SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY
AT HAMILTON

[2022] SC HAM 30

HAM-A1551/08

JUDGMENT OF SHERIFF JOHN SPEIR

in the cause

BANK OF SCOTLAND PLC

Pursuer/Holder

against

CROWN OFFICE AND PROCURATOR FISCAL SERVICE

First Defender/Claimant

and

M

Second Defender/Claimant

and

BILL CLEGHORN

Party Minuter

Pursuer: No appearance
First Defender: Duffy, solicitor
Second Defender: Party
Party Minuter: Forrester, solicitor; Morton Fraser LLP

Hamilton, 29 July 2022

Introduction

[1] This is an action of multiplepoinding. In the sheriff court such actions are governed by chapter 35 of the ordinary cause rules (OCR) 1993. In terms of OCR 35.10 there is a requirement that such actions be dealt with expeditiously. Sadly, that has not happened

here. The pursuer in the present case raised the action by way of initial writ in respect of which a warrant to cite was issued on 25 June 2008. The first and second defenders were called as persons having an interest in the fund *in medio.*

[2] The fund *in medio* at the time the action was raised comprised the sum of £86,523.24. That sum represented the net free proceeds from the sale of certain heritable property in East Kilbride ("the property") which the pursuer had taken possession of and sold under and in terms of a standard security granted by the second defender. As narrated in the initial writ the second defender had a right to a claim on the fund *in medio* by virtue of being a borrower entitled to the share in the surplus funds under section 27 of the Conveyancing and Feudal Reform (Scotland) Act 1970. The first defender was called as possibly having a claim to the fund *in medio* following upon their registration of a proceeds of crime order against the first defender. The pursuers raised this action because the respective rights of the first and second defenders to the fund *in medio* was unclear.

[3] Following upon service appearance was entered on behalf of the first defender but not (at that stage) the second defender. A first hearing of the case took place on 15 October 2008 an order made for consignation of the fund *in medio*. Thereafter, nothing of substance happened procedurally until 4 June 2021 when the following interlocutor was pronounced:

> "The Sheriff having noted that:-(a) on 19 November 2008 the sum of £88,681.80 was consigned with the court, interest to date is £1,080.40 and the total sum now held by the court is £89,762.20; (b) this money was consigned with the court as though the second defender M had a claim to it, it appeared that the first defenders might have also a claim to some of it as a result of confiscation proceedings against her at Glasgow Sheriff Court; (c) on 6 October 2011 at Glasgow Sheriff Court a confiscation order under the Proceeds of Crime Act 2002 in the sum £13,003.25 was made against the second defender but that no payment appears to have been made towards satisfying this order and that with interest to date of £9749.98 the total amount now due is £22,753.23; (d) on 24 November 2014 this case was sisted on the motion of the first defenders to await the outcome of other unspecified matters; and (e) the second defender is now seeking payment of the balance due to her;

> ex proprio motu, recalls the sist granted on 26 November 2014 and re-enrolls the cause for further procedure"

[4] As can be seen from that interlocutor the catalyst for further procedure appears to be a request for payment from the second defender. In addition, around that time agents acting for as enforcement administrator, now the party minuter, appointed under the Proceeds of Crime Act 2002 (POCA) had also contacted the sheriff clerk's office intimating his interest in the matter. The enforcement administrator had been appointed by interlocutor pronounced by Glasgow Sheriff Court on 22 July 2016 in terms of Section 128 of POCA *inter alia* "to take possession of, manage and realise and otherwise deal with certain property to meet the liabilities of the second defender" in respect of the said confiscation order made on 6 October 2011. Said confiscation order had been made pursuant to the second defender's conviction for housing benefit and council tax rebate fraud.

[5] Thereafter sundry procedure followed during which: (a) the pursuer (and holder) was exonerated and discharged in terms of OCR 35.15 (2); (b) the enforcement administrator was sisted as a party minuter to the action (hereafter " the party minuter"); and (c) the second defender lodged a document in terms of OCR 35.11 ("Lodging Defences, Objections and Claims"). At a procedural hearing on 3 November 2021 the court allowed a debate in terms of OCR 35.14(3) on the motion of the party minuter, the second defender having sought a proof.

