OUTER HOUSE, COURT OF SESSION

[2025] CSOH 39

CA94/23

P911/23

OPINION OF LORD SANDISON

In the cause

MEX GROUP WORLDWIDE LIMITED

Pursuer

against

(FIRST) STEWART FORD, (SECOND) BRIAN CORMACK, (THIRD) COLM SMITH, (FOURTH) MICHAEL GOLLITS, (FIFTH) MELVILLE CONSULTING PARTNERS LIMITED, (SIXTH) MELVILLE CONSULTANCY LIMITED, (SEVENTH) REGAL CONSULTANCY INTERNATIONAL LIMITED, (EIGHTH) CSM SECURITIES SÀRL, (NINTH) VON DER HEYDT & CO. VERMŐGENSVERWALTUNGS GMBH, (TENTH) VON DER HEYDT INVEST SA, and (ELEVENTH) MEX SECURITIES SÀRL

Defenders

Pursuer: Wolffe KC, Massaro; Dentons UK and Middle East LLP
First, Second, Fifth, Sixth and Seventh Defenders: McBrearty KC, E. Campbell; BTO Solicitors LLP
Third Defender: Party
Fourth and Ninth Defenders: R. Anderson; Harper Macleod LLP
Eighth Defender: K. Young, Young & Partners Business Lawyers Limited
Tenth and Eleventh Defenders: No representation

and in the petition of

MEX GROUP WORLDWIDE LIMITED

Petitioner

for orders in terms of section 1 of the Administration of Justice (Scotland) Act 1972

against

(FIRST) STEWART FORD, (SECOND) BRIAN CORMACK, (THIRD) MELVILLE CONSULTING PARTNERS LIMITED, (FOURTH) MELVILLE CONSULTING ASSOCIATES LIMITED, (FIFTH) REGAL CONSULTANCY ASSOCIATES LIMITED and (SIXTH) CSM SECURITIES SÀRL

Respondents

Petitioner: Wolffe KC, Massaro; Dentons UK and Middle East LLP
First, Second, Third, Fourth and Fifth Respondents: McBrearty KC, E Campbell; BTO Solicitors LLP
Sixth Respondent: K. Young; Young & Partners Business Lawyers Limited

23 April 2025

Introduction

[1] On 11 March 2025 Mex Group Worldwide Limited ("Mex") abandoned a commercial action which it had raised in October 2023 against Stewart Ford, Brian Cormack, Colm Smith, Michael Gollits, and companies called Melville Consulting Partners Limited, Melville Consultancy Limited, Regal Consultancy International Limited, CSM Securities Sàrl, Von der Heydt & Co Vermőgensgewaltungs GmbH (formerly known as Von der Heydt & Co AG), Von der Heydt Invest SA, and Mex Securities Sàrl. It similarly abandoned a petition under section 1 of the Administration of Justice (Scotland) Act 1972 which it had presented at the same time against Mr Ford, Mr Cormack, the Melville and Regal companies and CSM. Mex conceded payment of the expenses of these processes as a condition of the grant of the decrees of dismissal which it sought under RCS29.1(2), but the defenders and respondents moved the court to award expenses on the agent and client, client paying scale and further sought the grant of an additional fee in terms of paragraphs (a), (b), (c), (e) and (f) of Rule 5.2(6) of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019, which orders Mex resisted. The matter came before the court to determine those questions and

ancillary issues about the release of caution previously found by Mex and interim expenses awards.

Relevant statutory provisions

[2] Rule 5.2 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019/75 is in the following terms:

> "**5.2.— Additional charge**
>
> (1) An entitled party may apply to the court for an increase in the charges to be allowed at taxation in respect of work carried out by the entitled party's solicitor .
> (2) Where the application is made to the Court of Session the court may, instead of determining the application, remit the application to the Auditor to determine if an increase should be allowed, and the level of any increase.
>
> (3) The court or, as the case may be, the Auditor must grant the application when satisfied that an increase is justified to reflect the responsibility undertaken by the solicitor in the conduct of the proceedings.
>
> (4) On granting an application the court must, subject to paragraph (5), specify a percentage increase in the charges to be allowed at taxation.
>
> (5) The Court of Session may instead remit to the Auditor to determine the level of increase.
>
> (6) In considering whether to grant an application, and the level of any increase, the court or, as the case may be, the Auditor is to have regard to—
>
> (a) the complexity of the proceedings and the number, difficulty or novelty of the questions raised;
> (b) the skill, time and labour and specialised knowledge required of the solicitor;
> (c) the number and importance of any documents prepared or perused;
> (d) the place and circumstances of the proceedings or in which the work of the solicitor in preparation for, and conduct of, the proceedings has been carried out;
> (e) the importance of the proceedings or the subject matter of the proceedings to the client;
> (f) the amount or value of money or property involved in the proceedings;
> (g) the steps taken with a view to settling the proceedings, limiting the matters in dispute or limiting the scope of any hearing."

Background

[3] As the list of the *dramatis personae* already stated implies, the litigations in question were complex and involved a substantial international dimension. In essence, Mex sought declarator that the defenders had engaged in an unlawful means conspiracy directed *inter alia* at harming its interests by causing Mex Securities to seek to renege on a lawful and binding agreement recorded in a consent order granted by the High Court of Justice of the British Virgin Islands dated 14 December 2020. It sought damages from the defenders jointly and severally in the principal sum of £85 million.

[4] All of the parties are or were involved in some capacity in the financial services sector. The pursuer is a company incorporated under the laws of Hong Kong and is the ultimate holding company of a group of companies known as the MultiBank Group, the ultimate beneficial owner of which is Mr Naser Taher. The group's principal activity is the provision of trading platforms for investors dealing in derivative trading in assets including currency, metals and other commodities, shares and indices. Mr Ford and Mr Cormack are Scottish businessmen resident in Edinburgh. Mr Smith is an Irishman residing in Luxembourg, where he manages CSM, an investment advisory company. Mr Gollits is a German national and resident. He was the CEO of Von der Heydt & Co AG, an investment management company there, which subsequently underwent a restructuring and is now known as Von der Heydt & Co Vermőgensgewaltungs GmbH (although I shall refer to it as VDH AG, an abbreviation of the name it bore through most of the history of these litigations), and was also associated with the direction of Von der Heydt Invest SA (VDHI), a Luxembourg fund manager. It became insolvent in April 2024 and was not represented at any substantive hearing which took place in the litigations. The Melville and Regal companies are based in Edinburgh and also operate in the financial services sector. They are

associated with either or both of Mr Ford and Mr Cormack. The parties were not agreed on who was in control of Mex Securities, a Luxembourg company which played a significant role in the events giving rise to the litigation. There was originally a twelfth defender in the action, Mr Viacheslav Volotovskiy, a Luxembourg businessman associated with Mex Securities, but service was never effected on him for unclear reasons and the action was eventually dismissed so far as directed against him.

[5] The section 1 petition was directed at securing "dawn raids" on the residences of Mr Ford and Mr Cormack, and on the offices of the Melville and Regal companies in Edinburgh, with a view to recovering documents in support of the subject-matter of the action. Orders to that effect were granted on 18 October 2023.

[6] In the briefest of terms consistent with understanding the background germane to the aspects of the dispute dealt with in this opinion, it was maintained by Mex that in late 2020 it and the VDH companies had distinct interests in indices trading on the Frankfurt Stock Exchange. The VDH companies were directing investment into notes issued by Mex Securities which were backing those indices, and relative trading accounts were maintained with Mex's group company in the BVI, MultiBank FX International Corporation ("MBFX"). Mex had laid out substantial sums in dealing with earlier related litigation and the implementation of the arrangements which it had been agreed would be set up in order to dispose of that litigation, the detail of which it is unnecessary to recount here, and was receiving valuable commission income from the trading being carried out by MBFX. It also had the benefit of certain undertakings from VDH AG about the maintenance of investment levels in the notes.

