OUTER HOUSE, COURT OF SESSION

[2024] CSOH 15

CA56/23

OPINION OF LORD RICHARDSON

In the cause

SCOTLAND GAS NETWORKS PLC

Pursuer

against

QBE UK LIMITED (previously known as QBE INSURANCE (EUROPE) LIMITED)

First Defender

and

QBE CORPORATE LIMITED

Third to Fifth Defenders

Pursuer: D Thomson KC, A McKinlay; Addleshaw Goddard LLP
First Defender: Howie KC; TC Young LLP
Third to Fifth Defenders: Paterson KC; Kennedys Scotland

16 February 2024

Introduction

[1] The pursuer is the statutory successor of the Scottish Gas Board. It owns and operates an extensive network of gas mains and other gas transport media in Scotland. One of its gas pipelines is a high pressure transmission pipeline between Glenmavis and Letham Moss.

[2] One part of this pipeline runs adjacent to Cowdenhill Quarry. Cowdenhill Quarry was operated by D Skene Plant Hire Limited ("Skene"). Skene was placed in liquidation on 14 June 2017. After a number of name changes, Skene was dissolved on 8 January 2020.

[3] Following an aerial inspection of the pipeline on 29 June 2011, the pursuer became aware that there had been a landslip at the quarry. The pursuer avers that it also discovered that the rock both between the face of the quarry and the pipeline and underneath the pipeline had become fractured. The pursuer alleges that this had occurred as a result of quarrying operations carried out by Skene. These operations had gone beyond what was permitted in terms of the certification issued to Skene by Falkirk Council.

[4] The pursuer contends that as a result of Skene's operations the pipeline was inadequately supported. This lack of support arose both because of the proximity of the face of the quarry to the pipeline and the instability created in the adjacent and sub-adjacent bedrock of the quarry. Some of the land over which the pursuer held servitude rights had been destroyed or damaged. As a result, the pursuer avers that it was not able to operate the pipeline within a proper margin of risk. The pursuer avers further that "The Pipeline (and the pursuer's right of property therein) and the servitude right (and the pursuer's right of property therein) […] had been damaged." As a result of this damage, the pursuer avers that it required to divert the relevant section of the pipeline further away from the quarry and incurred costs in doing so.

[5] The pursuer avers that the face of the quarry will probably collapse in the medium term. The pursuer contends further that if this had happened while the pipeline was in place, then the pipeline would have buckled or ruptured. This, says the pursuer, would have risked a major escape of gas with "severe consequences for life and limb and for the maintenance of the gas supply to the customers served by the pipeline."

[6] Subsequently, the pursuer raised an action in the Court of Session against Skene claiming £3 million by way of reparation from Skene in respect of loss, injury and damage caused by Skene's lack of care and commission of nuisance in the operation of its quarrying business. Skene called its blasting sub-contractor as a third party and the pursuer subsequently directed a case against the sub-contractor.

[7] On 15 November 2017, decree in the sum of £3 million was granted against Skene in the action raised by the pursuer. The decree was granted by default following the failure by Skene to appear at a by order hearing of the court. No reclaiming motion was ever marked against the grant of that decree. Further, no attempt has ever been made to reduce the decree.

[8] Skene was insured by the defenders. The first defender issued annual policies of insurance to Skene for the years 2009/10; 2010/11; and 2011/12. In terms of those policies, the first defender's liability was limited to 21% of any losses for which Skene was to be indemnified. The third, fourth and fifth defenders are syndicates of Lloyd's names. The third, fourth and fifth defenders were each liable for the balance of losses for which Skene was to be indemnified in each of the years 2009/10; 2010/11; and 2011/12 respectively.

[9] In the present action, the pursuer seeks to advance a claim against the defenders in terms of section 6(2)(d) and 6A of the Third Parties (Rights against Insurers) Act 2010. The defenders resist liability on a number of grounds.

[10] The case came before me for debate at the instance of both the pursuer and the defenders.

The issues

[11] There are three issues between the parties.

- First, what is the legal effect of the decree by default granted on 15 November 2017 in terms of section 1(4) of the Third Parties (Rights against Insurers) Act 2010?
- Second, was the pursuer's claim against Skene excluded by the terms of the relevant policy of insurance?
- Third, has the pursuer pled a relevant case against the third and fifth defenders?

The first issue

Section 1 of the Third Parties (Rights against Insurers) Act 2010

[12] The material terms of section 1 of the 2010 Act are as follows:

"1 Rights against insurer of insolvent person etc

(1) This section applies if—

(a) a relevant person incurs a liability against which that person is insured under a contract of insurance, or

(b) a person who is subject to such a liability becomes a relevant person.

(2) The rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred (the 'third party').

(3) The third party may bring proceedings to enforce the rights against the insurer without having established the relevant person's liability; but the third party may not enforce those rights without having established that liability.

(4) For the purposes of this Act, a liability is established only if its existence and amount are established; and, for that purpose, 'establish' means establish—

(a) by virtue of a declaration under section 2 or a declarator under section 3,

(b) by a judgment or decree,

(c) by an award in arbitral proceedings or by an arbitration, or

(d) by an enforceable agreement.

(5) In this Act—

> (a) references to an 'insured' are to a person who incurs or who is subject to a liability to a third party against which that person is insured under a contract of insurance;
>
> (b) references to a 'relevant person' are to a person within sections 4 to 7 (and see also paragraph 1A of Schedule 3);
>
> (c) references to a 'third party' are to be construed in accordance with subsection (2);
>
> (d) references to 'transferred rights' are to rights under a contract of insurance which are transferred under this section."

The defenders' argument

[13] The critical issue between the parties was whether the decree by default granted on 15 November 2017 established Skene's liability to the pursuer. The position of the first defender was that it did not. Furthermore, the first defender argued that, in any event, the establishment of Skene's liability to the pursuer, while necessary to establish the first defender's liability to the pursuer, was not in itself sufficient to bring about that result.

[14] The starting point for the first defender was that the 2010 Act allowed injured parties, such as the pursuer, to raise proceedings against indemnity insurers on the basis of a statutory assignation in favour of that injured party. That assignation transferred to the injured party the rights of indemnity from the insurer which were possessed by the insured. It followed that the injured party could have no better or different rights than the insured (see, for example, *Gemmell* v *KSL Hair Limited* [2021] SAC (Civ) 6 at paragraph 60). In this way, the 2010 Act followed the same approach as its predecessor the Third Parties (Rights against Insurers) Act 1930.

