SHERIFFDOM OF LOTHIAN & BORDERS AT EDINBURGH

[2020] EDIN 48

EDI-A542/18

JUDGMENT OF SHERIFF K J McGOWAN

in the cause

PAULINE MOLES

Pursuer

against

(FIRST) ALEXANDER COOK
(SECOND) CHUBB EUROPEAN GROUP PLC

Defenders

and

THOMAS MOLES

Third Party

Pursuer: [INFO]
Defender: [INFO]

Edinburgh, 15 December 2019

Introduction

[1] This is a road accident claim in which the pursuer sought damages for the cost of repairs to her car and hire of an alternative vehicle while her car was being repaired, following an accident on 15 January 2018. The first defender was the driver of the other vehicle involved in the collision; the second defender was the motor insurer of the vehicle being driven by the first defender; and the third party ("Mr Moles") is the pursuer's husband who was driving her car at the material time. Although not a party to the action, it is relevant to note that Accident Exchange Limited ("Accident Exchange") were the owners

of the replacement car, ostensibly hired to the pursuer whilst her own car was being repaired.

The background to the motion before me

[2] There was an options hearing on 15 November 2018. It was discharged and the court granted an order for service on Mr Moles at the behest of the defenders.

[3] After sundry further procedure, a proof before answer was fixed. The proof commenced on 9 July 2019 when evidence was led but not concluded. At the date fixed for the continued proof diet on 30 September 2019, the pursuer abandoned her action. The court was invited to grant decree of absolvitor in favour of the defenders and to find her liable to the defenders in the expenses of process. That motion was granted unopposed.

[4] As a consequence, the third party proceedings were automatically brought to an end and the defenders were found liable to Mr Moles in the expenses of the action.

[5] The defenders had enrolled a motion in which *inter alia* they sought to pass on to the pursuer the liability which they had incurred to Mr Moles in expenses. The pursuer was not in a position to argue that motion and it was continued to 16 October 2019 when it called before me.

Preliminary issues

[6] The motion for the defenders was to (i) hold that that Accident Exchange was the true *dominus litis* in the litigation and to find it liable to the defenders in a sum equivalent to the defenders' liability in expenses to Mr Moles; (ii) in the alternative, in the event of the motion for an award against Accident Exchange was not granted, to find the pursuer liable

to the defenders in a sum equivalent to the defenders' liability to Mr Moles; and (iii) to sanction the cause as suitable for sanction for counsel.

[7] As I understood it part (ii) of the motion gave rise to a concern about conflict of interest and accordingly arrangements were made for Accident Exchange to be separately represented before me.

[8] In advance of hearing submissions on the substance of the motion itself, I was advised on behalf of the pursuer that it was understood that the conflict had been resolved but that a watching brief would be maintained.

[9] On behalf of Accident Exchange, I was advised that (i) Accident Exchange accepted that it was the *dominus litis*; (ii) that if it was found that there was a liability to the defenders in respect of the expenses which they had incurred to Mr Moles, that it should be should be against the *dominus litis* and not against the pursuer; (iii) that it was accepted by Accident Exchange that the case was suitable for the employment of junior counsel and (iv) that it was accepted that liability for expenses already incurred by the pursuer to the first and second defenders lay with it, thereby eliminating any question of conflict.

[10] Those matters having been clarified, counsel for the defenders adopted the terms of his written submissions and supplemented them with some additional comments.

Submissions for the defenders

Dominus litis

[11] The first issue was whether Accident Exchange was the true *dominus litis* in this action. The starting point for examining the concept of the *dominus litis* is *Court of Session Practice*, page C/225, paragraph [115]:

> "A *dominus litis* is a party having '… a direct interest in the subject-matter of the litigation, and [who] through that interest [is] master of the litigation itself, having the control and direction of the suit, with power to retard it or push it on, or put an end to it altogether.' The element of control, and particularly the power to compromise an action, is a very important feature of the *dominus litis*. As to the nature and degree of the interest which is required, it seems that a person must have at least some degree of direct personal interest in the subject matter of the litigation to qualify as *dominus litis*. Where a person falls to be regarded as *dominus litis*, he becomes liable for the expenses of an action, as the party truly responsible for causing those expenses. Accordingly he can be sued for those expenses, or sisted as a party to a continuing action. A *dominus litis* cannot be made liable for payment of the principal sum, however, the limit of his liability being the expenses of the action. Where it is abundantly clear that a person has acted as *dominus litis*, or that status is admitted, that person may be found liable in expenses at the conclusion of an action. It is more usual, however, to raise a separate action concluding for expenses against the *dominus litis*."

Accident Exchange met all of the requirements for a *dominus litis* in this case.

[12] There were various mechanisms available for obtaining expenses from the *dominus litis*. The reference to a separate action reflected several practical realities: first, that it may not be possible to recover the expenses from the nominal party; secondly, that the existence of a *dominus litis* may only become known after decree has been granted in the initial actions; and thirdly, that proof of the existence of a *dominus litis* will sometimes not be a matter that is clear from proof of the matters in dispute in the action.

