SHERIFF APPEAL COURT

[2019] SAC (Civ) 16
ABE-CA35-16

Sheriff Principal Abercrombie QC
Appeal Sheriff Braid
Appeal Sheriff Cubie

OPINION OF THE COURT

DELIVERED BY SHERIFF PETER J BRAID

In the appeal and cross appeal

In the cause

SHEILA RITCHIE

Pursuer and Appellant

against

EUAN DUNBAR AND NICOLA DUNBAR

Defenders and Respondents

Pursuer and Appellant: Garioch; Gilson Gray LLP
Defenders and Respondents: McDiarmid; Stronachs LLP

29 January 2019

Introduction

[1] This case arises from the pursuer and appellant's eagerness to assist the defenders and respondents to raise the necessary funds to enable a limited company of which they were the sole shareholders and directors to purchase the shareholding of a company whose

business they wished to acquire. (For convenience, we will hereafter refer to the parties as "pursuer" and "defender(s)" respectively.)

Factual background

[2] A brief summary of the salient facts giving rise to the dispute is as follows. The defenders were unable themselves to raise the necessary purchase price of £2,500,000 to enable a company of which they were the sole shareholders, Altens Development Company Limited ("ADCL"), to acquire the shareholding of another company, EDIC. The acquisition was important to the defenders since they stood to turn over a large profit if the transaction proceeded. The pursuer not only provided £10,000 of her personal money, £10,000 of her firm's money and arranged to borrow £2,700 from the funds of an executry in which her firm was involved, she also contacted another client, referred to by the sheriff as GT, to enquire whether he could advance any sums. He initially agreed to lend £50,000 for a return of 10%, which offer he subsequently increased to £130,000. GT knew that the pursuer was acting for clients but did not know their identity. The £130,000 was subsequently transferred to the pursuer and the share purchase was able to take place. Unfortunately, the pursuer's eagerness to help the defenders raise the funds which they required was not matched by her attention to detail. Not only was no paperwork drawn up at the time, there was no express agreement between any of the parties as to the precise legal relationships which came into being at the material time. Unsurprisingly and perhaps inevitably, the defenders did not repay GT and, after several months, the pursuer did so. She subsequently obtained an assignation from GT, purporting to assign his right to sue the defenders. (Perhaps indicative of the lack of clarity surrounding the transaction, GT also assigned his "right" to sue ADCL, although nothing turns on that for present purposes).

The sheriff court action

[3] On the basis of the assignation the pursuer raised a commercial action against the defenders in Aberdeen Sheriff Court. After sundry procedure, a proof took place. Evidence was led from the pursuer, GT and both defenders, over three days in March and May 2017. The case was then adjourned until 31 July 2017 for submissions. Written submissions were lodged which prompted the sheriff to call for the shorthand notes to be extended as his recollection of the evidence did not accord with that of the solicitors on either side. That took some time, and a further hearing on submissions then took place on 6 November 2017. We mention all of this to illustrate the time and expense which has already gone into the action.

[4] As the solicitor for the pursuer submitted before us, there were two main factual issues[1] for the sheriff to resolve at the proof: who were the principals for whom the pursuer was acting in her dealings with GT; and what was the agreed rate of return? The pursuer's position, in short, was that the principals were both defenders and that the rate of return was £12,000. The defenders' position, by contrast, was that the principal was ADCL, and that there was no agreed rate of return. Since GT expressly did not require interest to be paid, the defenders' position was, therefore, that ADCL had been entitled to the free use of GT's money. One only has to state that proposition to appreciate how unattractive it is (irrespective of the identity of the party or parties liable to pay that rate of return).

[1] There was also an issue as to who the lender was, but nothing turns on that for present purposes, all parties now accepting that the lender was GT.

The sheriff's decision

[5] The primary ground of the sheriff's decision was that the pursuer had no title to sue. He reached this view because, by the time assignation was granted, the debt had been extinguished by virtue of having been paid by the pursuer. It appears to have been accepted by the sheriff and by the solicitors for all parties that the pursuer had been acting as agent for an undisclosed principal (although there was no agreement as to who that principal was).