[15] Turning to the provisions of section 1 of the 2010 Act, senior counsel for the first defender accepted that no issue arose in relation to subsections (1) and (2) as there was no

question that Skene was a "relevant person" in terms of the section. Subsection (3) made it clear that the pursuer could bring proceedings against an insurer without having established the insured's liability but the pursuer could not enforce those rights without having established that liability. This then prompted the question which was addressed by subsection (4).

[16] Senior counsel drew attention to the fact that in subsection (4) the word "establish" was repeated. Properly construed the importance of this repetition was that liability was only established by the matters listed if those matters did, in fact, establish it. Such a construction was consistent with and gave effect to the ordinary English meaning of the word "establish". What was required to "establish" a liability was that some degree of consideration required to be given to the merits. In this regard, senior counsel also noted the conspicuous absence from the list of a decision by an adjudicator under the Housing Grants, Construction and Regeneration Act 1996. This absence was consistent with the first defender's construction because such a decision, being only temporary, would not "establish" liability.

[17] The need for the insured's liability to the injured party to be established by judgment of the court, by arbitration or by agreement before the injured party could sue the insurer had been the position under the 1930 Act (see *Post Office* v *Norwich Union Fire Insurance Society Limited* [1967] 2QB 363 at 373 to 374).

[18] Senior counsel submitted that the first defender's analysis was not affected by the fact that the decree dated 15 November 2017 was a decree *in foro.* Rather, what mattered for the purposes of section 1(4) was that the decree had been granted on a basis other than a consideration of the merits. (See Mackay, *Manual of Practice in the Court of Session* (1893)

at 310; Maxwell, *The Practice of the Court of Session* (1980) at 617; Macfadyen, *Court of session practice*, Division K, chapter 1, section 5, paragraph 14, (issue 75) 'Decrees by Default'.)

[19] Senior counsel submitted further that the discretionary nature of a grant of decree by default was not consistent with the establishment of liability in terms of section 1(4) of the 2010 Act. (See *Moran* v *Freyssinet Limited* 2016 SC 188 at paragraph 47; *Fernandez* v *Fernandez* 2007 SC 547 at paragraph 34; *Caledonia Subsea Limited* v *Micoperi SRL* Court of Session Outer House, 24 November 2004, unreported; *Ravelston Steamship Co. Limited* v *Sieberg Brothers* 1947 SLT (Notes) 12.) The question of whether one was liable or not was susceptible only to a binary answer - yes or no. That was not so in respect of the discretionary grant of decree by default. In the same way, contrary to what was contended for by the pursuer, a decree by default did not represent the affirmation of pre-existing liability. A decree by default affirmed only that a situation existed in which the court had chosen to exercise its discretion.

[20] Approached in this way, the pursuer's case was irrelevant. The grant of the decree dated 15 November 2017, upon which the pursuer founded, had involved no consideration of the underlying merits of the dispute. It did not "establish" liability in terms of section 1(4) of the 2010 Act. To put it another way, the default on Skene's part which had resulted in the grant of decree was not an insured risk covered by the first defender's policy and, in particular, clause 3.1.1 (see below at para [65]).

[21] On this analysis, the first defender's primary position was that the pursuer's case fell to be dismissed. As a secondary position, the first defender sought the deletion of the pursuer's averments in respect of the decree by default. That was because, even if the first defender's construction of section 1(4) of the 2010 Act was incorrect, an insurer was still entitled to challenge the establishment of liability by an injured party against the insured.

[22] This part of the first defender's argument was founded primarily on the reasoning in *AstraZeneca Insurance Co Limited* v *XL Insurance (Bermuda) Ltd and Anr* both at first instance ([2013] EWHC 349 (Comm)) and on appeal ([2013] EWCA Civ 1660). The case involved a claim by an insurer against its reinsurer. The background to the claim was a putative class action brought against a pharmaceutical company that was insured by the insurer. The insurer had paid out significant sums to the insured pharmaceutical company both for legal costs incurred in defending the claims as well as in settling some of them. The insurer sought to recover those sums. It appeared that only one of the cases had been litigated through to a full trial and that had resulted in a verdict for the defence. Other claims had been dismissed summarily. The reinsurer denied that the insurer had any entitlement to an indemnity.

[23] Against that background, one of the issues before the court was whether, as the insurer contended, it was only necessary to demonstrate that it had settled an arguable liability or, as the reinsurer contended, whether it was necessary to demonstrate that the insured was under an actual liability. The reinsurer was successful on this issue both at first instance before Mr Justice Flaux and on appeal.

[24] Senior counsel relied, in particular, on the following passages from the judgment of Mr Justice Flaux:

> "65. I consider that the better view is that, absent some agreement to be bound, it will be open to a liability insurer or a reinsurer to challenge findings of liability in an underlying judgment in proceedings to which it was not a party in order to question whether in fact the insured is under a liability. In other words, whilst the judgment may ascertain or establish the loss, it will not necessarily establish the legal liability of the insured or reinsured, although it may be compelling evidence of such liability, depending on the circumstances in which it was obtained. I agree with Mr Edwards that the position must be an a fortiori one where there is no judgment ascertaining the loss, but only a settlement or settlements, as in the present case.
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> […]

> 96. From this analysis of the case law, in my judgment there is a consistent and well-established line of authority that, in the absence of clear contrary wording in the contract of liability insurance, under English law (i) the insured has to establish that it was under an actual legal liability, not just an alleged liability, to the third party before it is entitled to an indemnity under the contract and (ii) the ascertainment of loss by a judgment or settlement does not automatically establish such actual legal liability (although a judgment against the insured may be strong evidence of such liability). It is still open to the insurer to challenge that there was an actual legal liability, in which case it is for the insured to prove that there was."