[13] In MacLaren, *Expenses in the Supreme and Sheriff Courts in Scotland*, 1912, the learned author said at page 149:

> "If the party who is ultimately successful in a case discovers in the course of the proceedings that there is someone behind the opposite party who has an interest, and who is taking the entire control of the case, he may move that the latter party, along with his opponent, be found liable to him in the expenses of the cause. If the fact be admitted, or if, on making a motion for expenses, the successful party can incidentally prove, by the production of an assignation, or by some such mode, that this other party is the *dominus litis*, he may, and would, get decree against him in the action. If, however, the fact is disputed, a separate action should be brought, though a doubt upon this point has been expressed."

[14] That statement derives from the Opinion of Lord Adam in *Kerr* v *Employers' Liability Assurance Corporation Ltd* (1899) 1 F 17 at page 23. In *Kerr* v *Employers' Liability Assurance Corporation Ltd* the Lord President posed the question: "Must the expenses be recovered against the true *dominus litis* in the original action? or can they be recovered by subsequent action?" His Lordship concluded that it was competent to recover the expenses by a subsequent action. That question and the answer to it, however, indicate that the usual method would be to recover expenses from the *dominus litis* in the original action. Indeed, Lord MacLaren said, at page 24, that it is generally desirable for the motion to be made in the original action.

[15] In the present case, the way in which the proof was conducted, including the evidence led and the response by the pursuer's counsel to the sheriff's concern about conflict of interest, and the evidence of the witnesses other than the pursuer and third party, demonstrated quite clearly that the nominal pursuer was not in control of the proceedings and that there was a *dominus litis* in this action. The identity of the *dominus litis* is revealed by the terms and conditions of hire, which are found at number 5/3/6 of process. They refer to "Accident Exchange Limited or its associated companies, successors or assignees" as the party who has the exclusive right to pursue the claim. Accordingly, Accident Exchange Limited is the *dominus litis* (albeit they seem to have an arrangement with some "associated companies").

The third party's expenses

[16] Insofar as the pursuer's liability for the third party's expenses is concerned, a very similar situation arose in *Prospect Healthcare (Hairmyres) Ltd* v *Keir Build Ltd* [2017] CSOH 112. In that case the pursuer and the defender had entered into a contract in terms of which

the defender was to design and build a hospital. The pursuer claimed that the hot water piping was defective and sued the defender. The defender claimed to be entitled to an indemnity from one of its sub-contracts, who it convened as a third party. After sundry procedure the pursuer abandoned its action against the defender and conceded that it was liable to the defender in the expenses of the action. The third party sought its expenses from the defender. The defender accepted that it was liable to the third party in expenses but argued that the pursuer should bear all, or at least part, of those expenses. That was the only controversial matter.

[17] The Lord Ordinary refused to grant the relief which the defender sought, following the decision of an Extra Division in *Albert Bartlett & Sons (Airdrie) Ltd* v *Gilchrist & Lynn & Ors* [2010] CSIH 33, where the court said that a party, "cannot be liable, at least in ordinary course and in the absence of some unreasonable behaviour, for the expenses of a party whom he has not introduced into the process and against whom he has directed no case."

[18] The Lord Ordinary did not accept that there had been any unreasonable behaviour on the part of the pursuer, who had acted properly throughout. He accepted that the defender had also acted reasonably in convening the third party but that, since the pursuer neither introduced the third party into the process nor directed any case against it, it was the defender not the pursuer who caused the third party to litigate. As he put it, "[i]n the whole circumstances I was not persuaded that substantial justice required that the pursuer bear all or any part of the defender's liability in expenses to the third party": paragraph [22].

[19] In disposing of the substantive reclaiming motion, each of the three judges issued separate Opinions. They are reported at 2018 SC 569. The First Division concluded that the Lord Ordinary had identified the correct test and that he had exercised his discretion properly. The Lord President said this:

> "[17] The general rule is that the cost of litigation falls on the party who has caused it. If a pursuer loses his case, he must normally pay the defender's expenses since he has caused the defender to incur those expenses in vindicating his position. A pursuer's liability is normally limited to the person or persons whom he has convened as defenders. He cannot be liable, at least in ordinary course and in the absence of some unreasonable behaviour, for the expenses of a party whom he has not introduced into the process and against whom he has directed no case. The expenses of third parties are generally only recoverable against the party who has directed a case against them (*Albert Bartlett & Sons (Airdrie) Ltd* v *Gilchrist and Lynn Ltd*), Lord Carloway, delivering the opinion of the court, para 12)."