[7] The affairs of Mr Gollits and the VDH companies are said by Mex to have come under regulatory scrutiny in Luxembourg. On 2 December 2020, Mr Gollits represented to

Mex that it had become necessary for VDH AG to withdraw funds from the notes on account of a supposed new regulation preventing the indices from trading in gold derivatives. What VDH AG proposed was thought by Mex to be in breach of the investment maintenance undertakings it had previously given. Mex's ability to generate revenue from the project depended on the amount invested and the length of the period that funds remained invested.

[8] Mex accordingly did not wish the proposed withdrawal to take place, and conceived that it had a substantial claim for damages against VDH AG for breach of the obligations previously undertaken by it, as well as against Mex Securities, which had the proprietorial interest in the funds in question, and on whose behalf VDH AG was acting as agent by virtue of the investment management agreement concluded between them. It was said that the VDH companies had substantial exposure to the note holders for losses that would be crystallised on sudden withdrawal of investment from the notes, because the sums previously paid or laid out by Mex would have formed proper deductions before calculation of the balance of sums due to noteholders. Mr Gollits and the VDH companies would also, it is claimed, have had significant regulatory exposure should a dispute about the proposed withdrawal have emerged.

[9] Mex considered what it should do about the situation. It was advised by its then general counsel, Mr Adam Duthie, that it should make a claim against Mex Securities seeking payment on the premise that the funds it had spent in connection with the establishment of the indices fell to be treated as loan finance to Mex Securities, represented expenses and liabilities incurred by Mex Securities in respect of the fiduciary estate under its control and were thus deductible from that estate before any return to the noteholders.

[10] By letter dated 4 December 2020 Mex's solicitors intimated such a claim to Mex Securities. On 9 December 2020 Mex assigned that claim to a related company, Mex Clearing Limited. On 10 December 2020, Mex Clearing raised proceedings against Mex Securities and MBFX in the BVI seeking repayment of the sum of €36,385,509.52. Whilst the dispute was in substance between Mex Clearing and Mex Securities, MBFX was joined as a second defendant as it held the funds in respect of which Mex Clearing sought payment. Although the claim form described the sums sought as loans, it is now said by Mex that that was an imprecise shorthand term for liabilities of Mex Securities which could be constituted as debts due to Mex Clearing either by way of direct claim or by deduction from the sums held at credit of the trading account with MBFX.

[11] Representatives of Mex and Mex Securities engaged in direct negotiations about the prospect of settling the claim. Between around 8 and 16 December 2020 Mr Smith (ostensibly acting on behalf of Mex Securities) negotiated with Mr Duthie (ostensibly on behalf of Mex and its group) at a series of meetings in Dubai. An agreement was reached that Mex Securities would enter into a settlement agreement and thereafter a consent order in the BVI court process acceding to the claim to the extent of most of the relevant sums, that Mex would assign its claims against VDH AG to Mex Securities and would thereafter assist it in funding the pursuit of those claims against VDH AG; and that, in the event of successful pursuit of the assigned claim against VDH AG, the ultimate proceeds after reimbursement of legal costs would be used first to restore the note holders to the position they should have been in but for VDH AG's actions, and thereafter would be divided equally between Mex and Mex Securities. The settlement was presented to the court and formalised in a consent order and schedule thereto granted by Wallbank J sitting in the BVI High Court on 14 December 2020. On 18 December 2020 the consent order was partially

implemented. Mex Clearing received funds of €36,385,509.52 from MBFX in implement of an instruction from Mex Securities, in accordance with the consent order.

[12] At this point the plot thickens. Almost immediately after settlement terms were agreed and the consent order was finalised, Mex Securities purported to renege upon it. Mr Smith left Dubai to return to Luxembourg on 18 December 2020. On 22 December 2020, agents purporting to act on behalf of Mex Securities wrote to Mex's solicitors in the BVI claim and separately to MBFX, suggesting that only Mr Volotovskiy was a director of Mex Securities, which had no knowledge of the consent order and was seeking to challenge any implement of it. Mex claims that Mex Securities had been incorporated in Luxembourg in 2018 as a securitisation vehicle for the purpose of a proposed venture which had been discussed between Mex and VDH AG but which did not proceed. Mex allowed it to use the "Mex" style, but it was not integrated into its group and was not controlled by Mex. It was used as the vehicle for a note swap transaction which led to the operation of the indices in question at the suggestion of Mr Gollits, who appointed Mr Smith and Mr Volotovskiy to manage it.

[13] Mex claims that it now knows a lot more than it did at the time of negotiating and agreeing the consent order about the relationships amongst the various defenders. Some of that it found out before raising the action, and some emerged from the documents recovered in the section 1 petition process. What it says it knows now but did not know then is that Mr Ford had an extensive background in financial services and in particular in the marketing of complex bonds, but also had a lengthy history of dishonesty and misappropriation of investors' funds and is subject to a lifetime ban by the FCA from regulated financial activity. Mr Cormack and Mr Smith are now known, it is said, to be longstanding business associates of Mr Ford and have been used by him over many years to

assist and conceal his dishonest activities. Mr Cormack is said to be ostensibly the controlling shareholder of the Melville and Regal companies, but which are in fact vehicles for Mr Ford to conduct business despite the FCA ban, and through which bonds issued by CSM are marketed.

[14] It is claimed that CSM was in turn a business vehicle for C[olm] Smith, S[tewart] Ford, and M[ichael] Gollits and that from about August 2020, it was engaged in issuing bonds and for that purpose was soliciting investment funds from the VDH companies. The bonds were marketed by the Melville and Regal companies to investors and commissions were paid to them on sales. By the end of 2020 VDH AG had invested about £702,000 in a product called "Engenera Green Bonds", issued by a company in which Melville Consulting Partners Limited held a 50% interest. On 27 January 2021 VDH AG placed an investment of €1.525 million into a bond issued by CSM. Further substantial investment is said to have flowed in the following months and years.

[15] Adam Duthie, whom it will be recalled was at the material time Mex's general counsel, is now said by Mex to have been a long-standing associate of and adviser to Mr Ford, as well as an associate of Mr Cormack, and subsequently accepted office as a director of Melville Consulting Partners Limited. He is also said to have advised on the establishment of CSM, to have assisted it with a number of matters and to have dealt with proceeds of its business activities, which included dealings with a Portuguese company, SMPV Acquisition LDA, in which Mr Ford appeared to have a beneficial interest.

[16] In all of those circumstances, Mex claims that all of the defenders combined together in furtherance of their own commercial interests and the concealment of Mr Ford's illegal involvement in them and of the direct personal interest of Mr Gollits in the business of CSM, with the purpose of working together with the object of injuring the commercial and

economic interests of Mex by seeking to deprive it of the benefit of the settlement it had reached in the form of the consent order, by way of seeking to cause Mex Securities to renege on that settlement, thus enabling the VDH companies to dispute the settlement on the basis of a dishonest pretence that it had not been freely and validly entered into by Mex Securities, leaving the defenders as a whole free to pursue and profit from their commercial interests, and in particular from the substantial flow of investment funds from the VDH companies to bonds issued by CSM, and promoted and sold by the Melville and Regal companies, to the general benefit of them all. It is said that in the period between 7 and 17 December 2020 telephone records show that Mr Smith conducted a series of lengthy telephone calls with *inter alios* Mr Ford, Mr Cormack, Mr Gollits and Mr Volotovskiy. It is claimed that it is reasonable to infer that the discussions which took place on those calls were concerned with the facilitation of the conspiracy amongst the defenders and the steps taken in furtherance of it.

[17] Mex maintains that the means used by the defenders to pursue those purposes were unlawful, including causing Mex Securities fraudulently to renege on the consent order from December 2020 onwards by means of the dishonest denial that Mr Smith had had the necessary authority to bind it, the provision of financial or commercial inducement or bribes by the VDH companies in the form of substantial investment in bonds issued by CSM, and the general concealment of what was being done. It was also claimed that the reneging on the consent order by Mex Securities was a breach of contract on its part induced by the actions of the other defenders.