[25] He also drew my attention to the following passages from the leading judgment in the Court of Appeal which was given by Lord Justice Christopher Clarke:

> "16. Under English law a liability policy is, generally speaking and in the absence of wording to the contrary, a policy which indemnifies the insured in respect of actual liability. That means that, in order to recover from his insurer the insured must show that he was liable to the person who claimed against him. Liability cannot be determined in a legal vacuum. Hence the need to assume, for this purpose, a correct application of the law governing the claim in question to the facts properly found.
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> 17. In the event of dispute the existence of liability has to be established to the satisfaction of the insurer, or, failing that, by the judge or arbitrator who has jurisdiction to decide such a dispute. It is not, therefore, necessarily sufficient for the insured to show that he has been held liable to a claimant by some court or tribunal or that he has agreed to settle with him. In practice the fact that this has occurred may cause or persuade the insurer to pay, but, if it does not, the insured must prove that he was actually liable. Under English law the ultimate arbiter of whether someone is liable, if insured and insurer cannot agree, is the tribunal which has to resolve their disputes (or any relevant appeal body). It may hold that there was in fact no actual liability and that an insured who thought, or another tribunal which decided, that there was, liability was in error either on the facts or the law or both.
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> 18. This principle is potentially very inconvenient for insureds. It may mean that they face weak or dubious claims, which it would be commercially expedient to settle, but in respect of which, if they settle, they may not recover against the insurer because the claims cannot be shown to be well founded. In such a situation they may have to soldier on with the defence and hope to persuade the insurer that it is in his best interests to allow them to settle before trial and to indemnify them when they do, on the basis that, if they lose, the insurer is more likely to have to pay, and to pay more than he would if there was no settlement. Even if they are held liable, this may not in practice, and does not in law, mean that they are automatically covered. The insurer may still say that they were not liable.
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> […]

> 21. That liability policies require the establishment of actual liability is apparent from considerations of language and English authority. As to the former, 'liability' prima facie means the state of being liable and not alleged liability. As Aikens J said in *Enterprise Oil* 'One cannot be obligated to pay sums by law if there is only an alleged liability'"

[26] Senior counsel recognised that the *AstraZeneca* case did not involve either the 2010 Act or its predecessor. However, he submitted that it was relevant to the present case because it addressed the position of an insured in relation to an insurer (or in the case a reinsurer). The 2010 Act could not and did not alter that relationship. The 2010 Act was a statutory assignation of the rights of the insured to the injured party. The injured party could obtain no better right than the insured (see above at para [14]).

[27] In the present case, there had been no more than an allegation that the insured, Skene, was liable. That allegation had never been made good. A mere allegation of liability would not have been sufficient to enable the insured to recover and the pursuer had no better claim. In this regard, senior counsel referred to *Enterprise Oil Limited* v *Strand Insurance Co. Limited* [2006] 1 CLC 33 at paragraphs 72, 167, 170 and 171.

[28] In his submission, the judgment of Mr Justice Aikens in *Enterprise Oil* was also authority for the proposition that the insurer always had the right to challenge whether an insured's right to indemnity under the policy had been established. Senior counsel referred finally to *Omega Proteins Limited* v *Aspen Insurance UK Limited* 2010 2 CLC 370. This was a case which also involved the 1930 Act. Mr Justice Christopher Clarke (as he then was) usefully summarised the position as follows:

> "49. As it seems to me in liability insurance such as this the position, generally speaking, lies thus:
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> 1. The insured must establish that it has suffered a loss which is covered by one of the perils insured against: *West Wake*; *Post Office v Norwich Union* [1967] 2 QB 363; *Bradley v Eagle Star Insurance Co Ltd* [1989] 1 AC 957; *Horbury Building Systems Ltd v Hampden Insurance NV* [2004] 2 CLC 453, 464;

> 2. That may be done by showing a judgment or an arbitration award against the insured or an agreement to pay;
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> 3. The loss must be within the scope of the cover provided by the policy;
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> 4. As a matter of practicality, the judgment, award, or agreement may settle the question as to whether the loss is covered by the policy because the insurers will accept it as showing a basis of liability which is within the scope of the cover;
>
> 5. But neither the judgment nor the agreement are determinative of whether or not the loss is covered by the policy (assuming that the insurer is not a party to either and that there is no agreement by the insurer to be bound).
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> 6. It is, therefore, open to the insurers to dispute that the insured was in fact liable, or that it was liable on the basis specified in the judgment; or to show that the true basis of his liability fell within an exception;
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> 7. Thus, an insured against whom a claim is made in negligence, which is the subject of a judgment, may find that his insurer seeks to show that in reality the claim was for fraud or for something else which was not covered, or excluded by, the policy: *MDIS Ltd v Swinbank*;
>
> 8. Similarly, an insured who is held liable in fraud (which the policy does not cover) may be able to establish, in a dispute with his insurers, that, whatever the judge found, he was not in fact fraudulent, but only negligent and that he was entitled to cover under the policy on that account."

[29] On the basis of these authorities, senior counsel submitted that it was clear that an injured party, in the position of the pursuer, still required to prove in an action against an insurer, in the position of the first defender, that it had a good ground for an award of damages as against the insured, Skene, which fell within the terms of the policy. The pursuer had failed to do this because it relied solely upon the decree by default. However, for the reasons he had set out, in short, such a decree did not represent one of the perils covered by the first defender's policy (see paras [18] to [20] above). Accordingly, the pursuer's averments in respect of the decree by default granted on 15 November 2017 were irrelevant and fell to be deleted.

[30] Senior counsel for the first defender submitted that the pursuer's construction of section 1(4), which meant that any decree established liability, would produce such an unreasonable result that it could not have been intended. On that construction, an insurer would be bound by a decree obtained without the knowledge of the insurer.

[31] Senior counsel for the third, fourth and fifth defenders adopted the submissions made on behalf of the first defender on the first issue.

The pursuer's response

[32] Senior counsel both resisted the defenders' motion for dismissal and submitted that I should sustain the pursuer's first preliminary plea by excluding certain passages of averments made by the defenders on the grounds that they were irrelevant. The pursuer based its case against the defenders on the decree by default granted on 15 November 2017 against Skene. In short, in terms of section 1(4) of the 2010 Act, that decree gave rise to a right directly enforceable against the defenders. However, senior counsel emphasised that the pursuer's underlying case against Skene had been well developed and supported by expert reports. In the event that its primary case was unsuccessful, the pursuer would seek the opportunity to set out against the defenders the case it had developed against Skene.