[20] The Lord President went on to say that:

> "[20] The commercial judge's use of his discretion cannot be faulted. He followed the guidance in *Albert Bartlett & Sons (Airdrie)* as correctly setting out the principles to be applied. He reached the view that substantial justice did not require the pursuers to be found liable in the expenses of a party whom they did not convene. He took the view that, rather than having a 'chilling effect' on the use of third-party procedure, which has certainly not been noticed, the practice advanced by Lord Diplock in *LE Cattan Ltd* v *A Michaelides & Co Ltd* (p 720) could discourage pursuers from accessing the courts if they might be found liable in the expenses of multiple parties whom they had not sought to involve."

[21] Lord Malcolm issued a separate, concurring Opinion. The main purpose of Lord Malcolm's Opinion was to query whether practice in England and Wales was truly very different to practice in Scotland. Insofar as relevant for present purposes, Lord Malcolm said, at paragraph [35], that, "[w]ith regard to the full terms of para 12 [of the decision in *Albert Bartlett & Sons (Airdrie) Ltd* v *Gilchrist and Lynn Ltd*], I do not consider that the Extra Division intended to limit the possibility of such an award to cases where there had been unreasonable behaviour. Lord Carloway appears to make the same point in Court of Session Practice at page L/404, paragraph [501.1], where he has said:

> "Where a defender has convened a third party, and the pursuer has adopted the defender's case against that party, or introduced one of his own, similar considerations as appear in cases with multiple defenders. However, a pursuer does not have to do and the consequences are different when the pursuer does not do so. If the main action fails, that against a third party will fail with that. The defender will almost certainly be found liable in expenses

> so the third party, whom he has convened. It is unlikely, however, that [he] will be able to recover these expenses from the pursuer.
>
> A pursuer's liability is normally limited to the person whom he has convened as a defender. In the normal case, he cannot be found liable to a third party whom he has not convened and against whom he has directed no case (ie not caused to litigate). This follows from the fact that third party procedure is essentially a method of combining two actions, the first of which will be the principal one. The pursuer in that action could not be found liable for the expenses of either parties in the subsidiary cause. However, as the matter remains ultimately one for the discretion of the court, there may be exceptions, where third party procedure had been adopted, such as instances of unreasonable behaviour." [emphasis added]

[22] The following propositions apply. First, an award of expenses is a matter for the exercise of judicial discretion, designed to achieve substantial justice in the case. Secondly, it is a discretion exercised having regard to the particular circumstances of the case, including the averments of the parties, the evidence adduced, and the conduct of the parties. Thirdly, it is a discretion to be exercised in accordance with recognised principles. Fourthly, one such principle is that, as a matter of generality, a pursuer's liability is normally limited to the person or persons he has convened as defenders or against whom he has directed a crave. Fifthly, however, that general principle is subject to exceptions where substantial justice requires that the pursuer bear all or any part of the defender's liability in expenses to the third party. Sixthly, those exceptions include cases where there has been unreasonable behaviour.

[23] In this case, there are a number of factors which, it is respectfully submitted, point to substantial justice requiring the pursuer (or rather the *dominus litis*) to be liable for the third party's expenses. In the first place, there are certain averments made on behalf of the pursuer in the fifth article of the condescendence for which there can have been no basis in the papers. Secondly, the conduct of the proof on the part of the pursuer was in certain respects unreasonable. A number of witnesses were called whose evidence was, as it turned

out, of no relevance to the issues in dispute on record. Moreover, the evidence of those witnesses showed a disregard by the *dominus litis* of the interests of others involved, their own procedure, and the procedures of the court. Thirdly, it can be inferred from the way in which the proof was conducted that the decision to abandon the action is one that was taken for the benefit of Accident Exchange Ltd (and/or its associated companies).

[24] As it was put in *Howitt* v *W Alexander & Sons Ltd* 1948 SC 154, "an award of expenses according to our law is a matter for the exercise in each case of judicial discretion, designed to achieve substantial justice" (at page 157 *per* Lord President Cooper). In cases where a third party has been introduced, the rule which has developed is that a pursuer is not liable, at least in ordinary course, for the expenses of a party whom he has not introduced into the process and against whom he has directed no case. In this case, it is respectfully submitted that substantial justice requires that the pursuer (or rather the *dominus litis*) to be found liable to the First and Second Defenders in a sum equivalent to the First and Second Defenders' liability to the Third Party.

The present case

[25] There were a number of factors which pointed to substantial justice requiring *dominus litis* to be liable for the third party's expenses. First, there were certain averments made on behalf of the pursuer in the fifth article of condescendence for which there could have been no proper basis. In particular, it was averred as follows:

> "The pursuer was aware that the vehicle was provided on a credit hire basis. The pursuer was aware of the terms and conditions of the hire agreement".