[18] Mex claims to have suffered loss in consequence of the conspiracy and induced breach of contract, maintaining that but for those acts it would have secured the benefit of the settlement entered into in the consent order without material further expense, but

instead has been embroiled in extensive and costly litigation, with substantial loss of business and profits due to the reputational issues which arose for it. It is said that as a direct consequence of the allegations made, Mex required to postpone a bond issue that would otherwise have taken place, causing a net loss to it of €68.5 million, that it lost other investment that would otherwise have been made, and required to expend substantial amounts of money on legal and other costs in connection with the various litigations arising from the defenders' wrongful acts. Altogether, the relevant losses are said to amount to £85 million which, together with interest, formed the sum claimed jointly and severally against all of the defenders.

[19] It is further necessary to know for present purposes that in 23 April 2021 VDHI applied *ex parte* for interim relief as an additional claimant in the BVI litigation. The relief sought included a worldwide freezing injunction against MBFX, which was granted by Jack J and upheld by the Eastern Caribbean Court of Appeal: *MultiBank FX International Corpn* v *Von der Heydt Invest SA* [2023] ECarSC 63. The application was presented on the basis that Mr Smith had been an active participant with Mex and its officers in a fraud perpetrated upon the VDH companies and their clients. There were numerous interlocutory decisions and judgments at first instance and on appeal in the proceedings. VDHI's claim was appointed to proceed to a "mini-trial", but on 7 February 2024 that hearing was discharged to allow time for the BVI court to be updated on the progress of the action in Scotland and to see what had been gathered by way of the orders granted in the section 1 process.

[20] In the section 1 petition process, after the grant of commission and diligence on 18 October 2023, "dawn raids" duly took place at the residences of Mr Ford and Mr Cormack and the offices of the Melville and Regal companies. A very large amount of documentation in hard copy and electronic form was seized by three commissioners,

although it may be noted that on examination much of it turned out to have nothing whatsoever to do with the dispute amongst the parties. I refused to recall the section 1 orders in a contested hearing on 24 April 2024, and the relative opinion was issued on 17 May: [2024] CSOH 52. I subsequently gave permission for the properly recovered documents to be transmitted for use in the related litigations then in subsistence before the Court of Appeal of England and Wales and in the BVI.

[21] In the commercial action, warrant to arrest on the dependence of the action was granted against the Scottish-based defenders on 19 October 2023, and recall of that warrant was also refused on 24 April 2024 with the relative opinion issued on 17 May: [2024] CSOH 51, 2024 SLT 901. That decision was subsequently the subject of further discussion, in the context of an appeal against the discharge of a worldwide freezing order obtained against Mr Gollits and VDH AG, in the Court of Appeal of England and Wales: [2024] EWCA Civ 959, [2025] 1 WLR 975. I also ordered Mex to find caution in sum of £100,000 on 24 April 2024. A letter of request for recovery of evidence was authorised for issue to the Luxembourg District Court on 17 July 2024. A debate on issues of jurisdiction, *forum non conveniens*, *lis alibi pendens* and connected matters was fixed and took place, and was advised on 12 September 2024: [2024] CSOH 86, [2024] IL Pr 38.

[22] On 26 September 2024 I fixed a proof before answer to take place in the action on 10 June 2025 and the ensuing 15 days. I required Mex to lodge full witness statements for proof by 31 January 2025, and the defenders to do so by 7 March 2025. On 31 January 2025 the withdrawal of Mex's agents in both processes was intimated to the court, no witness statements having been lodged. The procedure under RCS30.2 was commenced and at a hearing on 5 March 2025 Mex appeared by fresh agents and counsel and indicated that it

proposed to abandon both processes. I recalled the arrestments previously granted and formal minutes of abandonment were lodged thereafter.

[23] On 20 March 2025 I found Mex liable to the defenders in the expenses of the causes on an agent and client, client paying basis; found the defenders' agents entitled to charge an additional fee in terms of paragraphs (a), (b), (c), (e) and (f) of Rule 5.2(6) of the 2019 Act of Sederunt, with 15% specified as the level of increase in the charges to be allowed at taxation in respect of each such paragraph, found Mex liable to the Scottish defenders for payment of interim expenses in the sum of £150,000 in each process and authorised the sum lodged as caution to be uplifted and paid to their agents. The Scottish defenders, supported by the other defenders, requested that I record the circumstances of and reasons for those decisions in a written opinion, which I now do.

Submissions for Mr Ford, Mr Cormack and the Melville and Regal companies (the "Scottish defenders")

[24] On behalf of the Scottish defenders, senior counsel submitted that the proceedings alleged fraud, conspiracy and inducement of breach of contract. The conduct of the action had been, at least, unreasonable within the meaning of *McKie* v *Scottish Ministers* [2006] CSOH 54, 2006 SC 528, 2006 SLT 528 where Lord Hodge stated at [3]:

> " … thirdly, where one of the parties has conducted the litigation incompetently or unreasonably, and thereby caused the other party unnecessary expense, the court can impose, as a sanction against such conduct, an award of expenses on the solicitor and client scale. Fourthly, in its consideration of the reasonableness of a party's conduct of an action, the court can take into account all relevant circumstances. Those circumstances include the party's behaviour before the action commenced, the adequacy of a party's preparation for the action, the strengths or otherwise of a party's position on the substantive merits of the action, the use of a court action for an improper purpose, and the way in which a party has used court procedure, for example to progress or delay the resolution of the dispute."

The Scottish defenders strongly believed that there had been no proper basis for the action ever to have been brought against them and that Mex had never had any intention of proceeding to proof. The proceedings had now been abandoned, and they had been denied the opportunity to vindicate themselves. The Scottish proceedings had commenced in October 2023, around three years after the alleged fraud in relation to the consent order in the BVI. Related proceedings, not involving the Scottish defenders, were then ongoing in Luxembourg and the BVI, but the conspiracy which was being alleged in the Scottish proceedings had not by then been alleged there. The validity of the consent order, and whether Mex's subsidiaries had committed a fraud in obtaining it, was to be the subject of determination after an evidential hearing in the VDHI element of the BVI litigation in February 2024. The existence of the Scottish proceedings was then used successfully to achieve a discharge of that evidential hearing, postponing any determination on whether those subsidiaries had acted fraudulently. The Scottish defenders understood that the party alleging fraud in the BVI proceedings, namely VDHI, was financially unable to continue with the BVI proceedings and that Mex's subsidiary was able in those circumstances to obtain the equivalent of decree by default. That decree was now being appealed by or on behalf of VDHI, funds to do so having been found.

[25] Mex had obtained a section 1 order on the basis of certain averments and arguments that could not be maintained at the motion for recall, which was demonstrative of its unreasonable conduct. As narrated in the opinion issued after the hearing of that motion, Mr Taher had an established history of failing to make full and frank disclosure when seeking interim orders from various courts. The diligence obtained in this case had made it difficult for the Scottish defenders to continue their businesses in anything like a normal fashion, and Mex had brought to the attention of the Scottish defenders' clients the existence

of the worldwide freezing order obtained in England, using it to claim that doing business with those defenders would amount to a contempt of court.

[26] Mex had been ordained by the court to lodge witness statements and documents by 31 January 2025. It had failed to do so. An email sent to the court on its behalf dated 30 January 2025 claimed that it had been "working tirelessly in preparation for filing its evidence". Despite that, no witness statements or further documents had been lodged. In the meantime, the Scottish defenders had continued to incur expenses. The next action from Mex was to seek abandonment. The Scottish defenders' clear view was that these proceedings were a sham, brought with the intention of avoiding an awkward and unwanted evidential hearing in the BVI. That aim appeared to have been attained. It was unsurprising to the Scottish defenders that Mex now sought to abandon at a stage when witness statements would require to be lodged and an evidential hearing in Scotland was on the horizon. Mex could never have justified its case.

