of condescendence); and (v) all of the invoices lodged in process (per article 3 of condescendence).

[31] He submitted that adequate specification of the breakdown of the sum craved appeared in the Statement of Account dated 12 July 2023 (per article 5; item 5/247 of process). It was conceded that the largest element of the debt now comprised legal fees incurred in pursuing this action. This sum was said to be recoverable by virtue of clause 5.15 of the Deed of Conditions. The balance comprised overdue monthly fees and late payment charges. The recoverability of legal fees was said to comprise an aspect of the general law of agency, namely that an agent, such as a factor, should not be left out of pocket.

[32] Further, it was submitted that the action proceeded both on the basis that the pursuer was entitled to charge "on account" by way of a monthly demand *et separatim* "in arrears" for expenses actually incurred. The former was justified on the basis of clause 5.6.2 of the Deed of Conditions. The "notice" was said to comprise the "Annual Forecast" (being item 5/172 of process; tenth inventory of productions for the pursuer). It was submitted (though, I observe, not averred) that the pursuer follows the same procedure each year, by budgeting for the forthcoming year's expenses, dividing that up between all the proprietors and issuing a monthly request or "demand". The pursuer's entitlement to charge the monthly fee was also stated to derive from the penultimate bullet point of the minute of the residents' meeting on 5 December 2017. The monthly invoices or "payment requests" were described as "simply a fact-check", whereas the "Annual Forecast" is the "written notice" and it was said to comply with clause 5.6.2.

[33] Having set the scene with those opening observations, the pursuer's agent sought to rebut specific attacks directed at the pursuer's case. Firstly, the suggestion that the company had been dissolved was said to have no relevance. This did not appear in the pleadings. Besides, it was said to be a matter that had previously been adjudicated upon by another sheriff, and had not been appealed. Secondly, the first defender's repeated identification of the pursuer's principal solicitor was said to be both irrelevant and inappropriate. The suggestion that the pursuer's principal solicitor was acting in conflict of interest was baseless. It was acknowledged that the pursuer's agents had been appointed by the Residents' Association at one stage and were now acting for the factor, but the Residents' Association no longer existed. Thirdly, the first defender's allegation that the pursuer had failed to provide adequate documentation to vouch its claims had already been adjudicated upon by the First Tier Tribunal in its decision dated 27 October 2021 (item 5/175 of process; pursuer's eleventh inventory of productions). Fourthly, the first defender had repeatedly adopted an inconsistent position regarding the pursuer's entitlement to charge monthly fees. At paragraph 12 of the First Tier Tribunal decision, the first defender is noted as having conceded that he was due to pay monthly charges (see also paragraphs 21, 26 and 27). Fifthly, the Statement of Account referred to in article 5 provided a calculation of the sum sued for. This was the "total specification of the debt".

[34] The pursuer submitted that the schedule that was appended to the record did not form part of the pleadings. They were not in proper form; it was impossible to ascertain if they were intended to respond to the condescendence or to introduce some form of counterclaim; they were generally contradictory in their content, and indicative more of a form of submission or opinion, rather than pleaded fact. Reference was made to OCR 1993, rules 9.6, 9.7 and 19.1; Macphail, *Sheriff Court Practice*, paragraph 9.27; *Jamieson* v

Jamieson 1952 SC (HL) 44, 50; *Miller* v *South of Scotland Electricity Board* 1958 SC (HL) 20, 36 and *JD* v *Lothian Health Board* 2017 CSIH 27.

[35] I was invited to sustain the pursuer's plea-in-law number 2 and to grant decree *de plano;* which failing, to sustain the pursuer's pleas-in-law numbers 3 and 4, exclude specified averments from probation, and likewise to grant decree. In either case, the pursuer's agent sought the taxed expenses of process. I asked whether this amounted to a "double recovery" as the principal claim was said to comprise the pursuer's legal fees incurred in pursuing this action, but the pursuer's agent stated that the pursuer would "ensure" that there was no double recovery. The pursuer's agent stated that, if there was any concern on that front, the pursuer's alternative motion was that the award of expenses could be restricted to the period from 1 September 2022 (on the basis that the sum sued for comprised legal fees up to August 2022), thereby avoiding any potential double recovery. *Esto* decree *de plano* was not granted, the pursuer invited me to allow a proof.