[33] The pursuer's position was that the case turned on a short point of statutory construction of section 1 of the 2010 Act that had not been the subject of judicial consideration either in Scotland or in England and Wales. Senior counsel noted that only one of the cases in the parties' joint bundle concerned the 2010 Act - that was *Gemmell* (as above at [14]). Senior counsel referred me to the approach of the Sheriff Appeal Court to the 2010 Act (at paragraphs 32 and 33). In order to succeed against an insurer under the 2010 Act, the injured party required to prove two things: first, that the insured was under a

liability to him; and second, that that liability was insured under a contract of insurance between the insured and insurer. However, senior counsel recognised that *Gemmell* was of limited assistance because it turned on the second of those matters: whether the particular liability properly fell within the scope of insurance policy whereas resolution of the first issue in the present case turned on the first matter: establishing the liability of the insured to the injured party.

[34] Section 1 of the 2010 Act represented a significant development in the law when compared with its predecessor, section 1 of the 1930 Act. Section 1 of the 1930 Act was much more limited. It simply effected a statutory transfer of the rights of the insolvent insured to the injured party.

[35] The wording of section 1 of the 1930 Act could be contrasted with that of section 1 of the 2010 Act. Subsections (1) and (2) of the 2010 Act effectively achieved the sum and substance of section 1 of the 1930 Act. Subsection (3) represented an innovation. An injured party could raise proceedings against the insurer without having first established the insured's liability to him but could not enforce his rights without that liability being established. That had not been the case under the 1930 Act (*cf Post Office*, as above at [17]). Subsection (4) was a further innovation - it provided, for the purposes of the Act, what was required to establish liability. The 1930 Act had been silent on this and, as a result, it had been possible for insurers to take issue with whether liability had been established. That position had been changed as a result of subsection (4).

[36] Subsection (4) listed four means by which the existence and amount of liability could be established. Paragraph (b) provided that one such means was by a judgment or decree. In this regard, senior counsel took no issue with the arguments advanced by the defenders as to the nature of decrees by default (above at [18] and [19]). However, these arguments

did not assist the defenders. Parliament must be taken to have known that there were different types of decree. Had Parliament intended to restrict the types of decree which were capable of establishing liability for these purposes it would not have failed to do so. That was not the position. Any decree would do for these purposes. There was simply no support in the wording of the section for the defenders' gloss to the effect that in order to establish liability a decree had to follow a consideration of the merits. The repetition of the word "establish" in subsection (4) could not bear the weight the defenders' argument imposed upon it.

[37] Furthermore, senior counsel pointed out that, on the defenders' arguments, not only did "establish" require a consideration of the merits for the purposes of section 1(4), but, thereafter, it was open to the insurer to require the injured party to re-litigate that question. This was the defenders' secondary position (see para [21] above). In these circumstances, one was left wondering what was the purpose of the additions made to section 1 of the 2010 Act when compared with section 1 of the 1930 Act.

[38] Senior counsel submitted that the defenders' secondary position could be tested by reference to the provisions of section 3 of the 2010 Act. Section 1(4)(a) provided that one of the means whereby liability could be established was the grant of a declarator under section 3. Section 3 provided a mechanism whereby an injured party, who had not yet established the insured's liability to him, could bring declaratory proceedings against the insurer to establish the insured's liability (section 3(2)(a)). In those circumstances, section 3(3) specifically provided that:

> "Where proceedings are brought under subsection (2)(a) the insurer may rely on any defence on which the insured could rely if those proceedings were proceedings brought against the insured in respect of the insured's liability to P [the injured party]."

Again, on the defenders' construction of section 1, this provision was apparently entirely unnecessary and, moreover, the insurer was entitled to rely on any defence which the insured could rely in respect of the other means provided in section 1(4)(b),(c) and (d).

[39] The pursuer's construction of section 1 did not produce an unfair result. An insurer was still protected by the terms of its policy. In the event that there was any suggestion that an insured had gone about matters in a wrongful way, it would be open to an insurer to avoid the policy. There had been no suggestion of that in the present case. Further, as was illustrated in the present case, the insurers had the opportunity to continue the defence of the action against Skene. They had chosen not to do so.

[40] Senior counsel submitted that the defenders' argument failed to take into account the innovations that had been introduced in the 2010 Act. In contrast with the situation prevailing under the 1930 Act, the 2010 Act had addressed how the liability of an insured was to be established. This failure was apparent from the defenders' reliance upon previous cases which also did not address the situation following the 2010 Act. The cases had to be seen in that light. In relation to *Enterprise Oil* (above at [27] and [28]), the pursuer took no issue with the proposition that an allegation of liability on the part of the insured was not sufficient. However, because it preceded the 2010 Act, Mr Justice Aiken's judgment did not address the new statutory mechanism for establishing liability which had been created by section 1(4). The same point could be made in respect of the *AstraZeneca* case (above, at paras [22] to [25]) and the *Omega Proteins* case (above at para [28]).

Decision on the first issue

[41] It became apparent during the course of hearing submissions on the first issue that the two questions which separate the parties in respect of this issue are: first, whether the

decree by default dated 15 November 2017 establishes Skene's liability to the pursuer for the purposes of section 1(4); and, secondly, on the assumption that it does so, what the consequences of that establishment are for the defenders - in other words, are the defenders still entitled to challenge Skene's liability to the pursuer notwithstanding the existence of the decree?

[42] The key to resolving both questions is determining the proper construction of section 1 of the 2010 Act and, in particular, section 1(4). There is no dispute that Skene is a "relevant person" in terms of section 1(1) and (5).

[43] At the outset, I consider that it is important to note that section 1 of the 2010 Act clearly represents an innovation upon the pre-existing position under the 1930 Act. The background to the 2010 Act was a recognition of the need to reform the pre-existing law (see Explanatory Notes at paragraphs 1 to 6).

[44] Turning to subsection (4), there are a number of points to note.

[45] The first is that the subsection is expressly addressing the issue of establishing liability only for the purposes of the Act and therefore, by implication, not more broadly.

[46] Second, the structure of the remainder of the subsection indicates that there are two elements to the definition. The first element is that the establishment of liability requires the establishment of both the existence of the liability and its amount. The second element - beginning with the words "for that purpose" - is a list of means whereby the existence and amount of the liability can be established including, at paragraph (b), a decree.

[47] The third notable feature of the subsection is that some form of the verb "establish" appears four times in 25 words. Given this repetition, it would seem very surprising were the word not to be given the same meaning each time it is used. Further, there also seems no

basis from the wording of the provision for that meaning not to be the word's normal meaning - to settle or fix; to place beyond dispute.

[48] Fourth, in respect of paragraph (b) the reference to decree is unqualified. This is also true of (c), which refers to arbitral proceedings and arbitration, and (d) which refers to enforceable agreements.