[26] There could be such a basis for averments of that type where for example a person whose car is damaged has hired a replacement vehicle. In the present case, it was a third

party who had signed the documents and accordingly nothing about the terms of the hire could be spoken to by the pursuer herself. It was averred that the third party had signed a hire documentation only as an agent for the pursuer so evidence about the terms in which the vehicle was provided (i.e. on a credit hire basis) could have come from the pursuer or a third party or somebody from Accident Exchange could have given evidence about this. Both the pursuer and third party said in evidence that they didn't know that it was a credit hire agreement. Moreover, the third party averred to the opposite effect that he was not aware that it was a credit hire agreement and that the pursuer was unaware of the terms and conditions of the agreement.

[27] The result is that the averments made on behalf of the pursuer had no proper basis and they were plainly designed to improve the prospects of the pursuer (and hence the *dominus litis*) in this litigation.

[28] Those averments also related to the third party's involvement in the overall factual matrix of the case. The basis on which the third party was convened was for contribution. The third party was also involved in relation to both causation and quantum. Thus, it was necessary for the defender to make appropriate averments as a basis for cross examination.

[29] Accordingly, it had been reasonable to convene the third party and it was also inevitable that the third party would play a major part in the action as he signed the documents.

[30] Second, the conduct of the proof on the part of the pursuer was in certain respects unreasonable. A number of witnesses were called whose evidence was, as it turned out, of no relevance to the issues in dispute on record. Moreover, the evidence of those witnesses showed a disregard by the *dominus litis* of the interests of others involved for their own procedure and the procedures of the court. It was evident that the main dispute was about

the terms of conditions and it was clear that there could have been no proper precognitions taken from the witnesses. In addition, no evidence was called from the engineer who carried out the inspection.

[31] Third, it could be inferred in a way in which the proof was conducted that the decision to abandon the action is one that had been taken for the benefit of Accident Exchange.

[32] As it was put in the case of *Howitt* v *W Alexander and Sons Ltd* 1948 SC 154:

> "An award of expenses according to our law is a matter for the exercise in each case of judicial discretion, designed to achieve substantial justice": Lord President Cooper, page 157.

[33] In cases where a third party has been introduced the rule which has developed is that a pursuer is not liable, at least in the ordinary course, for the expenses of a party whom he has not introduced into the process and against whom he has directed no case. In this case, it was respectfully submitted that substantial justice requires that the *dominus litis* be found liable to the first and second defenders in the sum equivalent to the first and second defenders' liability to the third party.

[34] The conduct of the case had had an impact on timing although this was difficult to say for sure. The case could perhaps have been completed in one day but it was accepted that that was speculation.

[35] Turning to the question of abandonment, there were two possibilities. It could be that Accident Exchange reviewed their position in light of evidence on liability but that was not likely given the evidence led and the fact that to succeed the pursuer only required to establish 1% liability against the defender. If it was an issue to do with liability then there had been a clear failure to precognosce the witnesses properly. For example, the witness Mr Stark was not able to describe the vehicle which the defender was driving.

[36] In the circumstances, it was more likely that the abandonment related to issues about quantum. During the course of the proof several issues materialised about the paperwork. The witnesses about this evidence would have been criticised in the submissions had the case gone that far. Faced with that the prudent course for the Accident Exchange was to abandon this action.

Sanction for counsel

[37] Insofar as sanction for counsel is concerned, the test is now set out in section 108 of the Courts Reform (Scotland) Act 2014.

[38] In this case, counsel was instructed shortly before the proof. Accordingly, for practical purposes, sanction relates to conduct of the proof, including submissions. The pursuer was represented by counsel at the proof, and accordingly arguments about equality of arms favour the defenders. The effect of the pleadings was that there were numerous legal issues that were likely to require to be addressed in submissions, including: sole fault, contribution, validity of the contractual documentation, and quantification. In all the circumstances of this case, it was reasonable to instruct counsel.

Submissions for Accident Exchange

[39] The first part of the defenders' motion should be refused. There was a preliminary point about competency. An order in the terms framed in the motion was not competent. It would put the *dominus litis* into the position of having to meet a liability over which it would have no power in relation to taxation or input.

[40] It was accepted that the court's powers in this respect arose from the judicial discretion but that had to be subject to certain principles.

[41] The defenders relied on the conduct of the *dominus litis.*

[42] It was appropriate to look at the pleadings. In answer 6, the defenders say that the third party was to blame. The *dominus litis* did not adopt the case against the third party.

[43] Reliance had been placed on the conduct of the litigation and the subsequent abandonment but it was well known that actions could be abandoned for a variety of reasons. The defenders cannot know why the action was abandoned. No explanation has been put forward by them.

[44] In any event there were mechanisms open to the court to reflect displeasure with how a party had conducted litigation and the duration of the litigation.

[45] The defenders' decision to convene the third party was a tactical one outwith the control of the *dominus litis*. There was no question of the defenders being duped into convening the third party in this case.

[46] The motion should be refused.

Reply for defenders

[47] The form of motion here was the one which had been used in *Prospect Healthcare*.

[48] It was accepted that the conduct of the litigation could be relevant to other motions but it was relevant here also.