Reasons for decision

[36] Having considered the foregoing, I have concluded that the pursuer's averments are irrelevant *et separatim* lacking in specification, that the first defender's preliminary plea (plea-in-law number 10) should be sustained, and that the action should be dismissed. In summary, first, the claim for monthly Common Charges on account is irrelevant because the pursuer fails to aver that the requisite preceding "written notice" was issued by it (a) in respect of the sums now craved and (b) in the format prescribed by the Deed of Conditions. Second, the claim for legal expenses is irrelevant (and incompetent) because the proper mechanism to recover such expenses is by way of an award of taxed judicial expenses in this process, not by way of a substantive crave for payment of a supposed pre-existing "debt".

Third, the claim for late payment charges is irrelevant because the pursuer fails to aver any contractual or statutory basis to entitle it to apply any such "late payment" charge. I explain my reasoning as follows.

Is the factor entitled to charge "on account"?

[37] The pursuer is a property factor. A property factor is, in law, an agent acting on behalf of the proprietors, usually by virtue of conditions in a Title Deed and/or a separate contract. In the present case, on a fair reading of the pleadings, there is no real dispute that the pursuer was appointed as factor by virtue of the Deed of Conditions which forms part of the defenders' Title Deed (Land Register of Scotland Title No GLA198254) (item 5/176 of process).

[38] At common law, an agent, such as a property factor, has a right to be paid remuneration for carrying out his duties, and a right to be reimbursed by the principal for all expenses properly incurred in the performance of the agency. However, an agent has no common law right to demand payment of remuneration or expenses *in advance* of carrying out his duties. Any such right to demand payment in advance (of remuneration or expenses) would require to be founded upon an express or implied contractual term.

[39] The defenders' Title Deed reflects that common law position. Thus, for example, the "Flat Common Charges" are defined as meaning:

> "The whole proper and reasonable expense *incurred* from time to time in respect of the cleaning, repair, maintenance and renewal of the flat common parts…and [an] equitable share of the remuneration of the Manager and the reimbursement to him of any expenses reasonably and properly *incurred* by him in performing his duties…" (*my emphasis*)

The same formula (specifically, the use of the past tense in referring to expenses and remuneration "incurred") is employed in the definition of each of the other "Common

Charges", including Block Common Charges, the Commercial Unit Common Charges, the Flat Common Charges, the Parking Spaces Common Charges and the Property Common Charges. So, the factor is entitled to seek payment of expenses or remuneration incurred by it, not *to be incurred* by it. The factor is not entitled to seek payment in advance or "on account".

[40] However, the Title Deed does contain an express provision allowing the factor to demand payment *on account* in certain specific circumstances. Clause 5.6 empowers a duly appointed factor, acting in the interests of good estate management, to decide that "maintenance" should be carried out in respect of the common parts (clause 5.6.1) and thereafter, by "written notice to each proprietor" to require that each proprietor deposits, within 28 days of the notice, a sum of money into the factor's "Maintenance Account", that sum of money being a sum not exceeding the proprietor's apportioned share. In this way, the Title Deed makes sensible provision for the forward-funding of "maintenance" (per clause 5.6.1). To this extent, clauses 5.6 to 5.11.1 expressly confer a power on the factor to charge *on account* (ie in advance) for the cost of maintenance (which might, perhaps, include the factor's remuneration).

[41] The existence of such an express contractual power is perfectly sensible and not uncommon. So far, so good, for the pursuer.

[42] However, this power (to demand payment *on account*) can only be exercised within its contractual limits. Those limits are set out in clause 5.7. It reads:

> "Any notice given under clause 5.6.2 shall contain, or to it shall be attached, a note comprising a summary of the nature and extent of the maintenance to be carried out together with the following information:
>
> 5.7.1 The estimated cost of carrying out that maintenance
> 5.7.2 The sum required from the proprietor in question
> 5.7.3 What the apportioned shares of the other proprietors are

> 5.7.4 A timetable for the carrying out of the maintenance, including the dates by which it is proposed the maintenance will be commenced and completed."

[43] The use of the word "shall" in clause 5.7 indicates that the constituent elements of the notice are mandatory. If a notice fails to comply with the form specified in clause 5.7, it would not be a "written notice" for the purposes of clause 5.6.2, and the proprietor would be under no obligation to comply with it. Therefore, if the pursuer, as factor, wishes to seek a payment on account (that is, in advance of the expense or remuneration being incurred or earned), the pursuer must aver and prove that the following conditions have been satisfied (per clause 5.7):

(i) That a "written notice" has been sent to the proprietor requiring payment of the proprietor's apportioned share of that future maintenance liability (clause 5.6.2);

(ii) That that notice contained (or had attached to it) a "summary of the nature and extent of the maintenance to be carried out";

(iii) That the summary also provided "the estimated cost of carrying out that maintenance" (clause 5.7.1);

(iv) That the summary specified "the sum required from the proprietor in question" (clause 5.7.2);

(v) That the summary disclosed "the apportioned shares of the other proprietors" (clause 5.7.3).