[6] Crucially, however, the sheriff went on to deal with the other factual issues in the case, lest he was wrong in his decision on title to sue. He considered the credibility and reliability of the respective witnesses. He had no hesitation in concluding that the pursuer was credible and reliable; that GT was credible and mostly reliable; that the first defender was "entirely unsatisfactory" and both incredible and unreliable; and that the second defender, whilst she was a "better" witness than the first defender, was also unsatisfactory, the pursuer's evidence being preferred whenever there was a conflict between her and the second defender.

[7] In relation to the facts, the sheriff made the following findings in fact which are of significance for the purposes of this appeal:

> "(4) The pursuer has acted as solicitor for the first defender since 2012. As at 2015 GSLP [the pursuer's firm] through the pursuer had acted on several occasions for the first defender. GSLP had acted for limited companies in which either or both defenders had a controlling interest. Prior to 2015, the pursuer had never acted as solicitor for the second defender.
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> (17) The pursuer has an acquaintance 'GT'. She asked if he could assist. GT agreed to provide a sum of £50,000. He was prepared to do so in consideration of repayment of £55,000. His expectation was that repayment would be made in a matter of weeks.

(18) By email of 25 September 2015, the pursuer contacted the first defender. The email is number 37 in the joint bundle. The pursuer identified for the first defender the consequences of failing to complete the transaction on time. At paragraph 6 of her email, the pursuer wrote 'I have an offer of £50,000 from a contact - private funds against personal undertakings only. But he wants £5K back. I could have it today'.

(19) The first defender agreed to borrow the sum of £50,000 on that basis. In the course of 25 September he spoke to the pursuer a number of times. He asked whether the pursuer's acquaintance could lend more than £50,000. The pursuer spoke to GT again. He agreed to lend £130,000 at the same rate of return.

(20) Later on 25 September 2015, the pursuer tried to confirm that to the first defender. She was not able to speak to the first defender. She spoke to the second defender by telephone. She explained to the second defender that GT was prepared to lend £130,000, that the loan was to be on the same basis, at the same rate of return as had been offered in relation to the sum of £50,000. The second defender told the pursuer to proceed.

(21) The second defender was not a party to the email of 25 September 2015. She had not seen that email prior to her telephone conversation with the pursuer. The first defender was not a party to that telephone conversation. When the second defender told the pursuer to proceed, the second defender did not know that those funds were to be made available '….against personal undertakings only…' She did not know the proposed return.

(22) No fixed date was agreed for repayment. GT, the pursuer and the defenders understood repayment would be made within 'a matter of weeks'.

(23) For the purposes of lending the sum of £130,000, GT did not know the identity of the pursuer's clients. The defenders did know the identity of GT.

(24) The first defender was aware that the sums being loaned by GT were being offered to him as an individual. He agreed to that. The second defender was not aware that the sums being loaned by GT were being offered to her as an individual. She did not agree to that. In arranging the loan of £130,000 with GT, the pursuer acted as agent for an undisclosed principal. The undisclosed principal was the first defender.

(25) The sum of £130,000 was made available by GT. By email of 28 September 2015, the pursuer wrote to the first defender 'Well, G has given you £130K, but he is not expecting it back for a month'.

(26) As at 25 September 2015, ADCL had insufficient funds available to it to allow the agreed share purchase price to be paid. The purchase price identified in the Share Purchase Agreement was paid on 1 October 2015. The transaction for the acquisition of the share capital of EDIC settled on 1 October 2015.

(27) Rather than insisting in a return of 10% GT offered to restrict the return on £130,000 to £12,000. By email of 4 October 2015, the pursuer wrote to the first defender *inter alia* 'I spoke, finally to G on Friday and he is looking for £12,000 back. Slightly less than pro rating the figure he gave us for the first £5K' (*sic*).

(28) The first defender responded to that email on 5 October 2015. He commented on a number of aspects of the email. He did not comment on the pursuer's reference to the return of £12,000.

(31) In March 2016, the pursuer made arrangements herself to borrow the sum required to repay GT. On 23 March 2016, the pursuer emailed each of the defenders. In that email she wrote 'To be clear about this, no one is asking for the £142K lightly for next week. It is needed to meet a contractual requirement. Given that you can't find it, I'm going to have to find it instead, since my integrity is on the line. I do not have £142,000, so I will have to borrow it. If I am to do that, I will need to have a clear understanding of when you will, without doubt, pay it back to me'.