[49] Against that background, the first question is whether the decree dated 17 November 2017 falls within subsection (4) as is contended for by the pursuer. I am satisfied that it does so. Both elements of subsection (4) are satisfied. The terms of the decree set up both the existence of Skene's liability and its amount - £3 million. There is also no question that it is a decree and falls within the scope of paragraph (b).

[50] I am unpersuaded by the defenders' proposed construction which involves imposing an additional third element into the definition of "establish" namely that it involve some degree of consideration of the merits. There is no basis for this additional element within the wording of the provision. As a matter of textual interpretation it depends on imposing on the word "establish" a particular meaning which is otherwise not referred to within the wording of the provision. There seems no basis for reading the meaning of "establish" contended for by the defenders into all the instances of the word being used in the subsection and, in particular, the first usage "[…] a liability is established […]".

[51] The meaning contended for by the defenders is also undermined by the unqualified reference to "decree" as the facts of the present case illustrate. The same observation could be made in respect of the paragraphs (c) and (d) which refer to arbitral awards and agreements respectively. None of these necessarily carry with them the notion of a consideration of the merits.

[52] A further argument against the defenders' construction is that it introduces a degree of uncertainty into the definition: how much consideration requires to be given to the merits in order for liability to be established? Without this additional requirement contended for by the defenders, determining whether liability has been established requires only ascertaining the straightforward elements of its existence and amount together with that establishment taking one of the forms listed.

[53] In the circumstances, I find it impossible not to conclude that had such meaning been intended, it would have been made explicit.

[54] On this basis, I turn to the second question, namely, the consequences for the defenders of the decree establishing Skene's liability.

[55] The defenders' position was that, notwithstanding the provisions of 2010 Act, the position as it had existed under the 1930 Act endured. In other words, notwithstanding the establishment of the liability of Skene to the pursuer in terms of section 1(4), it remained open to the defenders to dispute that there was any such liability. As I have noted above, the defenders founded this argument on the basis of case law which pre-dated and, as such, did not take account of the provisions of the 2010 Act.

[56] I consider that the defenders' position is misconceived precisely because it fails to take account of the fact that section 1(4) of the 2010 Act establishes a mechanism whereby the liability of an insured to an injured party is established for the purposes of the Act. Construing section 1(4) as the defenders do, one is left wondering what is the purpose of the provision. On the defenders' construction, the provision would seem simply to impose an additional hurdle in the way of an injured person: requiring an intermediate establishment of liability on the part of the insured which could then be challenged again by the insurer. In this regard, I also consider that there is force in the pursuer's argument in relation to

section 3(3) of the 2010 Act which relates to the declaratory proceedings (see para [38] above). The absence of any equivalent to this provision, which enables the insurer to rely on defences against the injured party which it would have had against the insured, in relation to the other means provided in section 1(4)(b) to (d) is striking.

[57] Viewed from the perspective of the changes introduced by the 2010 Act, I do not consider that the cases relied upon by the defenders assist them. The position in *AstraZeneca* (above at [22] to [25]) is clearly distinguishable. In that case, the issue of whether the insured had been liable to the injured party was live. Furthermore, there was clearly no equivalent in that case to the mechanism provided by section 1(4). (In this regard, it is notable that reinsurance is specifically excluded from the scope of the 2010 Act – section 15). The same points can be made in respect of *Enterprise Oil Limited* (at para [27]).

[58] Turning to *Omega Proteins* (at para [28]), the helpful summary of the law under the 1930 Act given by Mr Justice Christopher Clarke (as he then was) also has to be read in light of the changes introduced by the 2010 Act. Now section 1(4) of the 2010 Act addresses "for the purposes of this Act" the process by which the liability of the insured to the injured party is established. That liability having been established, the injured third party is then entitled to enforce the insured's rights against the insurer (section 1(3)). On this basis, as a result of these changes, I consider that paragraph 49 of *Omega Proteins* does not accurately summarise the law under the 2010 Act.

[59] Accordingly, I consider that once the liability of an insured to an injured party has been established in terms of section 1(4) of the 2010 Act, that matter is resolved. Of course, it remains open to an insurer to contest whether section 1(4) has been satisfied as was done in this case.

[60] Furthermore, notwithstanding that the insured's liability has been established, the injured third party also still requires to demonstrate, in seeking to enforce its rights against the insurer, that the liability so established falls within the scope of the policy. Accordingly, it remains open to the insurer to dispute that point - as indeed has also been done in the present case. (These arguments were the second issue with which I deal below.) On this basis, I am not persuaded that this outcome, whereby the insurer retains the protection of the terms of the policy, is so unreasonable as not to have been contemplated by the legislature.

The second issue

[61] The second issue between the parties was whether Skene's liability, established by the decree by default, fell within the scope of Skene's policy.

The defenders' arguments

[62] Under that heading, it became apparent during the course of submissions that two discrete lines of argument were being advanced on behalf of the first defender.

[63] First, it was argued that the fact that the pursuer was founding upon a decree by default meant that the liability established by that decree did not fall within the scope of Skene's policy. The second, separate line of argument, was that the pursuer's case, as averred, fell within the exceptions to Skene's policy and was, as a result, irrelevant.

The first line of argument

[64] This line of argument was advanced as part of the first defender's position in respect of the first issue (see paras [20] and [29] above): the default on Skene's part which had resulted in the grant of decree was not an insured risk covered by the first defender's policy.

[65] As part of the first line, senior counsel for the first defender advanced an argument based on the proposition that a decree effects a judicial novation. Senior counsel drew my attention to the fact that the pursuer specifically made the averment that:

> "A decree effects a judicial novation such that the measure of the Pursuer's rights (and the corresponding obligations of Skene and, thus, of the Defenders in terms of the policy) are to be found in the decree." (Article 11)

As the decree was a novation of the pursuer's rights, it followed that the prior obligations upon which the pursuer's action against Skene had been based were extinguished: the prior rights which the pursuer was seeking to enforce against Skene through the litigation were replaced with the right to enforce the decree (*Dick* v *Burgh of Falkirk* 1976 SC (HL) 1 at 27 per Lord Kilbrandon). As I understood it, the thrust of this argument was that it demonstrated that Skene's liability to the pursuer arising from the decree did not fall within the scope of Skene's insurance policy with the first defender because it did not fall within the scope of clause 3.1.1 (see above at [20]).