(vi) That the summary disclosed "a timetable for the carrying out of the maintenance, including the date by which it [was] proposed the maintenance will be commenced and completed".

[44] In my judgment, the pursuer's averments of an entitlement to charge "on account" for the sums now sought are irrelevant because the pursuer has failed to aver that a "written

notice" (or notices) in compliance with clauses 5.6.2 and 5.7 has (or have) been given to the defenders. To understand the deficiency, it is necessary to examine the constituent elements of the sum sued for in more detail. The sum sued for is now made up of three types of charge: (i) various monthly demands for payments "to account" of Common Charges; (ii) legal costs allegedly incurred by the pursuer to its own solicitors in pursuing this action; and (iii) "late payment" charges. In averment and in submission, the pursuer insisted that the Statement of Account dated 12 July 2023 (item 5/247 of process) provides all the necessary specification of these component elements. I shall look at each in turn.

The monthly Common Charges demanded "on account"

[45] According to the Statement of Account dated 12 July 2023 (item 5/247 of process), the first component element of the sum craved comprises monthly Common Charges demanded on account.

[46] There are 15 separate invoices identified for these monthly Common Charges. The first is an invoice number 4677 dated 1 May 2022 (for the period from 1 May 2022 to 31 May 2022) in the sum of £145, with a stated due date of 1 May 2022, of which £66 is said to have been paid by the pursuer, leaving a balance of £79. The last of these monthly Common Charges relates to invoice number 6617 dated 1 July 2023 (for the period from 1 July 2023 to 31 July 2023) in the sum of £180.

[47] Between these two invoices (in May 2022 and July 2023), the pursuer seeks payment of a further 13 invoices, each for a specified monthly period falling between June 2022 and June 2023, but each for only £140.

[48] In summary therefore, of the 15 monthly charges that are said to form part of the sum sued for, one is for the sum of £180; one is for the sum of £145 (of which £66 has been paid leaving an alleged balance of £79); and the remaining 13 are for £140.

[49] The question to be asked is this: has the pursuer complied with the contractual conditions in clauses 5.6.2 and 5.7, in order to trigger its right to demand payment of any of those 15 monthly charges "on account"? The answer is no.

The first deficiency in the "written notice" (item 5/172 of process)

[50] In the first place, in order to bring itself within clause 5.6.2 (and thereby assert a right to payment of an expense or remuneration "on account"), the factor must aver (and offer to prove) that a "written notice" was sent to each proprietor, complying with clause 5.7, requiring payment of the sum. In respect of each of these 15 demands for payment of monthly Common Charges, the pursuer has failed to aver that any "written notice" (in compliance with clause 5.7) was given to each proprietor. The best the pursuer could achieve was to point to the "Annual Forecast" forming item 5/172 of process (tenth inventory of productions for the pursuer). The pursuer's agent was explicit in his submission that this "Annual Forecast" (item 5/172 of process) was "the clause 5.6.2 notice" issued at the beginning of the year to the proprietors; and that the subsequent monthly invoices were simply a "fact-check". The flaw in that argument is that the "Annual Forecast" (item 5/172 of process) relates to an entirely different period. It relates to the period from 1 January 2021 to 31 December 2021. It does not relate to any of the monthly Common Charges for which payment is now sought, being charges for the period from 1 May 2022 (per invoice number 4677 dated 1 May 2022) to 31 July 2023 (per invoice number 6617 dated 1 July 2023). In other words, while the "Annual Forecast" might,

arguably, have been a clause 5.6.2 "written notice" for the purpose of seeking monthly charges "on account" during 2021, it is *ex facie* irrelevant to the monthly charges allegedly due from May 2022 to July 2023 (now forming part of this action).

[51] Perhaps a different "written notice" (in the form of a different "Annual Forecast") was sent at some time to each of the proprietors in compliance with clauses 5.6.2 and 5.7, relating to these further monthly charges in 2022 and 2023. But no such "written notice" is identified in the pleadings, or lodged in process, or relied upon in submission. (I reiterate that the document referred to in the pleadings as "Property Management Financial Report for Skyline Infinity Building for the coming year" was repeatedly identified by the pursuer's agent in submission as being the "Annual Forecast" to 31 December 2021, number 5/172 of process. No other document was identified by the pursuer as "the written notice".)