Grounds of decision

Dominus litis and sanction

[49] These parts of the motion were conceded and I need say nothing further about them.

Relief in relation to expenses

Procedural history

[50] I have set out above the immediate circumstances which gave rise to the defenders' motion but before going any further, it is appropriate to set out in more detail the procedural history of the case.

[51] The initial writ was served in July 2018. It discloses that the pursuer's car was being driven by Mr Moles – her husband. The averments in relation to the accident circumstances are unremarkable, setting out a case of fault against the first defender in relation to his manner of driving at the relevant time.

[52] The key averment supporting the sum sued for is as follows:

> "The Pursuer required to source a hire vehicle from Accident Exchange…for a period of 23 days at a cost of £8,782.80."

[53] According to the contractual documentation (see further below), it was Mr Moles who hired the replacement vehicle. That being so, the use of the phrase "The Pursuer required to source a hire vehicle from Accident Exchange…" is interesting. It appears to me to hint at the idea that it was the pursuer who hired the alternative vehicle, though it stops short of saying that.

[54] The defences were lodged in September 2018. It is apparent from the terms of them that the defenders knew that the pursuer was not driving her own car at the time: Answer 4. But it also appears that at that stage the defenders were proceeding on the basis that the pursuer herself had hired the alternative vehicle. For example, they aver "believed and averred that the pursuer entered into a hire agreement with Accident & Exchange (*sic*)…"; and they make a number of averments directed at a challenge to the quantum of the claim, such as raising the issue of impecuniosity, the hire rates and the hire duration: Answer 5.

[55] On 9 October 2019, the pursuer lodged a 'locus report', consisting of annotated photographs of the locus.

[56] On 10 October 2019, the pursuer lodged a so-called 'period statement' which consisted of a 'witness statement' of one Thomas Pugh together with documentation referred to therein. Two things are apparent from the terms of that statement. First, Mr Pugh appears to have had no direct knowledge of Accident Exchange's dealings with the pursuer, he having simply carried out a review of documentation; and second, it foreshadowed that Mr Pugh would say "Accident Exchange…provided the pursuer with a vehicle on a credit hire basis [between certain dates]…" while her car was being repaired.

[57] In early November 2019, adjusted defences were lodged. These focused the identity of the driver of the pursuer's car as Mr Moles (which was what the pursuer had averred): Answer 4.

[58] At the options hearing, the defenders' motion to grant warrant to serve a third party notice on Mr Moles was granted.

[59] On 4 December 2019, the pursuer lodged copies of documents relating to the hire and repairs, nos. 5/3/1 - 5/3/7 of process, thus:

a. a letter addressed to the second defenders, saying in terms that the charges were incurred by the pursuer;

b. an invoice addressed to the pursuer for the hire charges;

c. a breakdown of the hire charges;

d. an "ABI General Terms of Agreement Mitigation Questionnaire and Statement of Truth"; and

e. a vehicle rental agreement.

[60] The vehicle rental agreement (VRA) bears to show the pursuer as the hirer; and the pursuer and the third party are named as authorised drivers. No licence details are given for the pursuer and she appears to be recorded as 'non driver'. The third party's name and licence details have been added in manuscript. The document is signed, but the name of the person signing is not clear from the signature or otherwise given. In terms of Clause 3.1, the hirer undertakes to pay the hire charges to Accident Exchange. In terms of Clause 5.1, Accident Exchange are granted the exclusive right to pursue the claim for compensation from a third party for hire and repair charges.

[61] Other documentation lodged related to the repairs costs: 5/4/1 – 19 of process. Notably, there is a credit repair agreement (CRA), which although naming Accident Credit Group Ltd and the pursuer as the parties, bears to have been signed by Mr Moles. Moreover, it is evident that the signature on the CRA is the same as that on the VRA.

[62] On 21 January 2019, answers were lodged on behalf of Mr Moles. The averments about the accident circumstances were consistent with the pursuer's averments: Answer 4. As far as quantum was concerned, it was averred that the pursuer's losses were not known and that the sum sued for was excessive: Answer 5.

[63] The court is not party to the how the subsequent adjustment of the pleadings developed, but it is clear that there were material changes to the parties' respective positions as disclosed by the Record, lodged on 9 April 2019.

[64] The sum sued for had been increased, reflecting the introduction of a claim for the vehicle inspection and repairs costs: first crave and Answer 4.

[65] In relation to the hire charges, the pursuer averred as follows:

> "Whilst her car was being repaired, the pursuer required a replacement hire vehicle. She required a vehicle for commuting and childcare purposes. The pursuer was not impecunious. The pursuer was supplied with a credit hire vehicle from Accident

> Exchange…. The pursuer was in hire (*sic*) for 23 days. The cost of the hire was £8782.80. The third party signed for the hire documentation only as an agent of the pursuer. The pursuer was aware that the vehicle was provided on a credit hire basis."