Preliminary issue in relation to representation of the second defender

[6] Before dealing with the substantive issue discussed at debate it is appropriate that I deal with a preliminary issue that arose in relation to the representation of the second defender. At the diet of debate the second defender appeared with K. The second defender

expressed a wish for K to conduct the proceedings on her behalf as her representative. The second defender argued that K was entitled to act as an advocate on her behalf by virtue of a document entitled "General Power of Attorney" ("GPOA"). This document bears to have been signed by the second defender and K on 10 January 2022. The GPOA document *inter alia* states that:

> "My agent shall have full power and authority to act on my behalf within any legal proceedings, within any court, within any jurisdiction. This power and authority shall authorize my agent to manage and conduct all my affairs and to exercise all my legal rights and powers, including all rights and powers that I may acquire in the future. My agent shall include, and be limited to, the power to:
> 1. Liaison my behalf in any legal proceedings in any jurisdiction.
> 2. Appoint legal agents for the purposes of representing me in any jurisdiction.
> 3. Employ professional and business assistance as may be appropriate, including attorneys, accountants, experts as required."

[7] K is not a solicitor or advocate. She is not an authorised lay representative. The same issue that arose before me had been raised at an earlier diet of debate in January 2022. The interlocutor from that diet discloses that the presiding sheriff was not prepared to hear K unless she completed the necessary documents permitting her to apply to act as a lay representative. For reasons that are and remain unclear, she did not do so. As a consequence the sheriff, not being satisfied that K currently had a right of audience to appear on behalf of the second defender, discharged the diet of debate *ex proprio motu* and continued the case to a procedural diet for the second named defender to advise whether she intended to represent herself, instruct a solicitor or appoint a lay representative.

[8] By the time of the present diet of debate, there was no change in the position adopted by the second defender and K. Indeed, in the interim K had made attempts to sign a motion and represent the second defender at a motion roll hearing both of which attempts had been refused by other sheriffs on the same basis of want of capacity. At the outset of the debate, the second defender again made a motion to allow K to represent her and which I refused

on the same basis. I endeavoured to make it as clear as possible to the second defender that whatever other competencies were conferred on K by the GPOA document that did not elide the well-established rules as to who had rights of audience in Scottish courts.

[9] K was however, permitted to remain present during the hearing (conducted by WebEx) to offer assistance to the second defender without directly addressing the court. The second defender appeared to utilise this assistance during the debate in the form of whispered conversations and notes. In addition on request I allowed an adjournment at the conclusion of Mr Forrester's submission for a consultation to take place between the second defender and K. In the main however, even with that assistance, the second defender made repeated assertions of an unspecific nature that her human rights were being violated because K was not permitted to represent her. It is for that reason that I consider it appropriate to deal with this matter as a preliminary point.

[10] As the authors of Macphail *Sheriff Court Practice* (4th edition) note at paragraph 1.41

> "Limitation of the categories of persons whom the courts are prepared to hear as advocates for parties to proceedings before them is a feature of all developed systems for the administration of justice. In all proceedings in the sheriff court members of the Faculty of Advocates, solicitors and the parties who are natural persons may appear and conduct cases. The latter when conducting their own causes are known as party litigants."

Any extension of rights of audience beyond the restrictive categories of the traditional rule requires to be effected by express statutory provision: *Secretary of State for Business, Enterprise and Regulatory Reform* v *UK Bankruptcy Ltd 2011 SC 115* (*per Lord Justice-Clarke (Gill)* at paragraph 17). Such an extension was made in terms of the *Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Lay Representation) 2017* (SSI 2017/186). In terms of that enactment the court now has discretion to grant lay representatives of natural person party litigants a right of audience.

[11] The Scottish Courts and Tribunal Service website

(https://www.scotcourts.gov.uk/taking-action/lay-representation-in-civil-cases) *inter alia*

sets out the following guidance for lay representation in civil cases:

> "A person who is involved in civil court proceedings without representation from a solicitor is referred to as a party litigant. A party litigant can ask the court for permission for someone to help at the hearing. The court rules allow for two types of non-solicitor assistance during the court hearing.
>
> 1. You can ask the court for permission for someone who is not a solicitor to speak on your behalf. They are referred to as a Lay Representative**.**
>
> 2. If you intend to speak for yourself at the hearing, the rules allow someone to accompany you for moral support and advice, but they aren't allowed to speak for you. They are referred to as a Courtroom Supporter (sometimes referred to as a Lay Supporter or 'Mckenzie Friend'
>
> Lay Representative
>
> A Lay Representative is someone who is authorised by you to help you prepare and conduct a civil legal action. Court rules allow for a Lay Representative to do anything that you would be allowed to do to prepare and conduct your own case.
>
> You can have Lay Representation if you have started the court action or if you are responding to a claim started by someone else.
>
> A Lay Representative is not allowed to accept any form of payment for carrying out this service.
>
> There are rules that provide for Lay Representation in both the sheriff court and the Court of Session. Different court rules apply, depending on the type of civil action that has been raised."