[52] The problem that might have arisen here for the pursuer is that the sum sued for was significantly amended. Perhaps when the action first started the sum then sued for related to charges that fell within the "Annual Forecast" to 31 December 2021. Even if that is so, it is no longer the case. The sum now sued for relates to a different period; the pursuer's pleadings have not caught up with that change; and they do not identify a relevant "written notice" empowering the pursuer to demand the monthly advance payments now craved.

The second deficiency in the "written notice"

[53] In the second place, even if (as was expressly submitted at debate by the pursuer's agent) the "Annual Forecast" to 31 December 2021 (item 5/172 of process) constitutes the relevant "written notice" given by the pursuer to each of the proprietors, that supposed "written notice" is irrelevant because it does not conform to the mandatory format specified in clause 5.7 of the Deed of Conditions.

[54] To explain, the "Annual Forecast" is a one page document. (It was clarified by the pursuer's agent in submission that the "Service Charges Expense Report" which appears as item 5/173 of process was, in fact, sent at a later date to the proprietors, at the end of the relevant financial year, with further copy attached of the earlier "Annual Forecast". So, only the one page "Annual Forecast" (item 5/172 of process) was actually sent at the beginning of the relevant year. None of this is set out clearly in the pleadings, but I am content to accept what the pursuer's agent was telling me in submission.) Looking at the (one page) "Annual Forecast" to 31 December 2021, I can accept that it may contain a "summary of the nature and extent of the maintenance to be carried out" in the period to 31 December 2021. It can also be read as providing an "estimated cost" of carrying out that maintenance (per clause 5.7.1). And it can be read as disclosing the sum required from the proprietor and the apportioned shares of the other proprietors (clauses 5.7.2 and 5.7.3). However, what it does not do is provide "a timetable for the carrying out of the maintenance, including the date by which it is proposed the maintenance will be *commenced* and *completed*" (per clause 5.7.4) (*my emphasis*). In addition, it does not comply with clause 5.6.2, because, although it specifies that the total "annual Common Charges payment requests per residential owner" are forecast as £1,680, the "Annual Forecast" does not itself require or demand payment of that sum (or any part of that sum), still less by any specified date (per clause 5.7.2). In other words, this document (on which the pursuer founds) is not a "demand" for payment of any particular sum by any particular date. It is merely a "forecast" of an aggregate annual liability.

[55] Accordingly, on a plain reading, the "Annual Forecast" cannot be a "written notice" in the form envisaged by clause 5.6.2. It is not a demand or requisition for payment by any due date (bearing in mind that such a written demand or requisition for payment within

28 days is required by clause 5.7); nor does the "Annual Forecast" provide any "timetable" for the commencement or completion of the "maintenance" works therein. The "Annual Forecast" is simply a forecast. (It may also be rather generous to describe a "provision for bad debts", or a provision for management fees, as a form of "maintenance" at all.) As a matter of relevancy, the "Annual Forecast" is not a "written notice" in compliance with clauses 5.6.2 and 5.7.

Might each "invoice" constitute a "written notice"?

[56] The pursuer's agent relied only on the "Annual Forecast" (item 5/172 of process) as the supposed "written notice" entitling it to demand monthly payments on account. No other document is said to constitute that "written notice". However, in fairness to the pursuer, I considered whether any of the invoices lodged in process (and which also purportedly bear to be incorporated into the pleadings) may salvage the position for the pursuer. They do not.

[57] Take, for example, the first invoice referred to in the Statement of Account dated July 2023. This is invoice number 6617 dated 1 July 2023 relating to Common Charges (for the period from 1 July 2023 to 31 July 2023) in the sum of £180. This invoice is produced as item 5/356 of process (21st inventory of productions for the pursuer). On a plain reading, it does not comply with the requirements of a "written notice" in terms of clauses 5.6.2 or 5.7 of the Deed of Conditions. It neither contains nor attaches any summary of the nature and extent of the maintenance to be carried out (per clause 5.7); nor does it contain the "estimated cost of carrying out that maintenance" (clause 5.7.1); nor does it specify "the apportioned shares of the other proprietors" (clause 5.7.3); nor does it specify a "timetable

for the carrying out of the maintenance" (including the proposed commencement and completion dates) (clause 5.7.4).

[58] The same deficiencies appear in each of the other 14 monthly invoices for payment of Common Charges (covering the period from 1 May 2022 to 30 June 2023), which form part of the sum now craved.