[66] On behalf of the defenders, the following was averred:

> "… the sum sued for is excessive. The pursuer did not mitigate her loss. Believed and averred that the pursuer did not enter into a hire agreement. The pursuer did not incur hire charges. The pursuer did not have need for a vehicle and did not drive the hire vehicle. Believed and averred that (Mr Moles) entered into a hire agreement with Accident Exchange from 12 March 2018 to 3 April 2018 but was advised that he would not require to make payment. At the time of the collision, and during the hire period, the pursuer was not impecunious and could have hired a vehicle from a local hire company at basic hire rates…".

There then followed some averments about the duration of the hire, delay in the repairs and the condition of the pursuer's vehicle.

[67] On behalf of Mr Moles, it was averred that:

> "… the sum sued for is excessive. The pursuer was not impecunious at the time of hire. The pursuer could have hired a car locally on basic rates. The hire agreement was signed by (Mr Moles). (Mr Moles) was not aware it was a credit hire agreement. He did not know how much was being charged for credit hire. He did not know he would be responsible for the hire costs if his claim did not succeed. He understood he had instructed someone on a no win no fee basis and that he would never be asked to pay for the hire charges. The pursuer was not aware of the terms and conditions of the hire agreement. The credit hire agreement is unenforceable."

[68] Pausing there, it is clear that by this stage, there was a clear issue focused as to the validity and hence the enforceability of the credit hire agreement; and as to the pursuer's right to claim hire charges.

[69] Naturally, I do not know in detail how these issues came to light, but it seems reasonable to assume that the defenders' averments were based on a review of the contractual documentation and that the averments on behalf of Mr Moles were based on information which he had provided to his road traffic insurers, who were presumably dealing with the matter on his behalf.

[70] Any dubiety which may have remained about the defenders' position should have been eliminated by the note lodged by them in support of their preliminary pleas which specifically focuses the question of enforceability made in their averments and raises a further issue concerned with the effectiveness (or otherwise) of the putative exemption from the Consumer Credit Act 1974, mentioned in the VRA.

[71] At the options hearing, the preliminary plea for Mr Moles was not insisted in and was repelled; and a proof before answer was fixed.

[72] On 19 June 2018, a Notice to Admit was lodged on behalf of the pursuer. Among other facts which the defenders and Mr Moles were called upon to admit were the following:

a. the pursuer was aware that the vehicle was provided on a credit hire basis;

b. the pursuer was aware of the terms and conditions of hire agreement;

c. the pursuer was aware that she would remain liable for the credit hire costs if a claim was unsuccessful;

d. the third party signed for the car on behalf of the pursuer was at work at the material time; and

e. the third party signed the hire documentation only as an agent for the pursuer.

[73] Perhaps unsurprisingly given the averments already mentioned, the defenders and Mr Moles lodged notices declining to admit the foregoing.

[74] On 9 July 2019, the case called for proof before me.

[75] The first witness was Mr Moles. He explained that he had been driving his wife's car and went on to give his version of the accident circumstances.

[76] He then said that he had organised the repairs. He had phoned a "no-win, no fee" number. He got a call back telling him to take the car to premises at Newbridge and to pick up a courtesy car. Accident Exchange had fixed the car. He thought that the first call was not to Accident Exchange. He had heard about them online.

[77] Asked why he had selected Accident Exchange, he said it was the first number there. He had just wanted the car fixed as soon as possible.

[78] When he got the call, he was asked if the car was driveable. He had said yes. He then proceeded to exchange cars.

[79] By reference to number 5/3/4 of process, he agreed that the car had been assessed about 12 March 2018. He confirmed that his signature was on that document and it had been signed that day.

[80] He could not remember if he had read the VRA before he signed it. He had signed it because his wife was not there. He was dealing with everything for her. The credit hire process had been explained to him. He had read the relevant section of the document at the time. He had asked the guy if it was based on no-win, no fee and so he (Mr Moles) would not be held responsible for anything. They said yes. If he (Mr Moles) had known that he would have to pay he would not have signed it. He thought that the third party who hit him or the insurers would have to pay.

[81] Referred to the terms of 5/3/5 of process, Mr Moles agreed that his licence number had been written in; that the various signatures were his. He was unable to say why the pursuer's name was in the document. It was possible that it was because it was her car.

[82] He was asked if this was the first time he had seen the daily rental charge. He accepted that it was not because he had signed it. But he had not seen it as a daily rental fee. If he had, he would not have signed.

[83] He was taken to 5/3/6 of process and asked if he had seen it before. He said he had not read the terms and conditions. He knew this paper was there so he had seen them but he had not read them. He was told it was "no-win, no-fee"

[84] He agreed that 5/4/2, the CRA, could be signed "by or for". That accorded with the whole picture.