[27] The reasons advanced for the abandonment did not stand up to scrutiny, as could be seen from a close examination of a witness statement provided by the COO of the MultiBank Group, Salem Kattoura, in one of the related English proceedings. VDHI's insolvency event had occurred many months previously. It had not been represented in the proceedings here for a considerable time, and nothing about their circumstances justified an abandonment only in March 2025. The Scottish defenders were unaware of any particular change in VDH AG's ability to satisfy any decree despite the surrender of its banking licence as part of a restructuring exercise in January 2025. Mr Kattoura's allegation that Mr Taher considered CSM to be a Ponzi scheme was an example of just the sort of self-referential exercise that had characterised Mex's conduct throughout the proceedings here and elsewhere. No notice had been given of any change in circumstances on the part of the Scottish defenders which could

justify a change of approach in relation to them. Although Mex claimed that the "Engenera" entity in which Melville Consulting Partners Limited was heavily invested, Engenera Green Bond plc, had become insolvent, in fact it was another related entity with a similar name which had done so, as was quite clear from publicly available information. Melville Consulting Partners Limited continued to have substantial net assets, amounting to over £7 million according to its latest (unaudited) accounts to 31 March 2024. The timing of the abandonment in the context of the conduct of the action to date amply justified the inference that the conduct of the action had been unreasonable throughout.

[28] Observations made in the BVI and in the Court of Appeal of England and Wales concerning the support given to Mex's case by some of the documents recovered by the section 1 process simply represented the views of those courts in the context of the particular nature and stage of the proceedings before them; it was up to this court to determine what, if any, role they might play in determining the question now before it.

[29] At all times Mex's case had lacked specification on key issues. By way of example, it had never been clear on what basis the BVI consent order upon which so much turned had been obtained in the first place. Mex had initially claimed that there were underlying loans, but now was saying that that was a misunderstanding. When ordained to provide further specification by the court, it had merely gone through the motions of doing so, saying nothing meaningful. In all the circumstances, the Scottish defenders should not be left significantly out of pocket as a result. Expenses on the agent client, client paying, scale ought to be awarded in order to avoid that.

[30] Turning to the issue of an additional charge, that was sought in both sets of proceedings in terms of rule 5.2 of the 2019 Act of Sederunt, and in particular heads 5.2(6)(a), (b), (c), (e) and (f), for the following reasons:

(a) The complexity of the proceedings and the number, difficulty or novelty of the questions raised

The proceedings concerned an alleged complex unlawful means conspiracy, fraud and inducement of breach of contract, initially involving twelve defenders. The number of issues involved and the complexity of them was, to a large extent, demonstrated by the declarator sought in the commercial action, but was otherwise clear from the summons and defences. Mex relied upon a series of past events in relation to its own business, the business of the defenders and past disputes, most of which did not involve the Scottish defenders, but which required to be investigated and understood by them. As an example, the history and issues surrounding the setting up of the arrangements which were the occasion of the dispute between Mex and the VDH companies were complicated and available documentation was not comprehensive. There was a connection between these proceedings and the proceedings in the BVI and Luxembourg, such that those also required to be investigated and understood, as best as possible. Each material issue in the case was controversial. There was almost no scope for agreement of evidence. Part of the theory advanced by Mex was that the business dealings between certain defenders were connected to or enabled by the alleged conspiracy. This required those business dealings to be explored and explained. The proceedings raised complex factual and legal questions around the application of the law of unlawful means conspiracy and inducement of breach of contract. The issue of loss was in itself difficult, relating to the alleged inability to secure the benefit of the consent order and recovery of legal fees. Complex issues of causation and right of recovery arose, which were again tied into the past and related disputes.

(b) The skill, time and labour and specialised knowledge required of the solicitor

The issues in relation to head (a) were also relevant to this head. The solicitors involved required to understand each of the issues and build up specialised knowledge upon each in order to understand the factual and legal landscape, to liaise with the Scottish defenders and to provide advice. It was often necessary to consult and advise at the weekend on issues arising. There was a general responsibility on the solicitors to be available at short notice and, if necessary, outwith normal working hours.

(c) The number and importance of any documents prepared or perused

The petition had been served with three inventories of productions. The total page number for the inventories was 1400. These documents were all of great importance in considering the merits of the petition and recall of the section 1 order. The documents contained very detailed and often complex information that required to be read carefully and understood in order to represent the Scottish defenders. The dawn raids carried out in accordance with the section 1 order resulted in over 13,000 documents being recovered. Within those documents, a sub-set of around 1100 documents was identified as arguably confidential and/or privileged. In the commercial action Mex's productions alone amounted to 1314 pages. It was necessary to consider each carefully, understand the documents and obtain comments from the Scottish defenders on them. These documents often concerned complex matters relating to past or ongoing litigation, financial dealings and investment vehicles and projects. There were numerous parties involved in these and the relationships and interplay between each required to be understood in order to advise the Scottish defenders. There was no trust between those defenders and

Mex. This increased the importance of each document considered, because Mex's witnesses were not considered to be reliable in respect of any matter. Credibility and reliability were going to be at the heart of the proof scheduled for June 2025.

(e) The importance of the proceedings or the subject matter of the proceedings to the client

The section 1 order resulted in dawn raids at the domestic and business premises of the Scottish defenders. The significant invasion into their privacy was clear. That led to the removal of various electronic items and many thousands of documents being disclosed to Mex. Arrestments were granted against the Scottish defenders, causing obvious inconvenience for them in their daily lives. Worldwide freezing orders were obtained in England, on the strength of the Scottish proceedings. The petition and action were advanced on the basis of fraud and conspiracy. The Scottish defenders were of the clear view that the proceedings had been advanced on a basis known to Mex to be false. It was imperative for them to defend their position against the serious accusations made, and to be vindicated therein. The abandonment denied them that opportunity. The reputations of the Scottish defenders were important to them in their private and business lives. The proceedings had seriously impacted their ability to undertake business and had resulted in missed opportunities. For example, on 6 August 2024 Mex had written to clients or potential clients of the defenders and brought to their attention the worldwide freezing order, under threat that doing business with those defenders could result in contempt of court. The sum sued for in the action was £85 million. Had an award of that magnitude been made, then it is likely that the Scottish defenders would have been sequestrated or

liquidated. In all the circumstances, the proceedings were of the utmost importance to the Scottish defenders.

(f) The amount or value of money or property involved in the proceedings

Mex sought to recover £85 million from the defenders. For each of the Scottish defenders, an award of this amount would have resulted in sequestration or liquidation.

[31] There would, at least in the circumstances of this case, be no overlap between an award of expenses on the agent and client scale and the allowance of an additional fee.

[32] An interim award of expenses in favour of the Scottish defenders should be made, in the amount of £150,000 in each of the petition and commercial action processes. Fees and outlays amounting to £544,415.51 had already been incurred. A relative summary of invoices rendered was produced.

[33] The Scottish defenders should, further, be allowed to uplift and apply to their expenses the sum of £100,000 which Mex had been ordered to lodge by way of caution on their motion, together with accrued interest thereon.

Submissions by Mr Smith

[34] Mr Smith had represented himself throughout the proceedings and his position would therefore be unaffected by the resolution either way of the contentious matters of the scale of the award of the expenses to be made against Mex and the exigibility of an additional fee. He nonetheless travelled from Luxembourg to attend the hearing, and explained the personal and business difficulties in terms of time and expense which had flowed from the litigations, including the adverse effect on his business in consequence of Mex having contacted the Frankfurt Stock Exchange, and ending in an attempt in England to

have him imprisoned for contempt: *Mex Group Worldwide v Ford* [2024] EWHC 3243 (KB); [2024] EWHC 3379 (KB). There had never been a conspiracy; the action had always been all about influencing the outcomes of the BVI litigation.

Submissions for Mr Gollits and VDH AG

[35] On behalf of Mr Gollits and VDH AG, counsel submitted in support of their motion for expenses to be awarded on the agent and client, client paying scale that Mex's conduct of the action had been unreasonable. The relevant circumstances to be considered included the use of the proceedings to postpone a trial in the BVI; the lack of substantive progress since the summons passed the Signet in October 2023; and the use of the action for seeking the expensive and ultimately unsuccessful worldwide freezing order proceedings in England and Wales.