[12] As the present action is an ordinary action the applicable rules are set out in

Chapter 1A ("LAY RESPRESENTATION") of the Ordinary Cause Rules which provide

inter alia as follows:

> **"Application and interpretation**
> **1A.1.** (1) This Chapter is without prejudice to any enactment (including any other provision in these Rules) under which provision is, or may be, made for a party to a particular type of case before the sheriff to be represented by a lay representative.

(2) In this Chapter, a 'lay representative' means a person who is not—
(a) a solicitor;
(b) an advocate, or
(c) someone having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

Lay representation for party litigants

1A.2. (1) In any proceedings in respect of which no provision as mentioned in rule 1A.1(1) is in force, the sheriff may, on the request of a party litigant, permit a named individual (a 'lay representative') to appear, along with the litigant, at a specified hearing for the purpose of representing the litigant at that hearing.

(2) An application under paragraph (1)—
(a) is to be made orally on the date of the first hearing at which the litigant wishes a named individual to represent the litigant; and
(b) is to be accompanied by a document, signed by the named individual, in Form 1A.2.

(3) The sheriff may grant an application under paragraph (1) only if the sheriff is of the opinion that it would be in the interests of justice to grant it.

(4) It is a condition of permission granted by the sheriff that the lay representative does not receive directly or indirectly from the litigant any remuneration or other reward for his or her assistance.

(5) The sheriff may grant permission under paragraph (1) in respect of one or more specified hearings in the case; but such permission is not effective during any period when the litigant is legally represented.

(6) The sheriff may, of his or her own accord or on the motion of a party to the proceedings, withdraw permission granted under paragraph (1).

(6A) Where permission is granted under paragraph (1), the lay representative may do anything in the preparation or conduct of the hearing that the litigant may do.

(7) Where permission has been granted under paragraph (1), the litigant may—
(a) show the lay representative any document (including a court document); or
(b) impart to the lay representative any information,

which is in his or her possession in connection with the proceedings without being taken to contravene any prohibition or restriction on the disclosure of the document or the information; but the lay representative is then to be taken to be subject to any such prohibition or restriction as if he or she were the litigant.

(8) Any expenses incurred by the litigant in connection with lay representation under this rule are not recoverable expenses in the proceedings."

[13] Thus it is an essential requirement that in order for a lay representative to have a right of audience to make representations on behalf of a party litigant that an application is made to the court in the prescribed form. For an ordinary cause action the prescribed form

is Form 1A.2 (to which there is a link on the SCTS website). That prescribed form requires that a prospective lay representative make a declaration *inter alia* that: (a) they have no financial interest in the outcome of the case or if they do have such an interest what that is; (b) they will adhere to an obligation of confidentiality in relation to the court process; (c) they have no previous convictions or if they do what they are and (d) they had not been declared a vexatious litigant or if they had the details of that.

[14] It can readily be seen that these are all relevant and pertinent matters on which the court would be required to be satisfied before determining an application by a prospective lay representative. Despite the second defender and K being advised of the process by which the latter could be appointed as a lay representative no such application has been made. I accordingly followed the earlier determinations made as to K not having a right of audience despite the terms of the document founded upon by her and the second defender. While no reason or explanation has been advanced as to why K is not willing to make an application to act as a lay representative, I would observe in passing that one of the aliases by which the second defender is referred to in the interlocutor appointing the party minuter is *"JK"* (see refer paragraph [29] below for the full terms of the interlocutor). The extent to which this may disclose some interest held by *K* is a matter that may bear further scrutiny in the event that a proper application by that person to act as lay representative for the second defender is ever forthcoming.

The substantive issue at debate

[15] In advance of the debate the party minuter lodged a note of argument. In substance this was a repetition of the terms of the Note lodged by him (in terms of OCR 35) when

seeking the debate. At debate the solicitor for the party minuter, Mr Forrester, did not signficantly depart from or augment that note of argument.