[32] The first defender replied by email dated 24 March 2016 saying *inter alia* 'Unfortunately we can't give you an exact date'.

(33) On 30 March 2016, the pursuer sent an email to the first defender and copied it to the second defender. The email stated *inter alia* 'Euan and Nicola, over the weekend I have raised the funds to complete the purchase of "G's" house. What I would propose to do, subject, obviously, to your agreement, is to, effectively; lend this money to you, so you can discharge your liability to "G". To do that, I would like (indeed, require) a simple loan agreement with you, whereby you undertake to repay the funds to me within two months, the period for which I have borrowed them. The sum, as you know, is £142K. I require no interest. I do, however, need to have all the agreements signed by Thursday, when I draw down the funds. I'm aware you're going on holiday next weekend'.

(34) The first defender replied to that email. The email was copied to the second defender. The first defender said *inter alia* 'We don't have any problem with this in principal (*sic*) – Nicola tried to speak to you about this last week & I tried on Thursday'.

(35) At no point prior to the raising of these proceedings did the defenders dispute that the total sum to be repaid was £142,000".

The appeal

[8] The sole ground of appeal was that the sheriff erred in holding that the assignation conferred no title to sue on the pursuer. Consequently, the pursuer's note of argument focussed on whether or not there was still a debt to assign at the date of the assignation. As

had been the case throughout the action, the argument proceeded on the basis that the proper analysis of the relationship between the various parties was that the pursuer had acted as agent for an undisclosed principal, namely both defenders.

The cross appeal

[9] We mention at this stage that the defenders lodged a cross appeal challenging, *inter alia*, certain findings in fact which the sheriff had made - in particular, certain parts of finding in fact (24). We revert to this more fully below.

The first appeal hearing

[10] It seemed to us prior to the commencement of the appeal that to say that the pursuer was agent for an *undisclosed* principal might not have been the correct analysis. Rather, standing the sheriff's finding that GT was aware that the pursuer was acting as agent but not of the identity of the principal, it seemed to us at least possible that the correct analysis was that the pursuer was acting as agent for an *unnamed* principal: see Macgregor, *Law of Agency in Scotland*, para 12-16 *et seq*. If that were correct, she would have incurred personal liability to repay the loan. We put this to the solicitor for the pursuer at the outset of the first appeal hearing in August to give him an opportunity to consider the point and to submit, if appropriate, why he considered such an analysis was incorrect.

[11] After due consideration, the pursuer's solicitor told us that he now considered that the appeal was unarguable; that is, he accepted that any title to sue which the pursuer had could not derive from the assignation in her favour. Accordingly, he accepted that he could not advance an appeal based upon the original ground of appeal. However, he sought leave to lodge a minute of amendment. That was opposed by the defender but we granted leave,

since we thought it appropriate to afford the pursuer the opportunity of at least arguing that a final decision as to the parties' respective rights and obligations could be reached in this process, not least because there had already been a proof following which the main factual matters in dispute had been resolved.

The second appeal hearing

[12] The case called before us again on 30 October 2018. We had before us the pursuer's minute of amendment and the defenders' answers thereto. The solicitor for the pursuer moved us to allow the record to be amended in terms of the minute and answers. That motion was again opposed by the defenders.

[13] The minute of amendment proposed the deletion of article 4 of condescendence (which contained averments about the assignation) and the substitution of averments which, in effect, would entitle the pursuer to advance two different legal bases as to why she was entitled to payment from the first defender. First, she now averred that in making repayment of the sum due to GT of £142,000, she was acting as the first defender's agent and was entitled to be relieved by him as a matter of law. Second, *esto* she was not acting as agent, she averred that the first defender had obtained a benefit by virtue of her repayment and, as such, had been unjustly enriched.

[14] In moving the minute of amendment, the solicitor for the pursuer reminded us that whether or not to allow it was a matter within our discretion. He submitted that the minute of amendment was necessary to focus the real issue in controversy between the parties. The proof had dealt with the two factual issues in dispute and no further evidence on those would be required by virtue of the minute of amendment. The defenders would not be prejudiced by the lateness of the amendment. The authorities relied on – *Thomson* v *Glasgow*

Corporation 1962 SC(HL) 36 and *Clark* v *Greater Glasgow Health Board* [2017] CSIH 17 – were distinguishable on their facts.