[36] It was acknowledged that, in principle, a pursuer might abandon as of right. However, in considering the reasonableness of abandonment in this case, the court should consider the context. This was a case-managed commercial action making serious allegations of an unlawful means conspiracy, bribes, and dishonesty against the defenders, with a conclusion for payment of £85 million on a joint and several basis, representing an existential threat to all the corporate entities at which it was directed. VDH AG, at the outset of the action, was a regulated entity. The summons had been used as a basis to obtain warrant for a section 1 petition authorising dawn raids on the Scottish defenders. Warrants for diligence on the dependence were obtained. The action was the principal proceeding in the United Kingdom that allowed Mex to seek a worldwide freezing order in the English courts under section 25 of the Civil Jurisdiction and Judgments Act 1982, which was subsequently discharged.

[37] This was not the first time that a MultiBank entity had abandoned litigation concerning the disputed consent order shortly in advance of a trial. A trial had been set down to be heard in the BVI in February 2024, but in January the relevant Mex subsidiary had served a notice of discontinuance as against Mr Gollits and VDH AG. Although an interim award of costs had been paid there was an ongoing dispute in the BVI on the taxation of the whole costs award. In the remaining BVI proceedings, the funds which are or were managed by VDHI, represented by their liquidator, KPMG Tax & Advisory Sàrl, had been granted permission to appeal the order made to strike out the BVI proceedings, so that those proceedings could continue for the benefit of the noteholders. The consent order, the validity of which was being challenged, gave rise to a payment away of over €36 million of noteholders' funds. It was with the recovery of those funds that the liquidator of the funds managed by VDHI was concerned.

[38] Mex's approach had been to engage in extensive ancillary procedure, apparently in support of the present action, all based on affidavit evidence untested by cross-examination; consideration by the courts of that evidence in interlocutory applications was then presented as a "finding" to third parties. There was a serious danger that this sort of conduct involved the UK courts becoming instruments in a form of attritional economic warfare to oppress defenders, particularly given the notorious costs of BVI and English litigation.

[39] Mex's suggestion that the reason for abandonment was the poor financial position of the defenders should be treated with scepticism. Any genuine assessment of the ability of the defenders to satisfy an award of the magnitude sought could and should have been carried out at the start of the proceedings. VDH AG's funds were for the most part held openly in a fiduciary capacity in any event, and so would never have been available to satisfy any decree against it. Its restructuring and the surrender of its banking licence

(partly as a result of the financial strain placed on it by the various litigations mounted by members of the MultiBank group) did not affect the ability of any creditor to enforce claims against it. In the BVI proceedings, it had offered to undertake not to distribute any of its assets to its members until matters were concluded. No such undertaking had been sought in connection with the present proceedings. The defenders considered that the destruction of their financial position was always the principal purpose of the co-ordinated use of multiple international proceedings pursued with vigour at the stage of interim measures, coupled with a scrupulous effort to avoid the substance of the allegations being tested at trial. Such a *modus operandi* was an abuse of process. It posed real dangers to the administration of justice. This court could and should signal its disapproval with an award of expenses on the scale sought.

[40] Mex had made serious allegations of fraud and illegal conduct on the part of Mr Gollits and VDH AG. The allegations had been vigorously defended and the adequacy of the averments challenged. Those defenders challenged the relevancy of large parts of Mex's case. A principal source of that challenge was a formal settlement agreement, negotiated by well-known international lawyers, to which Mex and those defenders were party, the terms of which meant that there would have been nothing to assign in order to ground the Mex Clearing BVI litigation which had supposedly been settled by the controversial consent order. Mex had made no mention of that in its pleadings. The response it ultimately provided about that agreement was adjusted in only after it had been ordained by the court to address the point in terms of the court's interlocutor of 26 September 2024, and was itself unsatisfactory. At the procedural hearing in November 2024, Mr Gollits and VDH AG had lodged a detailed note of argument challenging the relevancy of Mex's averments. Mex had opposed a diet of debate, and the court had indicated the lack

of specification in its case could be cured by the service of witness statements. Those statements were due on 31 January 2025, but never came. The suggestion that Mex had made extensive preparation to lodge the statements was difficult to reconcile with the position articulated by its current solicitors, that they did not know how much preparation had been done in relation to witness statements or what further work was required. In the result, the defenders had been marched all the way up to the top of the hill on an unlawful means conspiracy case containing allegations of dishonesty; they had marshalled their preliminary defence; yet Mex had not obtempered orders to lodge even the rudimentary witness evidence that would allow its own case to be ventilated at trial. Where a challenge was made to the relevancy of averments of fraud or dishonesty, and a pursuer insisted on a proof but then offered no evidence that should be characterised as not even stating a case. That approach provided a well-recognised basis for expenses on the agent-client, client paying scale: *Livingston Football Club Ltd* v *Hogarth* [2024] CSOH 19 at [8].

[41] On the question of an additional charge:

(a) The complexity of the proceedings and the number, difficulty or novelty of the questions raised

The legal basis for the action was fraud, more specifically an unlawful means conspiracy, initially involving twelve defenders with differing interests. The complexity of the pleadings arose out of a complex factual and legal history which was already subject to advanced proceedings in the BVI. The BVI proceedings had been in dependence since 2020 and were heading to trial in February 2024, before the claimant in that action decided to discontinue it against Mr Gollits and VDH AG in January 2024. The content of the claim related to funding for a series of notes issued on exchanges, and the complex – and as yet untried – arrangements whereby

funding was provided to settle one dispute, a multiparty settlement agreement, and then issues which arose in relation to the use of client funds, and the highly unusual circumstances leading to proceedings being raised in the BVI but then immediately settled by way of a consent order.

(b) The skill, time and labour and specialised knowledge required of the solicitor Civil fraud cases with multiple international elements were a specialised category of litigation undertaken by agents with the skill and specialised knowledge to prepare and instruct such litigations. The commercial action was signeted contemporaneously with the instigation of a section 1 petition. The evidence recovered was to be used to supplement the averments in the commercial action. Mr Gollits and VDH AG were not party to the petition and were not provided with copies of the full suite of evidence (approximately 13,000 documents) recovered. Whilst that did mean that agents did not require to read those documents, there was a high degree of risk in tendering advice and taking instructions by the agents which was brought about by the substantial level of "unknowns" recovered by Mex and in its possession. The agents required to coordinate instructions and advice with the German, BVI and English lawyers acting for Mr Gollits and VDH AG. This required a high degree of skill, time and labour due to the need for the clients to co-ordinate their defence of the actions on multiple fronts. Mr Gollits and VDH AG were German. English was not the first language of Mr Gollits and whilst he was able to display a good degree of conversational English, he had stated a preference to his agents to provide all oral evidence in his mother tongue, with English translations and interpretations. The agents required to deploy a high degree of skill in overcoming the language problems to ensure advice tendered to the clients was

properly understood in order that proper and informed instructions could be obtained.

(c) The number and importance of any documents prepared or perused

The Scottish commercial action was preceded by the BVI proceedings and accompanied by the section 1 petition. Prior to Mr Gollits and VDH AG tabling a substantive defence in the commercial action, worldwide freezing orders were sought in the English courts under section 25 of the Civil Jurisdiction and Judgments Act 1982 in support of these proceedings. In each of the litigations, extensive witness testimony in the form of statements and affidavits had been produced. Because the Court of Session proceedings became the principal proceedings, significant quantities of this material had required to be perused. To give some practical indication of the quantity of material, in the English worldwide freezing order proceedings in December 2023 (which formed the background to the drafting of defences) volume 1 of the hearing bundle ran to 6,979 pages, and volume 2 to 2,342 pages. The Court of Appeal judgment in 2024 ran to 198 paragraphs. In the BVI, one of Mex's representatives alone had given over 50 affidavits in support of the various applications. The labour involved on the part of the agents in understanding what was happening in proceedings ancillary to the action was significant.