A final problem for the pursuer (clause 5.14)

[59] Clause 5.14 of the Deed of Conditions creates a final problem for the pursuer. It states:

> "Further providing and declaring that notwithstanding anything to the contrary provided in this clause 5 the [pursuer] shall not (other than in circumstances of emergency) instruct any maintenance or other works where the cost to each Proprietor is in excess of £100 each in advance of receipt of the full payments therefor [sic] from all of the relevant Proprietors".

The effect of clause 5.14 is to prevent the pursuer from instructing "any maintenance or other works" where the cost to each proprietor is in excess of £100 - unless "full payments" therefor have been received from all of the relevant proprietors (or in the case of emergency). Of course, since the defenders have (allegedly) not paid these sums, it follows logically that the pursuer would have had no power or authority to instruct any of the works in those invoices. In effect, clause 5.14 stymies the pursuer's claim so far as it might be founded in the alternative upon an assertion that the works therein have actually been carried out.

[60] Taking a step back, as a more general observation, the limitation imposed by clause 5.14 tends to support the conclusion that clause 5.6.2 and the related "Maintenance Account" provisions are probably intended to relate to specific, discrete, one-off maintenance projects only (such as a major roof repair, or refurbishment, or redecoration).

That explains why clause 5.7 requires the "written notice" to provide details of costs and timetabling. That is why clause 5.9 entitles proprietors to inspect any "tender" received in connection with the maintenance to be carried out (a precaution which might not be envisaged, perhaps, in relation to general ongoing maintenance). That is why clause 5.14 specifically prohibits the factor from instructing any such maintenance or other works where the cost to each proprietor is in excess of £100 each, prior to receiving full payments from all the proprietors. But for that clause, the factor could have proceeded on the authority of the majority, and the proprietors would then have been obliged to relieve the pursuer from costs incurred by it on the authority of the majority.

[61] I have sympathy for the pursuer's predicament. Obviously, the pursuer would prefer to have power to collect money in advance. The "forward-funding" of maintenance expenses (and, indeed, of the factor's own remuneration!) is plainly a preferable business model for the factor. However, at common law that is not how agency operates. Of course, it is perfectly open to parties to agree such a forward-funding arrangement by contract. But clause 5.6.2 (with all its attendant conditions) is probably just too cumbersome a vehicle to allow that objective to be readily achieved, except in relation to one-off maintenance projects. While it goes some way to allowing the factor to collect money *in advance*, my reading of the clause is that, in truth, it is intended for larger, one-off, discrete, planned maintenance projects, not ongoing routine maintenance.

[62] That said, I would acknowledge that, in theory, a series of written notices, carefully drafted, could well be brought within the terms of clause 5.6.2, entitling the pursuer, as factor, to collect a standing monthly charge "on account" for all projected "maintenance and other works" (including projected routine maintenance). However, in practice, if the "on account" demand exceeds £100 per proprietor, this modus operandi would readily be

stymied by clause 5.14 - because the maintenance (to which the notice relates) would grind to a halt if any one proprietor failed to pay the sum demanded in advance.

[63] In any event, putting aside that theoretical position, the document entitled "Annual Forecast" (item 5/172 of process), as founded upon here by the pursuer, is not a clause 5.6.2 "written notice" at all, for the reasons explained above.

[64] Recognising perhaps the difficulties presented by the £100 cap (clause 5.14), the pursuer sought to argue that a majority of the proprietors had previously expressly authorised a monthly charge in excess of £100. This line of argument is barely discernible within the pursuer's averments. It first emerged in the course of submissions. It ran as follows. In article 2, pursuer is averred to have been appointed as factor at a meeting of the owners on 5 December 2017. There is no other reference to that meeting (or to a minute of that meeting) in the pleadings. The minute is not even incorporated into the pleadings. For that reason alone, the pursuer's argument fails. However, if the minute of the proprietors' meeting is held to be part of the pursuer's pleadings (a proposition which I reject), the pursuer's agent founded upon the penultimate bullet point of that document (item 5/174 of process). He submitted that this bullet point evidenced a contractual right on the part of the pursuer to levy a monthly Common Charge of £130 upon each flat proprietor (including the defenders). In my judgment, on a proper reading, it does no such thing. The minute records merely the *appointment* of the pursuer as factor on 5 December 2017. The penultimate bullet point bears to record a "general discussion" of certain points, specifically the issue of "Common Charges" including a *proposal* that the then current "Common Charge" of £130 per month per flat would remain "*throughout 2018* with a review to be carried out during the last quarter of 2018". The pursuer does not aver (nor does the minute state) that the proprietors (or a majority) ever agreed to the levying of a monthly charge in excess of £100

in 2019, 2020, 2021, 2022 or 2023. In this action, the monthly Common Charges were levied in 2022 and 2023. They vary erratically from £145, to £140, to £180. None of these figures (each in excess of the prescribed £100 limit) is averred ever to have been agreed by a majority of the proprietors, whether at the meeting on 5 December 2017 or at any other meeting thereafter.