[16] In short compass the argument for the party minuter rested on two propositions:

(1) That as a result of the orders made at Glasgow Sheriff Court under POCA the party minuter had a right to take possession of the whole of the fund *in medio* and that any distribution due to the second defender would be determined by Glasgow Sheriff Court after the satisfaction of the sums to which the party minuter was entitled; and

(2) That the second defender had not advanced any relevant defence to the forgoing proposition or as it was put in paragraph 5 of the note of arguments the "complete answer to the Second Defender's opposition to the Minute is that the Party Minuter has been appointed as Enforcement Administrator."

[17] On that basis Mr Forrester invited me to grant decree in terms of the party minuter's second crave for payment of the whole of the fund *in medio* (now consigned) in favour of the party minuter.

[18] In relation to the first proposition, the party minuter took as his starting point the confiscation order made on 6 October 2011. That sum remained outstanding. The fact that the confiscation order had not been paid or appealed was the basis for the appointment of the party minuter in July 2016. The sum outstanding as at 26 August 2021 was stated to be £23, 023.99. No calculation or vouching of that that sum has been produced by the party minuter. Mr Forrester indicated that the amount outstanding had increased since then but could not advise by how much. The party minuter would also have a claim for his expenses and outlays but again no details or vouching of those were available. It was submitted that this court did not need to be concerned with the actual sums because on an order being

made to transfer the sum *in medio* to the party minuter any reconciliation or distribution would be the responsibility of Glasgow Sheriff Court.

[19] It was submitted that the foregoing outcome followed because of the said order made under section 128 of POCA in terms of the interlocutor dated 22 July 2016. The essence of the submission can be found in the first, sixth and seventh paragraphs of the party minuter's note of arguments:

> "1 …The interlocutor appointing the enforcement administrator is conclusive of the matters stated therein… The fund in medio comprises realisable property, of which the Party Minuter has been appointed to take possession in terms of Section 128 of the Act…
> 6. The Party Minuter is required to comply with his duties in accordance with his appointment and is required to take possession of the fund in media (sic). Distribution of the fund in media falls to be made in accordance with the scheme as set out in the Act, under the direction of the Sheriff in Glasgow. Decree should accordingly be granted in terms of the second crave of the Minute.
> 7 … The Party Minuter has been appointed as enforcement administrator to take possession of the Second Defender's realisable property which includes the whole of the fund in medio…."

[20] Mr Forrester was unable to refer me to any authority for the foregoing propositions in the context of a multiplepoinding where the fund *in medio* was apparently clearly in excess of the sum due under the confiscation order even with the application of interest. In particular I asked for assistance in relation to three points:

(1) The basis for treating the whole of the fund *in medio* which was now consigned into court as being the "realisable property" of the second defender when it was not held by her or a third party creditor or potential creditor such as those referred to in the interlocutor of 22 July 2016; and

(2) Whether it was appropriate to treat the party minuter's contingent and unascertained claim for expenses and costs as part of his claim on the consigned fund without appropriate proof and vouching thereof; and

(3) Where the party minuter's claim, on the information available, appeared unlikely to exhaust the whole of the fund what was the appropriate legal regime or mechanism for distribution of the remainder to the second defender?

[21] Mr Forrester was unable to assist any further with the first and second points beyond his primary submission as to the effect of the interlocutor pronounced under section 128. In relation to the third point he submitted that the issue was governed by Section 130 of POCA which provided for the application of funds of which the party minuter had taken possession as follows: (a) they must be applied in payment of the expenses incurred by the party minuter (being a person acting as an insolvency practitioner); (b) second, they must be applied in making any payments as directed by the court; (c) third, they must be applied on the accused's behalf towards satisfaction of the confiscation order. Thereafter if any sums remain in the party minuter's hands they require to be distributed in accordance with section 130(4) among such persons who held (or hold) interests in the property concerned as the court directs, and if more than one person then in such proportions as it directs. In the present case the only such person would appear to be the second defender. The distribution to her however was not automatic but only on an application being made to Glasgow Sheriff Court for a direction in terms of the said provision.