(e) The importance of the proceedings or the subject matter of the proceedings to the client

Whilst every case was important to a client, in this case, Mr Gollits was an individual accused of participation in an unlawful means conspiracy in an action seeking damages of £85 million. He required to defend his position in order to clear his name. VDH AG was a regulated entity. The allegations of dishonesty, deception

and bribes were very serious. The effect of the litigation, and the importance of vindicating its position, were corroborated by events. At the end of 2024 it chose to surrender its banking authorisation. It was now in the process of a solvent liquidation arising directly from the various court proceedings to which it was a party. It remained liable to its body of creditors and the proper conduct of this litigation was vital in the discharge of such duty. Mr Gollits and VDH AG operated in the financial services industry. There was a serious and substantial defence to try even on the hypothesis that the points articulated in their note of argument as to the relevancy of the entire case were not accepted. The reputation and regulatory requirements imposed on the German defenders was such that these allegations – remaining untried – had in fact had a serious and detrimental effect on their business and reputations.

(f) The amount or value of money or property involved in the proceedings

The damages claimed were £85 million plus interest. On any view this was a substantial commercial litigation at the higher end of the scale of cases typically litigated in the Court of Session. The submission relating to the reputation of Mr Gollits and VDH AG already noted was also relevant to this head.

The percentage uplift allowed under each head should be at the higher end of the usual scale of uplifts.

Submissions for CSM

[42] On behalf of CSM, counsel submitted that it deeply regretted that Mex had eventually abandoned the action after putting each of the defenders to great effort and expense in resisting its claim. Its preference, by no small margin, would have been to put

Mex to proof and to seek decree of absolvitor. It was accepted, however, that Mex was entitled to abandon its action, however unfortunate the result might be. What was sought now was a just disposal of the action, involving an award of agent and client expenses and the allowance of an additional fee.

[43] It was open to the court to deploy its discretion in respect of expenses to demonstrate its displeasure at the conduct of a party. It was trite to state at the outset that party/party expenses did not recover a successful party's whole expenses. It was thought that the usual scale of expenses would see a recovery in the region of 60% in a Court of Session action. CSM's central submission was that it ought to be indemnified by Mex for its expenses, because the action should never have been brought. It was a case wholly without merit, it was raised for an improper purpose, failing which it was conducted unreasonably, failing which it was conducted incompetently. It had, in short, been a waste of the court's and the defenders' time and expense.

[44] The factors that a court would generally take into account in deciding whether to make an award of expenses on an agent and client scale were set out in *McKie*. In this case, Mex's conduct of the litigation had been either, or both, incompetent and unreasonable. There was no cogent reason for a properly prepared action to be abandoned at this stage. The explanation tendered by Mex was not credible. The event of insolvency affecting VDHI had happened many months ago, that affecting VDH AG more recently, but on no logical basis could they be causally linked to the recent abandonment. In any event, CSM's liquidity position had not changed at any relevant point. If Mex was concerned about the liquidity of any of the remaining defenders, it could quite reasonably have abandoned the action against only those defenders which it deemed to be a recovery risk.

[45] The proceedings had been brought in October 2023. That was around three years after the events said to have given rise to the action. There was no cogent explanation for the delay. However, there were ongoing proceedings in the BVI concerned with the validity of the consent order which was central to the present action. The existence of the present proceedings was successfully used by persons and entities connected to Mex to persuade the court in the BVI to postpone a trial on that matter in February 2024. That was their purpose, and it was an improper one. Had the present action proceeded to proof, the defenders might well have been in a position to invite the court to find in fact that it had been an abuse of process. It was regrettable that that opportunity had been denied to them. However, the court was entitled to draw inferences from the background to the raising of these proceedings. Since all that these proceedings seemed to have achieved was a stay in the BVI case, and standing their abandonment for no cogent reason, the court was invited to find that the raising of this action was motivated solely by a desire to achieve that. That was unreasonable conduct. CSM cast no aspersions on counsel and agents who had acted for Mex. It was taken at face value that they would have been acting on instructions and were entitled to assume that Mex was genuine in its desire to ventilate the issues at proof. However, it might be noted in this regard that the turnover of representation for Mex had been vigorous.

[46] The action alleged an unlawful means conspiracy and a range of steps taken by the defenders said to amount to fraud. Those allegations had not been vindicated. CSM's position was that there never had been any proper basis to make those averments at the outset. However, it had been preparing for proof, in keeping with all timetables set by the court, to refute the allegations. Not only were the reputations of the averred conspirators impugned, but they were faced with an £85 million claim. Any defender acting reasonably

would vigorously oppose such claims where they were not admitted. CSM, having gone to entirely reasonable and predictable expense to resist Mex's claim, should not be left out of pocket by the award of expenses on the usual scale. Mex should bear the cost of its own unfounded and unreasonable, failing which incompetent, litigation.

[47] Mex had played fast and loose with the court timetable. CSM had expected it to obtemper the order of the court and lodge witness statements and documents by 31 January 2025. Work to defend the claim continued on behalf of CSM. Senior counsel was engaged to work with existing counsel prior to 31 January 2025, on the basis that the action was proceeding to proof. A significant volume of work continued to be done. Mex had failed to obtemper the order to lodge these documents. A hearing was fixed for 5 March 2025 by the court to discuss the timetable in the action. The day before the hearing, it was intimated to the defenders that Mex would be abandoning. It must have taken the decision to abandon prior to 5 March 2025 and the defenders had all wasted effort and expense from such time until 5 March 2025. It was submitted that, in fact, Mex never intended to go to proof. No witness statements or productions were ever disclosed. Notice of abandonment came the day prior to a procedural hearing. Matters then dragged on further, since no minute of abandonment was actually lodged even by then. CSM had been denied the opportunity to vindicate itself against averments of fraud and serious wrongdoing. In the troubling circumstances of this action, it should not be left out of pocket to any extent.

[48] The reasoning for seeking an additional charge was similar to that which had already been ventilated. The general point advanced was that the litigation – on the face of the summons – was complex and high value, but in reality, ought not to have been brought in the first place. An uplift of at least 15% should be allowed in respect of each of the heads advanced, as follows:

(a) The complexity of the proceedings and the number, difficulty or novelty of the questions raised

An uplift of 15% was sought in this regard. The proceedings were made more complex and more difficult by the conduct of Mex, all as already described. In addition, the underlying claim was itself complex, being one of a conspiracy said to involve twelve parties across various jurisdictions. There were multiple related sets of actions live (or at least not fully disposed of) during the currency of the action. There was a further element of novelty for CSM, in that its precise participation in the conspiracy was never fully specified beyond the receipt of funds said to have been the proceeds of conspiracy. The allegations were complex and interwoven. There required to be serious attention to the history of the various defenders, and examination of how the averred conspiracy could have come into being given the relationships between the various parties. The case was inevitably complex and made all the more so by the vague specification offered by Mex.

(b) The skill, time and labour and specialised knowledge required of the solicitor

An uplift of 15% was sought under this head. For the reasons already stated, agents had spent very considerable periods of time on the case. The firm of solicitors engaged were experienced commercial litigators, but serious attempts had been made to keep the expenses at a reasonable level. In addition, and to some extent as a result of Mex's unreasonable conduct of the litigation, work had also required to be undertaken out of business hours, in order to respond to events occasioned by it (most recently the intimation of abandonment on the afternoon prior to a hearing the next morning).

(c) The number and importance of any documents prepared or perused

An uplift of 15% was sought in this regard. There were 198 productions lodged by the pursuer, extending to 1,335 pages. The time spent considering those had been very great. Vast quantities of time had been spent reading into complex commercial matters. These also required to be considered in the context of what Mex had said in other court actions, to which it and various of the defenders were or are parties.

(e) The importance of the proceedings or the subject matter of the proceedings to the client and (f) the amount or value of money or property involved in the proceedings

An uplift of 15% was sought in relation to each of these heads, which were interlinked and could be considered together. Mex initiated an £85 million claim against the defenders. On any view decree for that sum would have been a financial catastrophe. It was not precisely clear why it had settled upon that sum, but any reasonable defender would – when faced with such a claim – have engaged serious efforts in defending the action. CSM had obtempered every order of the court and had engaged with the process in good faith, had endeavoured to assist the court candidly at each opportunity, and had – despite a reasonable apprehension that these proceedings were simply a device to sist the BVI action – acted as a responsible litigant. This was in stark contrast to Mex's conduct. Any claim of this size would inevitably involve very significant expenditure on legal representation.