[65] The upshot is that the pursuer's claim for the 15 monthly Common Charges in this action (covering the period from 1 May 2022 to 31 July 2023) is irrelevant. The pursuer was not entitled, under the Deed of Conditions, to demand those charges *in advance*, having failed to aver the giving of a relevant "written notice" under clause 5.6.2 of the Deed of Conditions. Nor is it averred that any of those charges have actually been incurred by the pursuer, still less with any degree of specification.

[66] These monthly Common Charges add up to £1,264.

The pursuer's legal fees

[67] The bulk of the sum sued for comprises a claim for payment of legal costs allegedly incurred by the pursuer to its solicitors in the pursuit of this action. That is an unusual claim.

[68] The normal rule is that pre-litigation expenses are not allowable or chargeable against an unsuccessful party, nor even can they be recovered as damages in a subsequent separate action (*McDowall* v *Stewart* [1871] 10M 193; *Shanks* v *Gray* 1977 SLT (Notes) 26; Macphail *Sheriff Court Practice* (4th ed.), 19.62). As for expenses incurred in the conduct of a litigation, they are recoverable but usually by means of an award of "judicial expenses". Such an award is within the discretion of the court and is subject to established rules and procedures regulating the computation of those judicial expenses. There is something

irregular and vaguely illogical in a party pursuing a "debt" action for payment of the legal expenses incurred in pursuing that debt action. A crave for payment of a debt is predicated on the logic that the "debt" is due and payable at the date of commencement of the proceedings (or, at least, when the claim was introduced by amendment). However, judicial expenses are not due and payable until the court, in the exercise of its discretion, awards them (usually at the end of the proceedings); and, even then, the precise calculation of those expenses is not known until the court so decides (usually after taxation).

[69] The illogicality of the claim was highlighted by the pursuer's primary motion at the close of the debate for an award of judicial expenses in its favour. If granted, that would have involved an element of double recovery. In an effort to address that manifest inequity, the pursuer's agent advanced an alternative motion, to restrict any award of expenses to the period after 1 September 2022, on the logic that the legal fees sought in the context of the substantive crave pre-date September 2022.

[70] While that alternative motion did go some way to addressing the potential for double recovery, it failed to address two residual competency issues: (i) that a crave for payment of a debt is only competent if there is indeed a debt that is presently "due and payable" (whereas no "debt" for judicial expenses exists until there is an award of expenses in favour of a party, and a decerniture therefore); and (ii) that the recoverability of legal fees incurred in the pursuit of a court process should be determined by the court *in that process* by the mechanism of an award of judicial expenses (not by way of a crave for payment of a supposed "debt"). In *Shanks*, *supra*, the Inner House stated the rule as follows:

> "It has not been doubted in over 100 years and is in line with the established law and practice that the legal and other expenses, such as the cost of medical or other reports and plans, incurred in vindicating or establishing or defending a claim cannot be claimed as damages. The legal expenses which are recoverable are the judicial expenses allowed by the court. All other expenses

> of vindicating or establishing or defending a claim are extra-judicial, whether or not there is a litigation…"

Admittedly, this dicta relates to the recoverability of legal expenses by way of damages, but it tends to support the instinctive view that the appropriate mechanism for recovery of legal fees incurred in pursuing a court action is by way of an award of judicial expenses in that action.

[71] It is conceivable that legal costs incurred by a party could be recoverable by another means, such as by virtue of a statutory right to compensation (as in *Shetland Sea Farms Limited* v *The Braer Corporation* 1999 SLT 1189), or by virtue of an express contractual right allowing the recovery of such legal costs. The pursuer's claim is founded in contract (not damages as in *Shanks*). It seeks to characterise its legal fees as a debt recoverable from the defenders by virtue of clause 5.15 of the Deed of Conditions. That clause states:

> "The proprietors shall pay the Common Charges to the manager in the appropriate proportions herein provided. The manager will be entitled in its own name to sue for recover [sic] of Common Charges together with interest thereon as hereinafter provided and the whole expenses, judicial and/or extra-judicial in such recovery, in the event of non-payment of same within one calendar month of demand for payment. In the event of the manager after using all reasonable endeavours being unable to recover such Common Charges, interest and expenses, or any part thereof from any proprietor, then such sums shall be payable by the remaining proprietors in the appropriate proportions as herein provided."