[15] In response, the solicitor for the defenders submitted, under reference to the cases of *Thomson* and *Clark,* both *supra,* that the minute of amendment should not be allowed because it was inconsistent with the pursuer's case thus far and, indeed with the testimony which she had given at proof, which was that she had claimed to be acting as agent for both defenders whereas now she was claiming to be acting as agent only for the first defender. Further, he argued that the defenders would be prejudiced by the minute of amendment, which prejudice could not be alleviated by an award of expenses. The proof had been conducted on the basis of the case as pled originally. Had the defenders known of the amended pleadings, the case, and proof, might have been conducted differently. Further, there had been excessive delay in making the amendment which had not been adequately explained. Relatively speaking, the sum in dispute was so small that further procedure would be disproportionate. The pursuer may well have a remedy against her agents.

Decision on the minute of amendment

[16] We decided to allow the minute of amendment in part. In relation to the first new case advanced in it, we were not persuaded that there was any real prejudice to the defenders which could not be alleviated by an order of expenses. We were not persuaded that the factual issues at the proof (as opposed to the legal analysis applied thereto) would have been any different. In particular, the issues as to whom the money was ultimately advanced, and what the rate of return was to be, would have been precisely the same. The fact that the pursuer had contended for a different factual position was entirely beside the point, given that, having heard the evidence, the sheriff decided what the factual position

was. In that respect, this litigation is no different from countless others, with or without amendment of the pleadings. Accordingly, we saw no reason why the pursuer should not be permitted at least to argue that, on the facts as found by the sheriff, she is entitled to a remedy in law. To have held otherwise would have necessitated a fresh action by the pursuer to indicate her rights which, having regard to the sum involved, did not seem to us conducive to doing justice between the parties if it could be avoided. We agreed with the solicitor for the pursuer that the facts in *Thomson* and *Clark* could be distinguished. Each case must in any event turn upon its own facts and circumstances.

[17] However, in relation to the proposed new unjust enrichment line, we took the opposite view. As far as that new case was concerned, different evidence may well have been led at the proof had it been an issue at the time. We therefore allowed the minute of amendment (and answers thereto) only insofar as it related to the first new line advanced, excluding the averments anent unjust enrichment.

[18] As regards proceedings thereafter we considered that, if argument was to take place as to the remedy (if any) open to the pursuer on the basis of the findings in fact made by the sheriff, the logical starting point was to hear argument on the cross-appeal first, given that the defender challenges the making of certain key findings in fact. We therefore invited the parties to address us on the cross appeal which they duly did.

Defenders' submissions on the cross appeal

[19] The focus of the cross appeal was that the sheriff erred in several respects in making finding in fact 24, which we have set out above. In particular, the solicitor for the defenders submitted that there was no basis in the evidence for a finding that the first defender was aware that any sums were being offered to him alone as an individual. At best the evidence,

namely the terms of the email of 25 September 2015 (described in finding in fact 18) might support a finding that the first defender knew that the loan of £50,000 was being offered to both the first and second defender ("on personal undertakings"). However, there was no evidence in support of the proposition that it was in any of the parties' contemplation that the first defender would solely agree to a loan. Accordingly, the finding in finding in fact 24 that "the first defender was aware that the sums being loaned by GT were being offered to him as an individual he agreed to that" should be deleted. Further, there was no basis in the evidence for the finding that the first defender agreed to a loan of £130,000, at least not in any way averred by the pursuer. The evidence did not support a finding of any express acceptance by the first defender of an offer of a loan of £130,000 by GT prior to payment of the money. The evidence was that the pursuer communicated to the second defender that there was an offer of a loan for £130,000 from GT but the terms of which the second defender was unaware. There was no basis for holding (and in any event no relevant finding) that the second defender had any authority to accept an offer of a loan on behalf of the first defender. Although the sheriff at paragraph 64 of his judgement stated that in his opinion the second defender had ostensible authority to bind the first defender to the offer of loan, he had fallen into error. His opinion on the existence of an ostensible authority erred by treating the pursuer as a third party (or an agent of a third party, GT) who was dealing with the second defender on the understanding that she was an agent for the first defender. However, that was not the relationship or situation contended for by the pursuer. Ostensible authority required a representation of conduct by the principal which induced the third party to believe that the agent was authorised and the third party relied upon the representation or conduct: Stair, *Agency and Mandate Reissue*, paras 75-80; *Gregor Homes Limited* v *Emlick* 2012 (Sh Ct) (5).