[85] Under cross-examination for the defenders about the same document, Mr Moles agreed that he had signed and dated the CRA but there was no signature after the colon where the printed words "signed by or for and on behalf of the client:" appeared below his name where it had been handwritten in.

[86] Under reference to the VRA, Mr Moles said that he did not understand why his wife was recorded as a non-driver as she needed the car for work. He agreed that his licence details had been written but said that the handwriting was not his.

[87] Mr Moles was not sure of the hire dates. The name and date in 5/4/19 was in his handwriting. He agreed he had collected the car and that all the signatures in the documents he had been referred to were his.

[88] He had left all issues about the repairs to Accident Exchange. He did not know how long the repairs would take. He had asked and he did not think it would take that long but he wasn't worried about it because the arrangement was no-win no fee.

[89] Cross examined by his own solicitor (Mr Moles having been called as a witness for the pursuer) he agreed that the VRA, 5/3/5 of process said nothing about credit. He had not been aware that the rental charge was £315 per day. He thought it was no-win, no fee. He was not told about any additional charges. He had not been provided with the document before he went to pick up the vehicle. They were just given to him on the day. He could not remember if he had been given any copies of them that day.

[90] Under reference to clause 7.4, Mr Moles reiterated that he thought it was no-win no fee. His position was the same in relation to the CRA, 5/4/2 of process. He had not read that document before he signed it because he thought it was no-win no fee. He was not provided with a copy of that agreement in advance. The signature at the bottom of the document was already there when he saw it.

[91] The pursuer had used the replacement vehicle. Mr Moles had picked it up and dropped it off.

[92] There was some brief re-examination about the duration of the hire.

[93] A Mr Coleman was then called to give evidence for the pursuer. He spoke to the accident circumstances and substantially supported Mr Moles' version of events.

[94] The pursuer then gave evidence. She nearly explained how she had come to learn of the accident. She was then asked what part she played in arranging the repairs and replied "zero". Mr Moles had telephoned her and said he'd got her car. He then brought it down. She got a call from Accident Exchange. That was about 7 to 10 days after the accident had happened. In the meantime she had been using her own car which was still driveable.

[95] The pursuer said that when she received a phone call from Accident Exchange, she was told that it was a "no-win, no fee process". That had been during the conversation on the phone with Accident Exchange. She was told that it was a hire car but that she would not be liable for any costs. If she had been told that there was a cost and the amount she would have to pay she would not have taken it.

[96] She thought it was all being done through the first defender's insurance. She thought that the phone call from Accident Exchange was about her driving the hire car. She didn't understand why she was noted as a non-driver in the VRA. She drove the car all the time from day one.

[97] She was not 100% clear what she had been asked during the conversation with Accident Exchange. She was told that was a hire car. She had asked if it was no-win no fee three times. She had asked if she was going to incur costs and was told "no, absolutely not".

[98] She had been asked about the mileage and use of the car. If she had been told the costs she would not have taken it.

[99] She didn't think she had been asked anything about Mr Moles or a driver licence number.

[100] She may have been asked about endorsements or points. She had to get a code to authorise them to speak to the DVLA.

[101] She had spoken to the DVLA and some information was provided to Accident Exchange by her or DVLA. As far as she was concerned she was entitled to drive the hire car.

[102] The agreements had been signed by Mr Moles because he dealt with getting the car.

[103] She thought the basis of which the car was provided was that the first defender had hit her car and she'd be provided with a car and get her car fixed.

[104] Under cross examination for the defenders, the pursuer was unsure when she had seen the documentation and said that she would be lying if she said she had been aware of the terms and conditions.

[105] Under cross-examination on behalf of Mr Moles, the pursuer did not think she had had sight of any of the documents before the car was dropped off and had not seen any of them after the car had been dropped off.

[106] Under re-examination, the pursuer agreed that she thought that Mr Moles was doing what he thought was best by making sure her car got fixed and she was kept mobile. He had

understood the car to be being made available on a 'no win no fee' basis and she was happy for him to sign the paperwork for her car being fixed.

[107] A Mr Davies then gave evidence. He was employed as an Investigation and Disclosure Officer by Accident Exchange. Although he was able to speak to Accident Exchange's internal processes and the documentation utilised by them, it became clear relatively quickly that he was not in a position to give any direct evidence about the contractual and related matters which had emerged from the evidence because he had no direct knowledge of them. Much the same position arose in the evidence of the next two witnesses, Debbie Knowles and Thomas Pugh.

The principles

[108] I did not understand the analysis of the principles to be applied to be in dispute. Put briefly, these can be summarised as follows:

a. an award of expenses is a matter for the exercise of judicial discretion, designed to achieve substantial justice;

b. it is a discretion exercised having regard to the particular circumstances of the case;

c. it is a discretion to be exercised in accordance with recognised principles;

d. as a matter of generality, a pursuer's liability is normally limited to the person or persons whom he has convened as defenders or against who he has directed a crave;

e. that general principle is subject to exceptions where substantial justice requires that the pursuer bear all or any part of the defender's liability in expenses to the third party; and

f. those exceptions can include cases where there has been unreasonable behaviour.