However, in my judgment, clause 5.15 serves a different purpose. It does not create a new form of "debt" recoverable from the defenders. It does not create a new contractual right vested in the pursuer to demand payment of expenses, judicial and extra-judicial, from the defenders, where no such right previously existed. Instead, clause 5.15 merely confers a title upon the factor to sue *in its own name*. Clause 5.15 does not expand upon the type of debts that are recoverable by the factor. The common law rule remains that the proper vehicle or mechanism by which a party can recover the expenses of pursuing or defending a litigation

is by way of an award of judicial expenses in that litigation. The extent of the recovery can be increased by seeking, with court sanction, a more generous basis of taxation (such as taxation on a solicitor and client, client paying basis).

[72] For these reasons, the pursuer's claim is irrelevant, so far as comprising a claim for payment of the legal costs incurred in the pursuit of this action. Indeed, I would go further and characterise the claim as incompetent to the extent that it seeks to recover, by way of a crave for payment of a supposed "debt", legal costs that are properly characterised as judicial expenses incurred in the very same process.

[73] In *Clydesdale Bank plc* v *Mowbray* 2000 SC 151, the Inner House discussed the competency of pursuing an action for the recovery of expenses that might properly be characterised as expenses of a judicial process. The Inner House expressly reserved its opinion on the pure issue of competency in that case. The circumstances in *Mowbray* were rather unusual. Here, the issue is clearer. The expenses that are sought to be recovered in the principal crave are, by concession, the legal costs of pursuing this action. In my judgment, such expenses are competently recoverable only by means of an award of taxed judicial expenses in this process. They are not competently recoverable as a supposed "debt" in the same process in which they have been incurred.

[74] Finally, the specification of the legal costs is inadequate. It is said to appear in the pursuer's Statement of Account dated 12 July 2023. That statement discloses four separate invoices for legal costs allegedly payable by the pursuer to its solicitors. Those invoices are: (i) invoice number 3911 dated 18 November 2021 for £80; (ii) invoice number 4758 dated 18 May 2022 for £1,156; (iii) invoice number 5403 dated 9 September 2022 for £798; and (iv) invoice number 5402 dated 9 September 2022 for £2,373. The individual invoices are unilluminating. The first claim (pertaining to an invoice numbered 3991 dated 18 November

2021 for £80) describes the "legal costs" as "BTO charge for registration of NOPL". Having regard to its date, it is plainly extra-judicial and irrecoverable. The remaining three claims for legal costs all appear to have been incurred in the course of, and pertain to, the pursuit of this judicial process, though none of the invoices provides any further specification beyond the bald description appearing in the Statement of Account dated 12 July 2023 (item 5/247 of process) (see items 5/225, 5/233, 5/243 and 5/244 of process). No other specification is provided. For that further reason, this claim lacks essential specification and falls to be dismissed.

Late payment charges

[75] Lastly, the third tranche of the claim is for "late payment charges". Payment of six separate invoices is sought, each bearing to be for a "late payment charge". No other specification is provided.

[76] By way of illustration, invoice number 2838 dated 11 March 2021 relates to a late payment charge of £24. (The invoice is produced as item 5/213 of process). Neither the Statement of Account dated 12 July 2023 nor the pursuer's related invoice (item 5/213 of process) provides any intelligible specification as to what the supposed "late payment" is or relates to. For that reason alone, this element of the claim is lacking in specification and falls to be dismissed.

[77] Quite apart from that lack of specification, the claim is irrelevant in law. No statutory, common law, or contractual basis is averred or otherwise discernible to justify the pursuer's claim for a "late payment" fee. Nothing in the Title Deed confers any power to charge a "late payment" fee. Accordingly, absent pleadings (or submission) explaining the basis of the pursuer's right to impose a "late payment" *et separatim* absent intelligible

specification as to how the "late payment" allegedly arises, this element of the claim falls to be dismissed as irrelevant.