Submissions for Mex

[49] On behalf of Mex, senior counsel confirmed that it wished to abandon both sets of proceedings for pragmatic reasons despite remaining confident in its case. It was entitled to do that. It conceded that awards of expenses should be made against it and intended in due

course to meet those awards and seek decree of dismissal of its causes in terms of RCS29.1(b). It opposed the defenders' motions to award those expenses on an agent and client, client paying basis. Something more than mere abandonment required to occur in order to justify the court exercising its unfettered discretion to take that course of action.

[50] It accepted that an additional charge would be justified by reference to: (i) the complexity of the proceedings and the number, difficulty or novelty of the questions raised; (ii) the skill, time and labour and specialised knowledge required of the solicitor; (iii) the amount or value of the money or property involved in the proceedings; (iv) the number and importance of documents prepared or perused; and (v) the importance of the proceedings or the subject matter of the proceedings to the client. It invited the court to bear in mind the rule of thumb (of 10-15% per head) articulated by the First Division in *Centenary 6 Ltd* v *TLT LLP* [2024] CSIH 29, 2024 SLT 1106 at [4], but to apply some discount to reflect the significant duplication in the factual material relied upon under the various heads. On a broad brush basis, a total additional charge of 50% would be appropriate. If, contrary to its primary position, expenses were to be awarded on an agent and client, client paying basis, an additional charge would not be appropriate.

[51] On taxation of an account of expenses on an agent and client, client paying, basis, "all the expenses incurred by the client are allowable except those unreasonably or extravagantly incurred, or unreasonable in amount, the benefit of the doubt being given to the receiving party" (Parliament House Book, note to Rule of Court 42.1). Whilst Mex acknowledged the competence of combining an award of expenses on an agent and client basis with an additional charge – *Trunature Ltd* v *Scotnet (1974) Ltd* [2008] CSIH 33, 2008 SLT 653, 2008 SCLR 522 – on the face of it, such a course would result in a substantial over-compensation.

[52] In relation to the applications for agent and client expenses, there had been significant developments in the closely-related case in the BVI, in which VDHI had made allegations against MBFX and Mr Taher, alleging collusion between Mr Taher and Mr Smith to procure the consent order, which gave rise to the claims of conspiracy and loss in the action before this court. As a result of Wallbank J having seen documents recovered by way of the petition proceedings here (disclosure of which this court had authorised) he had on 24 September 2024 discharged a worldwide freezing order against MBFX, released Mr Taher from related undertakings, and ordered an enquiry into damages thereby caused to MBFX and Mr Taher, on the basis that VDHI had failed to prosecute its claim with reasonable diligence and had failed to provide full and frank disclosure on its *ex parte* application, it being unlikely that the court would have granted the injunctions in question had it been provided with the information that had emerged through the Scottish proceedings. On 14 November 2024 his Lordship had also struck out VDHI's claim and granted summary judgment with costs in favour of MBFX and Mr Taher (albeit that was subject to an appeal at the instance of the liquidator of VDHI's funds), on the basis that the claim had no prospect of success, was a fiction, and that that the accusations and allegations against Mr Taher and MBFX were untenable. Those orders vindicated the position taken by Mex in these proceedings. The allegations that the consent order was the product of improper collusion had been seen off. Mr Gollits and VDH AG had indeed been brought into the BVI proceedings at one point, but those proceedings were discontinued against them after it became apparent that their involvement in matters was best ventilated in the case in Scotland. A costs order was sought against them before the present concerns about the solvency of VDH AG had emerged, but in any event an adverse costs order against them might be useful for set-off purposes.

[53] Mex's decision to abandon the present proceedings had finally been prompted by a change in status of VDH AG. In February 2025, it had been advised that that defender had surrendered its banking licence with effect from 31 December 2024 and was no longer regulated by the German financial services regulator. As from that date it was no longer permitted to conduct any regulated activities, including its main activity as an asset management company, or allowed to receive fees for performing such activities. It had changed its legal status. It would appear that it had entered upon a process of winding up or liquidation, with Mr Gollits appointed as liquidator. Mex had been informed that VDH AG was facing numerous mis-selling claims in the German courts by German noteholders. It had concluded that the realistic prospects of recovering substantial damages and expenses no longer justified the significant ongoing costs and diversion of management time on litigation, particularly given that release of the worldwide freezing order originally granted by Jack J in the BVI had eventually been obtained. The conclusion that the realistic prospects of recovery no longer justified the costs was reinforced by the facts that VDHI had entered insolvency in April 2024 and that Melville Consulting Partners Limited was the 50% owner of an English company, Engenera Green Bonds plc, which appeared also to have become insolvent in 2024. Mex was not in a position to comment on the version of events concerning that company put forward on behalf of the Scottish defenders. The Scottish defenders had confirmed that decree against any of them would result in their insolvency.

[54] The decision to abandon the proceedings had been taken for pragmatic reasons and not by reason of any want of confidence in Mex's case. That confidence had been reinforced by the recoveries made from the Scottish defenders' premises as a result of the section 1 order. The support which those recoveries provided to the case had been acknowledged both by the decisions of Wallbank J in the BVI and by the decision of the Court of Appeal of

England and Wales recalling the worldwide freezing order obtained in that jurisdiction against Mr Gollits and the VDH companies, which had concluded at [58] that "the Scottish documents … provide what appears to be considerable support for the claimant's case". In brief (although the written submission for Mex went into matters in some depth), the recovered documents strongly suggested that the claim that Mex Securities was a creature of the MultiBank Group and/or Mr Taher was false and that, indeed, Mr Smith, Mr Ford, Mr Gollits and the VDH companies appeared to have been involved in making decisions about its corporate governance; that the proposition that Mr Smith was under the control of Mr Taher or MBFX was false; that Mr Smith, Mr Ford and Mr Gollits were all involved in the business of CSM; that Mr Ford was in a position, through Regal, to procure that Mr Gollits would benefit personally from CSM's business; and generally (albeit inferentially) that the alleged conspiracy, or something very similar to it, was likely to have taken place. In *Mex Group Worldwide Ltd* v *Ford* [2024] EWCA Civ 959, Males LJ in the English Court of Appeal had noted at [58] that the recovered documents had the following features:

> "(1) They contain some references to loans having been advanced by the claimant.
>
> (2) They cast doubt on the respondents' case that Mex Securities was controlled by Mr Naser Taher. It appears that Mr Ford, Mr Smith and Mr Gollits were all involved in some way with Mex Securities from as early as November 2019, making decisions without apparent reference to Mr Taher as to who should be on the company's board of directors, and that they continued to have such involvement until at least August 2021.
>
> (3) They suggest that CSM was established in about July 2020 in order to take over from Mex Securities as the issuer of new Notes to be issued to investors on the recommendation of VdH AG; that Mr Ford, Mr Smith and Mr Gollits were the founder members of and partners in CSM, which was indeed named after them; that Mr Smith was merely the nominal shareholder of the company; and that they sought to conceal their involvement in CSM from the claimant.
>
> (4) They suggest that Mr Smith did not simply do what Mr Naser Taher told him to do, and that Mr Ford, Mr Smith and Mr Gollits were in close communication during

> the period when Mr Smith was negotiating the settlement agreement and Consent Order with Mr Taher in Dubai during December 2020.
>
> (5) They suggest that the Luxembourg proceedings were viewed by Mr Ford, Mr Smith and Mr Gollits as a means of targeting Mr Naser Taher and MultiBank.
>
> (6) They suggest that by September 2023 Mr Ford and Mr Smith, at least, saw CSM's role as having been to support VdH AG in legal proceedings with the claimant in Luxembourg and the BVI, and that they made this known to Mr Gollits as a line to take with a more junior employee who was questioning the propriety of VdH AG's relationship with CSM. Mr Gollits did not demur. It will be recalled that in the Luxembourg proceedings, VdHI's case was that Mr Smith had been coerced into agreeing the settlement agreement, while in the BVI VdHI's case was that Mr Smith had wrongfully colluded with Mr Naser Taher in making that agreement.
>
> (7) They demonstrate, at the very least, that Mr Gollits on behalf of VdH AG was prepared to do business with CSM, including placing substantial amounts of clients' money with CSM, for a period of several years after the settlement agreement and Consent Order. If Mr Gollits genuinely believed that Mr Smith had colluded with Mr Naser Taher to cheat VdH AG's clients in the December 2020 negotiations, this would seem incomprehensible."