[22] Thereafter on the basis that his primary proposition was correct, the party minuter argued that the second defender had not advanced any relevant defence to his claim. In short the following points were made:

(1) The second defender's averments regarding her Convention Rights were irrelevant and lacked specification in particular her claim for damages on a putative breach of those rights;

(2) The second defender's averments which seek to restrict in some way the party minuter's claim to the fund *in media* are irrelevant, whether in respect of other funds which she says have been ingathered and in which she says she has an interest, or in respect of the amount of the fund *in media* compared with the amount of the confiscation order with interest added.

(3) The second defender's averments in relation to how the party minuter should perform his functions were not relevant to this process and any issue in that regard would require to be made in the proceedings at Glasgow Sheriff Court.

(4) The Second Defender's averments regarding the payment of interest on the fund *in media* are irrelevant as any interest due would be that accrued on the consigned sum: section 5 of the Sheriff Court Consignations (Scotland) Act 1893).

[23] Mr Forrester accepted that if I was not with him in relation to his primary submission that the case would require *inter alia* to proceed to a proof before answer in the context of which the party minuter would require to vouch all sums he maintained were due to be paid to him out of the consigned fund *in medio*.

[24] In reply, as I have already observed, the primary focus of the second defender's submission was in relation to her perceived unfairness in relation to the barring of K from acting as her advocate. Beyond that however, in response to questions seeking clarification, her position was that:

(1) She was insisting on her claim to the fund *in medio*.

(2) She did not accept that the party minuter had properly vouched his title and interest in terms of what was required in terms of POCA.

(3) She accepted that she had been convicted of fraud but disputed that a valid confiscation order or the order appointing the party minuter had been made in terms of POCA despite the terms of the certified extract interlocutors produced.

(4) If there was a valid confiscation order then it had already been satisfied from assets she had held in the Isle of Man that had already been seized by the party minuter.

[25] Mr Duffy, solicitor, also appeared at debate on behalf of the first defender. He had no discrete submission to make and it appeared that his presence was in the nature of a watching brief.

Discussion

[26] In the present case there is an interface between the law and process relative to an action of multiplepoinding and the law and process relative to recovery of sums due under POCA. I was not addressed to any meaningful extent in relation to the former.

[27] The property or money held by the pursuer in an action of multiplepoinding is called the fund *in medio*, because it is, or may be, subject to the claims of all the claimants, and as yet belongs to none of them. It is thus common to them all, and forms the centre or substance of the litigation (see *Trayner's Latin Maxims and Phrases, 4th Edition,* p266-267). Ultimately, the objective of the court in which the action of a multiplepoinding has been brought is to pronounce a decree of ranking and preference. Where there is a competition between claimants it is for the sheriff to determine further procedure (OCR 35.17). An interlocutor ranking and preferring the successful claimants in terms of their claims may include, or be followed by, an order for payment or transfer of the fund *in medio* to the claimants preferred. In my view this is a function and requirement of this court which has

been seized with action of multiplepoinding rather than Glasgow Sheriff Court in terms of section 130 of POCA. In this regard it is also important to note the terms of OCR 30.2, which states no decree for payment out of the fund in *medio* shall be made until the necessary Inland Revenue clearance certificates have been obtained and lodged. Mr Forrester did not refer to this requirement nor how that would sit with his primary proposition for simple payment of the fund *in medio* to the party minuter with the determination of distribution of any residue being dealt with in terms of section 130 of POCA.

[28] Fundamentally the primary argument for the party minuter would appear to proceed on the basis that the fund *in medio* is the "realisable property" of the second defender and as such requires to be made over to him having regard to the terms of section 128 of POCA taken with the interlocutor pronounced by Glasgow Sheriff Court on 22 July 2016. Section 128 *inter alia* provides that:

> "(5) The court may confer… on an administrator:
> (6) ..
> (a) power to take possession of any realisable property;
> (b) power to manage or otherwise deal with the property;
> (c) power to realise any realisable property, in such manner as the court may specify.
> (7) The court may order any person who has possession of realisable property to give possession of it to an administrator...
> (10) The court—
> (a) may order a person holding an interest in realisable property to make to the administrator such payment as the court specifies in respect of a beneficial interest held by the accused or the recipient of a tainted gift;
> (b) may (on the payment being made) by order transfer, grant or extinguish any interest in the property."