[78] This leaves only a single invoice for £90 dated 28 June 2022 (invoice number 5019) which bears to be for "recovery of printing/photocopying of multiple contractors' invoices (Aug 21)". No further explanation of the charge is provided in the pleadings or in any of the documents incorporated therein. Again, for that reason alone, this claim is lacking in essential specification. There is no explanation as to what the printing or photocopying related to, or why it is attributable to the defenders. Again, quite apart from that issue of specification, this remaining head of claim (for £90) is irrelevant because the pursuer fails to aver the legal basis on which it is allegedly entitled to charge the defenders for printing or photocopying. These are of the nature of overheads. The pursuer could not, for example, unilaterally impose a charge on the defenders for the cost of the paper on which the pursuer's correspondence is printed. For that reason, this final remaining element of the claim falls to be dismissed as irrelevant *et separatim* lacking in specification.

[79] For these reasons, each of the discrete tranches of the claim is irrelevant *et separatim* lacking in essential specification. Accordingly the action falls to be dismissed.

Competency of action so far as directed against the second defender

[80] Lastly, according to the Record, the second defender is designed as "the last known representatives of the [sic] Audrey Simpson (deceased)". The condescendence then narrates that those representatives are unknown.

[81] Where, as here, a defender dies (or comes under a legal incapacity) during the dependence of the cause, and the deceased's representatives do not sist themselves as parties to the action (by virtue of rule 25.1, OCR 1993), the pursuer may apply to the court

by minute to have the cause transferred against any person who represents the estate, in terms of rule 25.2, OCR 1993. The simplest illustrations would be the transfer of an action against a deceased's confirmed executor, or a bankrupt's trustee, or the guardian of an incapax. In each case, the representative must be named and designed in the instance.

[82] However, where, as not infrequently happens, an alleged debtor has died and no executor has been appointed; or where the executor has declined to confirm; or where there is no executor and the deceased's next of kin are not *luctrati* by the succession, and have not intromitted with the estate, the proper course is to call as defenders all the known next-of-kin of the deceased and to seek decree against those named representatives *cognitionis causa tantum* (*Davidson Pirie & Co* v *Dihle's Representatives* (1900) 2F 640). Again, it is essential that the next-of-kin are convened as named defenders in their representative capacity (*Kay* v *The Representatives of the late John Morrison* 1984 SLT 175).

[83] This remedy is known as an action of constitution. The purpose of this action (and the reason for calling the known next-of-kin as representatives of the defenders) is simply to remove them from the pursuer's path, and thereby allow the pursuer's claim to be constituted against the deceased's estate (*Smith* v *Tasker, supra,* 348, per Lord Guthrie). It clears the field. In effect, the remedy being pursued is essentially declaratory in nature; it is not an action for payment of a debt (Walker, *Civil Remedies*, Chapter 16).

[84] In my judgment, this action, so far as directed against unnamed "last known representatives" of the late Audrey Simpson, is *ex facie* incompetent (*Kay* v *The Representatives of the late John Morrison, supra*). The second defender, as originally designed, having died while the action was in dependence, the pursuer should have sought, by minute, to have the action transferred against the deceased's *named* next of kin, so far as known, as representatives of the deceased; and should have sought decree against those

named next of kin *cognitionis causa tantum* in order to constitute its claim against the deceased's estate (OCR 1993, rule 25.2; *Davidson Pirie & Co* v *Dihle's Representatives, supra; Smith* v *Tasker* 1955 SLT 347, 349 per Lord Guthrie; *Stevens* v *Thomson* 1971 SLT 136; *Garland* v *Fairnington* 1993 SLT 711; Macphail, *Sheriff Court Practice* (4th ed), 4.127 and 12.11; Parliament House Book, Rules of the Court of Session, 31.2.1). Instead, the last known representatives are neither individually named, nor designed in the instance in their representative capacities; nor does the crave seek to restrict decree against those representatives *cognitionis causa tantum*. Accordingly, the action falls to be dismissed as incompetent so far as directed against the second defender.

[85] The pursuer complains that the last known representatives are not known. If that is correct, then the remedy of constitution cannot be pursued (though I am puzzled why the first defender, as the deceased's widower, is not designed as a "known" representative.) Other commissary remedies may perhaps be available.

[86] For completeness, I observe that an interlocutor dated 7 July 2023 purported to authorise service of proceedings on the deceased's executor, which failing, representatives, but there has never been an interlocutor sanctioning the formal transfer of the cause against (named) representatives of the deceased or any amendment of the crave to seek decree *cognitionis causa tantum* against them.

Expenses

[87] In respect that expenses follow success, and applying the general rule, in the exercise of my discretion I shall find the pursuer liable to the first defender in the taxed expenses of process, from the date on which the claim was appointed to proceed as an ordinary action.