[66] In adopting this argument, senior counsel for the third to fifth defenders noted, in addition, that so far as those defenders were concerned, on the logic of this part of the first defender's argument, they also could not be liable to the pursuer. This was for the simple reason that the passing of the decree on 15 November 2017 did not occur during a period in which they were providing insurance cover (see para [8] above).

The second line of argument

[67] The first defender's second line of argument challenged the relevancy of the pursuer's case that Skene's liability fell within the scope of Skene's insurance policy. The pursuer founded upon the reference to "damage or denial of access" in clause 3.1.1 which set out the public liability cover. Clause 3.1.1 provides as follows:

> "3.1.1 The insurer agrees to indemnify the insured by the terms of this insured section against legal liability to pay damages, including claimant costs recoverable from the insured, as a result of bodily injury, personal injury, advertising injury, damage or denial of access that occurs during the period of insurance and arises out of and in connection with the business."

"Damage" is defined in clause 11.6:

> "Damage means:
>
> 11.6.1 loss of, destruction of or damage to tangible property;
>
> 11.6.2 and/or for insured sections B-E [which at section B – includes Public liability cover] loss of use of tangible property that has been lost, destroyed or damaged."

"Denial of access" is defined in clause 11.7:

> "Denial of access means nuisance, trespass, or interference with any easement, right of air, light, water or way."

Senior counsel also drew my attention to the exclusion contained in clause 7.11 of the policy:

> "7.11 Financial loss
>
> liability for pure financial loss that is not consequent upon bodily injury or damage".

[68] The relevant passages of the pursuer's pleadings were as follows:

> Article 5
>
> "The pursuer raised an action in this Court (Ref. A754/14) against Skene, which called its blasting sub-contractor as a third party. A copy of the Closed Record in the action is produced herewith and referred to for its terms which are held to be incorporated herein for the sake of brevity. The pursuer's action sought £3,000,000 by way of reparation from Skene in respect of loss, injury and damage caused to it in consequence of Skene's lack of care and commission of nuisance in the operation of its quarrying business and causing the Pipeline to suffer a loss of support. In

> consequence of that lack of care, nuisance and loss of support, the Pipeline was inadequately supported. This was due to the combination of the proximity of the face of the Quarry to the Pipeline, and the instability created in the adjacent and subjacent bedrock of the Quarry. The Pipeline could not be operated in its then present location within a proper margin of risk. Some of the land over which the pursuer held servitude rights (as granted by Mrs Mary Williamson or Stevenson under and in terms of a deed of servitude dated 16th August 1972 and recorded in the General Register of Sasines for the County of Stirling on 26th September 1972) had been destroyed or damaged such that it was no longer available for use by the Pursuer for *inter alia* support, inspection, maintenance and repair of the Pipeline. A copy of the deed of servitude is produced herewith and referred to for its terms which are held to be incorporated herein *brevitatis causa*. The Pipeline (and the pursuer's right of property therein) and the servitude right (and the pursuer's right of property therein) (together the 'Pursuer's Property') had been damaged. In those circumstances, the Pipeline required to be diverted away from the quarry. It could not be inspected, maintained and repaired routinely, and the Pipeline was no longer adequately supported, within a proper margin of risk, while the ground surrounding it was in the state which Skene's operations had caused. The pursuer has subsequently diverted the relevant section of Pipeline further away from the Quarry. To date (1 August 2023) the pursuer has incurred costs of £2,979,900.74 in relation to the diversion of the pipeline."

[69] And Article 6:

> "The face of the quarry will probably collapse in the medium term. Had it done so with the Pipeline still in place, the Pipeline would probably have buckled or ruptured, risking a major escape of gas with severe consequences for life and limb and for the maintenance of the gas supply to the customers served by the Pipeline. Those risks have now been averted due to the pursuer diverting the relevant section of the Pipeline further away from the quarry."

[70] On the basis of these averments, senior counsel for the first defender submitted that the pursuer had not averred a relevant case of damage or denial of access in terms of clause 3.1.1. The pursuer's averments made clear that damage to the pipeline had been apprehended but, as a result of action taken by the pursuer, that had not transpired. As a result, there had been no damage as defined in the policy. In relation to the averments concerning the damage to land over which the pursuer had a right of servitude, the critical point was that the averred damage had happened to tangible property belonging to someone other than the pursuer. On the pursuer's averments, the costs incurred by the

pursuer related to the costs of moving the pipeline. These were properly to be characterised as pure financial loss. Such loss was expressly excluded from the scope of the policy by clause 7.11. The exception to the exclusion did not apply because, as had already been submitted, on the pursuer's averments there had been no damage as defined in terms of the policy.

[71] Senior counsel for the third, fourth and fifth defenders again adopted the first defender's submissions. In addition, senior counsel pointed out that there was an inconsistency in the pursuer's pleadings on the issue of damage. In Article 5, the pursuer averred that the Pipeline had been damaged. However, in Article 6, the pursuer averred that the risk of damage to the pipeline had been averted. These two averments could not be reconciled and he submitted that the latter averment had to give way to the former.

The pursuer's response

The first line of argument

[72] Responding to the first line of argument advanced by the defenders in respect of this issue, senior counsel for the pursuer drew my attention to the terms of the decree dated 15 November 2017 upon which the pursuer founded. It decerned against Skene for the sum of £3 million "in full satisfaction of the summons". The decree was thus based on the summons and the claims articulated within it. That, in turn, connected the liability created by the decree to the terms of clause 3.1.1 of the first defender's policy.

[73] In relation to the argument based on judicial novation, senior counsel accepted that this was the effect of a decree. However, he submitted that it would be a strange outcome if, having satisfied the provisions of section 1(4) of the 2010 Act and thereby established

liability, that very act resulted in that liability being extinguished. He submitted that such an outcome was unlikely to be the intention of Parliament.

The second line of argument

[74] In respect of the second line of argument based on the policy exclusions, the position of the pursuer was that it had pled a relevant case but senior counsel accepted that a proof of those averments was necessary.

[75] Senior counsel submitted that the primary flaw in the defenders' analysis of clause 7.11 was to presuppose that it excluded financial loss which was consequent on damage to the tangible property of another. However, that was not what the wording itself said. There was no reference as to whom the property which was damaged belonged. Senior counsel submitted that the defenders' averments that advanced this argument were irrelevant and should not be admitted to probation.