[29] The interlocutor from Glasgow Sheriff Court dated 22 July 2016 is in the following terms:

> "The sheriff, on pursuer's motion, there being no appearance by or on behalf of the defender, Grants Decree as craved and in terms thereof appoints Bill Cleghorn (hereinafter 'the enforcement administrator'), Aver Chartered Accountants, 21 York Place, Edinburgh, EH1 3EN, as enforcement administrator in terms of Section 128 of

> Proceeds of Crime Act 2002, to take possession of, manage, realise and otherwise deal with, certain property to meet liabilities of M also known as JK, EM, AM, LH, MP,DR, MR, MH, SJ, CD, RL AND GM, present whereabouts unknown… under a confiscation order made under Section 92 of the Proceeds of Crime Act 2002 (hereinafter the 'Act'), specifically (but not restricted to) the respondent's interest in the sum at credit of (an) account … transferred to Price Waterhouse Coopers as liquidator, on 9 October 2008; …"

[30] That interlocutor does not identify the sums which had been held by the pursuer in this case and which subsequently came to form the fund *in medio*. Further, and perhaps significantly, the terms of the interlocutor do not apply the language found in section 128. It does not refer to "any realisable property" but rather to "certain property" which it then identifies albeit with the caveat that it is a non-exhaustive list. Accordingly I am not satisfied that the party minuter has established a basis in law (or fact) for his primary propositions as I have set out in paragraph [19] above in particular that

> "The interlocutor appointing the enforcement administrator is conclusive of the matters stated therein… The fund in medio comprises realisable property, of which the Party Minuter has been appointed to take possession in terms of Section 128 of the Act…".

Central to the operation of section 128 is the concept of "realisable property" in terms of section 128(6). "Realisable property" is defined in section 149 of POCA as "(a) any free property held by the accused; (b) any free property held by the recipient of a tainted gift." Unfortunately, I was not addressed on the terms of this provision or any judicial consideration of it. It may be that this issue will require to be considered further but for present purposes I consider that that definition is not habile to cover the second defender's contingent claim in the present action. In my view it appears to be inconsistent with the nature and purpose of an action of multiplepoinding to characterise the fund *in medio* as "free property held" by the second defender. Further, I consider that such definition runs contrary to the party minuter's central proposition that his appointment as administrator is

sufficient in law for him to take possession of the fund *in medio*, in a sense analogous to the way that the estate of a bankrupt vests in her trustee. In my view the proper approach is for the party minuter to fully specify the legal basis for his claim and thereafter to properly vouch it. Only then, in my view can this court proceed to issue a decree of ranking and preference. I consider that further procedure by way of a proof before answer will be required in that respect. That will also allow the party minuter to consider whether he wishes to insist on his primary legal proposition (being the preliminary matter of law for which the debate was sought) and if so to address the issue more fully by reference to any relevant authority.

[31] In relation to such further procedure by way of proof before answer, however, I do consider there to be force in certain of the party minuter's challenges to the second defender's pleadings, in particular those I have summarised at parts (1), (3) and (4) of paragraph [22] above. Accordingly I have determined that the following sections of those pleadings in "part 2" of the record should be excluded from probation…*[not relevant for purposes of report]*

[32] What remains of the second defender's case on record (including the averments in "part 1") still contain certain averments which are of doubtful relevancy. In particular, the second defender's challenge to the interlocutors from Glasgow Sheriff Court dated 6 October 2011 and 22 July 2016 of which certified extracts have been lodged (see *Walker & Walker, The Law of Evidence in Scotland (2020)* paragraph 19.15). It is difficult, however, to disentangle these averments from what I understand her primary arguments to be in relation to her claim on the fund and what may be relevant challenges to the claim of the party minuter, in particular the proposition that he is entitled to payment of the whole fund *in medio*.

Accordingly, I consider it appropriate and pragmatic that any further consideration of these matters be determined at proof before answer.

[33] In relation to the issue of the expenses of the debate, having regard to the outcome being best characterised as mixed success I will make a finding of no expenses due to or by.

Further procedure

[34] In terms of further procedure, I propose to fix a procedural hearing for the purposes assigning dates for said proof before answer and for a pre-proof hearing. I will ordain the party minuter to prepare a fresh record to reflect the terms of this interlocutor in advance of that hearing. At that hearing I would also expect the first defender to clarify whether they have any continuing interest in this matter and intend to stay in the process. If the first defender's position is to be the same as was held at debate but that they nevertheless wish to remain in the process then the basis of their further participation will require to be clarified.