[20] It was further submitted that the sheriff also erred in finding that "in arranging the loan of £130,000 with GT the pursuer acted as agent for an undisclosed principal. The undisclosed principal was the first defender" (also finding in fact 24). There was no basis in the evidence for the finding that an agent's relationship existed between the pursuer and the first defender alone in respect of the entering into of a contract of loan by him alone. The court should therefore vary the sheriff's interlocutor of 30 November 2017 by deleting the said finding.

Pursuer's submissions

[21] In response, the solicitor for the pursuer submitted that the issue was whether the sheriff was plainly wrong. He was not, and there was no good reason to interfere with finding in fact 24. The sheriff had correctly interpreted the email of 25 September, which referred to personal undertakings. It was plain what the pursuer meant by that phrase. It was also plain that the first defender understood that the defenders personally would have to repay the money. He referred to the transcript at page 508 of the appendix where the first defender, in response to a question as to what he understood by the phrase 'personal undertakings' replied: "That we had to undertake to repay it". Underpinning all of this was a distinct lack of credibility in the first defender's position. He had put forward no explanation as to why he was not personally liable. He had conceded that he would have been made bankrupt had the funds not been raised. The sheriff had found his assertion that he would not have accepted personal liability to be incredible. The evidence at proof had been that the company had never accounted for the loan in its accounts (see appendix pages 520-524). As far as ostensible authority was concerned the evidence was that both defenders had met the pursuer; they were desperate for funds; there were multiple phone calls; and

they were all undertaken with a view to trying to arrange funds. It was also relevant that the parties were married to each other and were in business together. The sheriff's analysis was correct. Reference was also made to the appendix pages 542 and 543, where the first defender stated that he "would be quite comfortable with any course of action [the second defender] took." The first defender was well aware of the loan and its terms. There was also evidence from the first defender that prior to settlement he was aware of the receipt of the £130,000 and that he allowed the transaction to settle. On any view he had ratified the arrangement. Further, the sheriff had been entitled to take into account the evidence of post transaction communications in order to infer what had been agreed.

Discussion

[22] The only finding in fact challenged by the defenders in the cross appeal is finding in fact 24. Several components of that finding are challenged. The essence of the cross-appeal is the submission that there could be no contract because neither defender expressly agreed to the terms of the final contract which the sheriff found to have been entered into, and that because the pursuer did not at any stage expressly agree with those terms with the first defender. It is true that there was no conversation between them to that express effect. However, it is clear that in making finding in fact 24, the sheriff was in reality drawing the inference that the first defender was aware that the sum being loaned by GT was being offered to him as an individual and that he agreed to that. The real question for us is whether or not the sheriff was entitled to draw that inference. In considering that matter, the starting point is to consider the other findings in fact which the sheriff made, which the defenders have not challenged. We have set these out above. The salient points to emerge from them are as follows:

- The pursuer had acted as solicitor for the first defender since 2012;
- As at 21 September 2015 the defenders had secured an offer of loan which would realise an immediate £2.1m, leaving them with a shortfall of £400,000;
- The first defender was (personally) able to contribute £170,000 to that shortfall, leaving a balance to be found of £230,000;
- On 21 September 2015 the defenders asked the pursuer if she could assist in raising funds, to which the pursuer agreed;
- As at 25 September 2015 the defender were still faced with a shortfall;
- The pursuer asked GT if he could assist and he agreed to provide an initial sum of £50,000;
- By email of 25 September 2015, the pursuer told the first defender that she had an offer of £50,000 from a contact against personal undertakings only, with a rate of return of £5,000;
- The first defender agreed to borrow £50,000 on that basis but asked the pursuer whether her acquaintance could lend more than £50,000;
- The pursuer spoke to GT again and he agreed to lend £130,000 at the same rate of return.