[76] In any event, the pursuer had, in Article 5, specifically averred that there had been damage to the pipeline (see above at para [68]). The pursuer's case was that this damage to the pipeline resulted from it being inadequately supported which, in turn, resulted from the fracturing of the rock adjacent to and underneath the pipeline (see Articles 4 and 9). There was also no contradiction between the averments in Article 5 and 6. The risks referred to in Article 6 which had been averted related to further damage to the pipeline. In Article 5, the pursuer had also made averments in respect of the damage to the land over which the pursuer held servitude rights. The pursuer averred that Skene's liability to it was in respect of both damage and the denial of access in terms of the policy (see Article 10).

[77] In light of these averments, it could not be said that the pursuer was bound to fail. Accordingly, the pursuer should be allowed proof of these averments.

Decision on the second issue

The first line of argument

[78] The defenders argue, in essence, that as the decree by default was granted without consideration of the merits of the underlying dispute between the pursuer and Skene, the liability established by that decree did not fall within the scope of clause 3.1.1 of Skene's policy.

[79] Although logically discrete from the first issue (which I have dealt with above), the argument advanced by the first defender that the liability created by the decree by default did not fall within the scope of Skene's policy is essentially a development of the defenders' position in respect of the first issue. The argument depends upon regarding the liability established by the decree as entirely separate from the cause in which the decree was granted. So, the defenders argue, the liability established by the decree on 15 November 2017 arose from the decree and not as a result of any of the matters listed in clause 3.1.1.

[80] I consider the defenders' argument to be overly artificial. I am not persuaded by it. The defenders overlook the fact that inherent to a decree is the cause in which it is pronounced (Mackay (above at [18]) at page 308; Maxwell (above at [18]) at page 615). The decree does not exist and cannot be considered in isolation. It is a decree granted in the cause brought by the pursuer against Skene (among others). That can be seen from the wording of the interlocutor dated 15 November 2017 which decerns against Skene "in full satisfaction of the summons". That summons articulated the pursuer's claim against Skene for reparation as a result of damage caused to the pipeline.

[81] In these circumstances, I do not consider the fact that Skene's liability to the pursuer was established by the decree dated 15 November 2017 means that it falls outwith the scope

of clause 3.1.1: it is a legal liability to pay damages "as a result of" damage. The fact that the decree was passed following a default by Skene does not alter that.

[82] I also reject the defenders' argument based on the fact that a decree effects a judicial novation on the parties' underlying rights and liabilities.

[83] The fallacy in the defenders' argument is that it assumes that this judicial novation in turn affects the establishment of liability for the purposes of section 1(4) of the 2010 Act. In other words, the defenders' argument depends upon the extinction of the parties' underlying obligations brought about by the judicial novation to also extinguish the liability established in terms of section 1(4).

[84] However, I can see no support whatsoever for the defenders' argument in the wording of section 1(4). On the contrary, the opening words of the provision "[f]or the purposes of this Act" make clear that the establishment of liability for the purposes of the Act is discrete. Furthermore, as was pointed out by senior counsel for the pursuers, if correct the defenders' argument would produce an extremely surprising result: subsection (4) would create a mechanism whereby an insured's liability to an injured party could be established and, yet, by adopting that mechanism an injured party would, instead, extinguish that liability.

[85] For these reasons, I reject this line of argument.

The second line of argument

[86] I am satisfied that the pursuer has pled a relevant case that Skene's liability to it falls within the scope of clause 3.1.1 of the policy.

[87] In Article 5, the pursuer avers, among other things, that the pipeline was damaged. At Article 11, the pursuer goes on to aver that Skene's liability was in respect of "Damage"

as defined in the policy. On this basis, I agree with the pursuer that it has averred a case, which if proved, cannot be said to be bound to fail.

[88] Read fairly, I also do not consider that there is any contradiction between the averments in Articles 5 and 6. The averments in Article 6 relate to risks that have been averted through the action of the pursuer. I do not read them as contradictory of the damage averred in Article 5.

[89] I have also considered the parties' competing arguments concerning the correct construction of the exclusion for pure financial loss contained in clause 7.11 and, in particular, whether, as the defenders contend, in order not to be excluded financial loss requires to be consequent upon damage (as defined) to the pursuer's tangible property.

[90] This argument is of particular significance in respect of the inter-relationship between the coverage of "denial of access" in clause 3.1.1 and the pure financial loss exclusion in clause 7.11. On this basis, the defenders argue that the pursuer's averments as to the destruction or damage of the land over which it has rights of servitude in Article 5 are irrelevant. That is because, so argue the defenders, the financial loss claimed by the pursuer was not consequent upon damage to the pursuer's tangible property but rather to property belonging to the proprietor of the servient tenement over whose land the pursuer exercised its right of servitude.

[91] I consider that the defenders' argument in respect of clause 7.11 is misconceived for two related reasons. First, the wording of clause 7.11 (together with the associated definitions) does not restrict the exception to the exclusion in the way that the defenders contend. The exclusion is simply for "pure financial loss" except that which is consequent upon bodily injury or damage.

[92] Second, if clause 7.11 is construed as the defenders contend for, it would appear difficult to give any content at all to the inclusion of an indemnity to pay damages as a result of denial of access in clause 3.1.1. The definition of "denial of access" in clause 11.7 clearly envisages a situation in which the person to whom the insured has become liable has intangible rights - easement, right of air, light and water - over the tangible property of another which have been interfered with. Were clause 7.11 to be construed as meaning that financial loss which was consequent upon damage to the property of another was excluded from the scope of the indemnity, that would appear to exclude any denial of access liabilities. Given the express inclusion of such liabilities in clause 3.1.1, that would seem an unlikely result.

[93] In these circumstances, I reject the defenders' motion for dismissal. The pursuer moved for the deletion of certain averments. However, in all the circumstances, having considered the averments in question, I consider that all parties' averments in respect of their competing contentions in relation to this line of argument should remain in place pending probation.

The third issue

The defenders' argument

[94] The third issue was raised on behalf of the third to fifth defenders. The issue turned on the fact that the liability of each of those defenders was restricted, as a result of the way that the first defender's policies were structured, to the balance of losses for which Skene was to be indemnified in a particular year (see para [8] above). The years in question were 2009/10; 2010/11; and 2011/12 for the third to fifth defenders respectively.