The utilisation of third party procedure

[109] Before turning to consider the application of those principles to the present case, I simply wish to observe that there are different situations which may give rise to third party being used. It is clear that Rule 20 OCR is framed and is to be interpreted in a broad way, the purpose being to allow all matters arising out of a dispute to be resolved in one process. But there are some cases where the dispute between the defender and any third party arises directly out of and is closely connected to the dispute between the pursuer and the defender; and others where any dispute between the defender and any third party is not directly connected to the dispute between the pursuer and the defender.

[110] For example, in the present case, the pursuer's case against the defenders and the defenders' case against Mr Moles – at least so far as the question of negligent driving is concerned – concern an examination of the same evidence. In other cases, a pursuer's case against a defender and the defender's case against a third party may have no evidential, factual or legal overlap. An example might be where an occupier of premises is sued by a visitor who sustains injury; and the householder is refused indemnity by his insurers and brings the insurer in to the action in attempt to obtain such. In such a case, the pursuer's case against the occupier's defender would depend on the circumstances of the accident; and the defender's case against a third party might depend on matters relating to the contract of insurance and how it was entered into. In my view, the present case falls into the former category.

[111] In a case of this type, if the pursuer's claim were to be successful against a defender and no third party had been convened, two things would follow. First, the pursuer would recover 100% of the damages awarded even if she only established that the defender was 1% to blame. Second, in order to seek a contribution from the driver of the pursuer's vehicle, a separate action would be required. That would involve the witnesses giving the same evidence all over again.

[112] Accordingly, in my view, it is (or should be) within the contemplation of a party pursuing this type of claim that third party procedure is likely to be invoked.

Other aspects of the pursuer's case

[113] Leaving aside the evidence about the accident circumstances, in my view it should have been clear to from the outset to the *dominus litis* that there were issues around validity of this claim being brought in the pursuer's name. They knew that she had not entered into the hire agreement. The writ as initially framed seems to be an attempt to skate over this point.

[114] The evidence of Mr Moles and the pursuer about the hire arrangements and how they were entered into gave rise to serious problems for the pursuer's case. I am driven to the conclusion that that neither Mr Moles nor the pursuer was properly precognosced before the action was raised. Had that been done, it would have been apparent that there were likely to be difficulties with the case at proof.

[115] Even if the potential difficulties were not apparent when the action was raised, the position could not have been clearer by the time the pleadings were finalised. By that time, it was clear that Mr Moles' position was not going to be of assistance to the pursuer's case in relation to the hire contract issues.

[116] So in summary, the following should have been apparent to the *dominus litis*:

a. There were likely to be issues about the validity of the VRA and CRA;

b. that this was the type of case where a third party notice would be likely to be served on the driver of the damaged vehicle; and

c. the issues about the validity of the VRA and CRA were likely to come to the attention of the defenders and third party when the documentation was disclosed.

[117] Yet against that background, it appears that no attempt was made to check what the pursuer and Mr Moles might have to say about the VRA and CRA before the action was raised; the defenders and third party gave clear notice of their position in relation to the contractual issues in the pleadings; and the case was allowed to proceed to proof, where the difficulties around this issue became manifest.

Decision

[118] I have already noted the principles to be applied. In my view it is clear that "unreasonable conduct" is a factor that is relevant to whether an order in favour of a defender may be made, in effect indemnifying them for the expenses which they have incurred to a third party whom they convened to an action but against whom the pursuer has not directed a case.

[119] The question is whether the unreasonable conduct identified in this case would justify the making of such award. In my view, it does. The action was raised and conducted in an unreasonable manner from the outset and that should be reflected in how expenses are dealt with in order to achieve substantial justice between the parties. Accordingly, I shall find the *dominus litis* liable to the defenders in a sum equivalent to the defenders' liability in expenses as taxed to the third party, Mr Moles.

[120] Some concern was expressed about the competency of the order sought. In my view, that difficulty is more apparent than real. To avoid further argument later, the defenders can (and would be well advised to) provide information to the *dominus litis* about the third party's account of expenses and seek their input on any agreement that might be reached about it. Furthermore, given the terms of the interlocutor to be pronounced, it appears to me that the *dominus litis* would have title and interest to appear at any taxation of the account and make submissions about before the Auditor of Court, given that they have the ultimate liability for meeting it.

Disposal

[121] I shall make an order (i) finding that the *dominus litis* in this action is Accident Exchange Ltd, Alpha One, Canton Lane, Hamshall, Caulshill, West Midlands B46 1GA; (ii) sanctioning the cause as suitable for the employment of junior counsel; and (iii) finding the *dominus litis* liable to the defenders in a sum equivalent to the defenders' liability to the third party in expenses, as taxed.