[23] Pausing there, the state of play between the pursuer and the first defender at that time was that the first defender was already contributing some £170,000 of his own money; he was aware that the pursuer was assisting in obtaining the balance of £230,000; he was aware that an offer of £50,000 had been made and that he was to undertake personal liability for that sum; he had asked the pursuer to try to raise more. It is against that background that the subsequent events must be viewed. These were as follows:

- Later on 25 September 2015 the pursuer tried to contact the first defender to inform him of the offer of £130,000. She was not able to speak to him but spoke to the second defender by telephone. She explained to the second defender that GT was prepared to lend £130,000 and that the loan was to be on the same basis at the same rate of return as had been offered in relation to the sum of £50,000. The second defender told the pursuer to proceed which she duly did;
- On 28 September 2015 the pursuer wrote to the first defender referring to the £130,000;
- The transaction settled on 1 October 2015;
- On 4 October 2015 the pursuer emailed the first defender referring to the return of £12,000;
- The first defender, although he commented on a number of aspects of the email, did not comment on the pursuer's reference to the return of £12,000.

[24] In all of these circumstances, the sheriff in our view plainly was entitled to draw the inference that the first defender was aware that the sums being loaned by GT were being offered to him as an individual. He was aware of that from the time that personal undertakings were mentioned. Indeed, given the situation on the ground at the time, where the defenders were married to each other and were jointly trying to raise funds, we find it logically irresistible to infer that the second defender would have told the first defender that an additional £80,000 had been offered. In our view that is an inference which the sheriff was entitled to draw, and events after 25 September 2015 tended to confirm that the first defender was aware of the increased offer, since he did not express any surprise. There is no need to resort to the doctrine of ostensible authority, since the correct inference (or certainly, an inference which the sheriff was entitled to draw), in our view, is that the second defender

had actual authority to bind the first defender. We observe that even if the conversation between the pursuer and the second defender had not taken place it may have been arguable that the pursuer had implied authority to agree to a loan of £130,000 on personal undertakings in any event. Finally, standing the findings in fact which are not challenged and to which we have drawn attention, we do not consider it necessary to consider the transcript in detail but for completeness the passages referred to by the pursuer's solicitor merely reinforce that the sheriff was entitled to draw the inferences that he did as to the first defender's state of mind.

[25] The first defender's main argument is that the first defender at no time agreed to be solely liable for repayment of the money. There are several answers to that. First, if the first defender truly considered that were material, it would have been open to him to have argued that in fact the sheriff had erred by holding that he was solely liable, and that the correct analysis was that the second defender was equally bound by the transaction. Certainly, to revert to the ostensible authority argument, if it is correct that the second defender had the ostensible authority to bind the first defender, it may be equally arguable that the first defender had ostensible authority to bind his wife. Equally, it might have been possible to draw the inference that the second defender was, by the time of the phone call with the pursuer, aware that the sums were being offered on a personal liability basis. However, the first defender has elected not to run that argument. Second, again given the defenders' close relationship, there is no material difference to the first defender in being solely liable for repayment of the money as opposed to his being jointly and severally liable. We acknowledge that the sheriff expresses the view that, had he found both defenders liable he would have found them jointly liable but whether that is correct or not is immaterial. The fact of the matter is that the first defender was so desperate for the money at the time of

the transaction that his current complaint of being solely liable for repayment of it lacks credibility (particularly when, on any view, on his own averments, he would have a right of relief against the limited company, for whose benefit the money was ultimately raised).

[26] Accordingly, we decline to adjust finding in fact 24 by deleting the first two sentences, as invited to do by the defenders. The further question is whether the sheriff was correct in holding that the pursuer acted as agent for an undisclosed principal namely the first defender. This is closely bound up with the issue which we just discussed. The facts (and the evidence) to which we have drawn attention clearly demonstrate that the sheriff was entitled to infer that the pursuer was acting as agent for the first defender. However, standing our observations above in paragraph [10], we consider it more accurate to describe the first defender as an unnamed rather than as an undisclosed principal, since GT was aware that the pursuer was acting as an agent but simply did not know the identity of her client. Accordingly, we will modify finding in fact 24 by deleting undisclosed, where it occurs twice in the last line and substituting therefor "unnamed".

[27] The other issue which was canvassed before us was the rate of return. However, the defender's position in relation to that is that there were no findings in fact about the rate of return. Accordingly, we consider that this is a matter to be considered further when the pursuer addresses us on her appeal.

[28] We have therefore refused the cross appeal, except in so far as indicated in paragraph [26] above. As regards further procedure we shall assign a hearing on the pursuer's appeal on a date to be afterwards fixed and reserve meantime the question of expenses until that date.