[95] Importantly, the policies of insurance were occurrence-based as opposed to being issued on a claims made basis. Accordingly, it was of critical importance to determine in which of these three years, if any, Skene's liability to the pursuer had arisen.

[96] Against that background, the pursuer had attempted to plead alternative cases. However, senior counsel for the third to fifth defenders submitted that this attempt was in vain. The approach adopted by the pursuer was to offer to prove that Skene's liability had arisen in the year 2010/11 which would mean that the fourth defender was liable to indemnify. In Article 9 of condescendence, the pursuer had made various factual averments and then pled the following: "In the foregoing circumstances, the pursuer believes and avers that Skene's liability was incurred at some point during policy year 2010/11." On this basis, submitted senior counsel, it would follow that the pursuer's cases against the third and fifth defender should be dismissed.

[97] However, the pursuer had instead averred:

> "*Esto* Skene's liability was not incurred during the policy year 2010/11 (which is denied) it was incurred during the 2009/10 policy year. *Esto* Skene's liability was not incurred during either of those policy years (which is denied) it was incurred during the 2011/12 policy year. For the reasons condescended upon above, there is no realistic possibility that Skene's liability was incurred any earlier than the 2009/10 policy year or any later than the 2011/12 policy year."

[98] Senior counsel also pointed out that within Article 9, the pursuer had made averments that it was "unlikely" that the damage had arisen during either of the years 2009/10 or 2011/12. It followed from these averments that the pursuer was offering to prove that neither the third or fifth defenders was liable. This followed from the way in which the law of proof operated. In a civil case, if the judge found that a fact was more likely than not, that fact was proved. There was no room for finding that it might have happened. The law operated a binary system (see *In re B (Children)* 2009 1 AC 11 at

paragraph 2 per Lord Hoffman). On this basis it followed that the pursuer's case against the third and fifth defenders was irrelevant.

[99] In the present circumstances, the pursuer did not fall within the exceptional category of cases in which a party was entitled to plead in the alternative based on inconsistent facts. Senior counsel referred to the judgment of Lord President Cooper in *Smart* v *Bargh* 1949 SC 57 at 61 to 62. In that case, Lord President Cooper had declined to identify any particular general rule to regulate the circumstances in which alternative cases on inconsistent facts might be pled. However, his Lordship did consider that the court ought to retain supervision and control over the more extreme types of case and, in that regard, his Lordship identified two factors which would make it easier for the court to permit the pleading of such cases. The two factors identified were, first, that the party making the averments can justifiably assert that he or she is in ignorance of the precise facts in question; and second, that the party seeking to plead in the alternative was the defender.

[100] In considering the present case, senior counsel submitted that neither factor was present. Taking the second factor first, clearly in this case it was the pursuer whose pleadings were under consideration. Then, in respect of the first factor, the pursuer's ignorance of the precise facts, this highlighted a fundamental inconsistency. Despite the pursuer's case proceeding on the basis of Skene's liability having been established (by the decree dated 15 November 2017), the pursuer was also maintaining that the date the damage had actually occurred remained unknown.

The pursuer's response

[101] The pursuer's response to this argument was straightforward. The pursuer was in exactly the position envisaged by Lord President Cooper in *Smart*. The pursuer justifiably

was unaware of the precise timing of the works that had been carried out in Skene's quarry by Skene's sub-contractor. In Article 9, the pursuer had set out in detail both the nature of the investigations that it had carried out and the inferences which the pursuer drew from those investigations. Those averments informed the pursuer's alternative cases.

[102] The pursuer was not offering to prove something which was unlikely. The defenders' criticism overlooked the difference between the pursuer's averments as to when the damage occurred, on the one hand, and then, based on those averments, the year in which liability had been incurred, on the other.

[103] As to the defenders' allegation of inconsistency, senior counsel submitted that the defenders failed to recognise that the decree had established Skene's liability to the pursuer. What was currently at issue was which policy required to respond to that indemnity. He submitted that the pursuer had set out a relevant basis for inquiry.

Decision on the third issue

[104] The pursuer sets out three alternative cases against each of the third, fourth and fifth defenders. Each of those cases proceeds on the basis that Skene's liability arose in a different year. To that extent, each of the three cases proceeds on the basis of inconsistent facts.

[105] The critical question is whether or not, to borrow Lord President Cooper's formulation, substantial justice permits the pursuer to proceed in this way? In addressing this question, it is important to bear in mind three propositions which can usefully be taken from Lord President Cooper's judgment.

- First, that in a question of practice and procedure, it is neither necessary nor desirable to try to pursue an inquiry for abstract principles.

- Second, that there are many cases in which substantial justice not only permits but requires that case may be stated alternatively on inconsistent facts.
- Third, the court must always retain supervision and control over the more extreme case in which it would be incompatible with substantial justice to the opposite party that a case should be allowed to proceed on such inconsistent averments.

[106] Approaching the question in this way, I have no hesitation in concluding that the pursuer should be permitted to proceed against the third, fourth and fifth defenders with cases pled in the alternative. I do not consider that the pursuer's case comes close to being one of the more extreme cases referred to by Lord President Cooper. In its averments in Article 9, the pursuer has set out, in detail, when and how it became aware of, to put it neutrally, issues at Skene's quarry and the actions it subsequently took. It is significant that the first date of detection averred is 29 June 2011 which falls two days after the 2011/12 policy period had begun. On the basis of the pursuer's averments, I do not consider that any issue arises of a lack of fair notice or other prejudice to the defenders. Notably, no such argument was made on behalf of the defenders.

[107] Against this background of averred fact, I also consider that the pursuer can properly be considered to be excusably in ignorance of the precise facts in question, namely when the averred damage occurred and, therefore, exactly when Skene's liability arose.

Disposal

[108] In light of my decisions in respect of the three issues argued before me, I consider that the pursuer's case is relevant for probation and, accordingly, I reject the defenders' motions for dismissal.

[109] Given my decision in respect of the first issue, I am minded to sustain the pursuer's first plea in law to the extent of excluding certain of the defenders' averments relating to that issue. Equally, for the reasons I have given in respect of the second issue, I also consider that the parties' averments in respect of the arguments in relation to the pure economic loss exclusion should remain in place pending probation.

[110] In these circumstances, I will put the case out by order in order to be addressed on the precise extent of the defenders' averments which fall to be excluded from probation and to discuss further procedure.

[111] Finally, having not been addressed on the issue, I will also reserve all questions of expenses meantime.