The law as regards an award of agent and client expenses was set out by Lord Hodge in *McKie*. The Scottish defenders' primary basis for contending that expenses should be awarded on an agent and client basis was their stated belief that there was no proper basis for the action ever to be brought against them. Their contention to that effect was untenable. Mex had been represented throughout the proceedings by experienced senior counsel. The court should proceed on the footing that counsel had a proper basis for the pleadings which they drafted. Following argument in the application for recall of the section 1 order, the court had concluded that Mex had a statable case and that various material relied upon "amply provides an intelligible basis upon which an inference of the existence of the alleged conspiracy might proceed": [2024] CSOH 51 at [49]. Likewise, in the commercial action, the court had described what had been said by Mex as " … a good arguable case, notwithstanding that it will face … challenges and hurdles …": [2024] CSOH 52 at [6]. As already noted, the Court of Appeal of England and Wales had concluded that documents

obtained by virtue of this court's section 1 order provided what appeared to be considerable support for Mex's case. Wallbank J in the BVI had observed that "… the Scottish documents show that the very basis of VDHI's claim is, if I can use the word 'fiction' then I don't think that's an exaggeration. It's a clever construct".

[55] Mex acknowledged that it would not be appropriate for the court to adjudicate definitively on these matters in the context of a hearing on expenses, but it did invite the court to accept, as the other courts involved had done, that the recoveries, on the face of it, provided material support for its case. That conclusion would be destructive of the contention that the case was brought without a proper basis or was a sham.

[56] It was correct that it had initially been claimed on behalf of Mex that it had made loans rather than that it had advanced sums on a basis which was subsequently stultified, but that misunderstanding had been clarified in the pleadings when it was raised by the defenders.

[57] Mex's decision to abandon these proceedings following its recent receipt of information about the change in VDH AG's status did not justify any view that the litigation had always been unfounded. The Rules of Court envisaged that a petitioner or pursuer might properly abandon proceedings, on the footing that it paid the expenses of the respondents or defenders. A responsible litigant kept under review the prospects, not only of success in a litigation, but of ultimate recovery, as well as the continued justification for the costs of litigation, financial and otherwise. That principle was not altered by the nature of the proceedings, or by the fact that provisional and protective orders had been obtained.

[58] The defenders claimed that a prime purpose of the proceedings in this court was to obtain the discharge of an evidential hearing which Mex did not wish to proceed in the BVI proceedings in February 2024. At that time it was still awaiting sight of the recoveries made

pursuant to the section 1 order. The BVI court had acceded to its application to discharge the hearing, and subsequent events had justified that decision, inasmuch as, having seen documents which came to light as a result of the section 1 order, that court had now struck out the VDHI claim.

[59] The defenders also sought support from the failure by Mex to lodge evidence for the June 2025 proof in the commercial action by 31 January, as required by the court-imposed timetable. Mex had already lodged a substantial body of evidence in the course of the proceedings. Its key witnesses had given sworn evidence by affidavit in other proceedings. In January 2025, it had sent material for the preparation of witness statements to its then solicitors, but was already actively considering withdrawing instructions from them and instructing a new firm. It had contacted the new firm to that end. It decided at that time that it should not transfer instructions until its evidence had been filed in accordance with the court's order. It believed that its then solicitors had the preparation of evidence in hand with a view to meeting the court's deadline. It became apparent in the week before 31 January 2025 that that firm would not be in a position to lodge Mex's evidence by that date, and it had suggested asking the court to grant a postponement of the date for doing so. Mex then decided to withdraw instructions from that firm and to instruct its present solicitors. It only thereafter learned of the change of status of VDH AG. It was accepted, however, that the indisputable fact that it had not lodged the required material timeously might be a factor in favour of the making of an order for expenses on the agent and client scale.

[60] Those considerations disposed of the contentions advanced by Mr Gollits and VDH AG that there had been an abuse of process and oppression. Those defenders sought to make something of the fact that Mex sought ancillary protection in the English courts by

way of a worldwide freezing order against them. The order against those defenders had been discharged and Mex's appeal against that discharge failed, though the Court of Appeal concluded that it had a good arguable case. The English courts could be relied upon to deal with any questions of costs which arose in relation to those proceedings.

[61] The other considerations advanced by the defenders did not justify an award on an agent and client basis. Whilst it was correct that, at the motion for recall of the section 1 order and the arrestments the court had not accepted certain averments and arguments advanced by Mex, it had refused the recall motions. In the event, the section 1 order resulted in the production of documents which provided substantial support to Mex's claim and vindicated the court's decision. The other, more minor matters raised and relied upon by the defenders had been dealt with in the pleadings or correspondence, as required by the court, and nothing material could be taken from them.

Decision

Agent and Client Expenses

[62] The description of the kinds of circumstance which might justify an award of expenses on the agent and client, client paying scale provided by Lord Hodge in *McKie* is most useful, but it should be borne in mind that it sets out examples only of when the interests of justice may require such an award, the purpose of which is often (if slightly inaccurately) described as being to indemnify the receiving party in respect of the expenses which have been laid out in the litigation in question, rather than leaving him out of pocket by being able to recover only such expenses as a hypothetically prudent litigant would have incurred. The ultimate basis upon which the court will exercise its discretion as to the scale of expenses to be awarded is a consideration of what the interests of justice require in that

connection in all the circumstances of the case. The proposition, pitched at that level of generality, is of less practical utility than the formulations in *McKie*, but it is nonetheless important not to lose sight of the wood for the trees, particularly if procrustean efforts to fit the case to the specific examples in *McKie* may thereby be avoided. I did not understand counsel for any party to demur from the proposition as so expressed.

[63] Considering first of all the merits of the action (the summons in which formed the narrative upon which the petition necessarily proceeded), it is not difficult to see why the defenders, circumstanced as they were when faced with very serious reputational and ruinous financial claims, might well subjectively have regarded the litigations as a device to influence the progress of the ongoing BVI action and as advancing claims which it was never intended to make good, particularly having regard to the timing of the institution of the Scottish proceedings, the lack of any allegation of the supposed conspiracy in any of the previous litigations, and the eventual failure (in unexplained circumstances) on the part of Mex to produce any witness statements. I did, however, hold in the recall motions in both Scottish processes that the tests required to sustain the validity of the section 1 order and the diligence which had been allowed to proceed on the dependence of the action were met, and without seeking to recapitulate the precise nature of those tests, which were fully analysed in my opinions at [2024] CSOH 51 and [2024] CSOH 52, that involved the conclusion that Mex had at least a potentially sustainable narrative to put forward. Its present agents and counsel were understandably unable to say very much about exactly how it came to pass that no witness statements were lodged by Mex pre-abandonment or whether all the material necessary for their preparation had indeed been timeously provided to the agents previously instructed, and I consider that it would be invidious to speculate on that matter.

[64] I was not asked in the course of the proceedings to form any view on the significance of the documents recovered by the section 1 petition process, although I was very familiar with their nature, having personally carried out the exercise of determining the claims of privilege and confidentiality which were advanced by those from whom they had been seized. It was a substantial part of Mex's position in the expenses hearing that those documents provided substantial, if retrospective, support for the case which it had put forward, and that that had been affirmed by Wallbank J in the BVI High Court and by the English Court of Appeal in the proceedings for discharge of the worldwide freezing order originally granted in the High Court there by Lavender J against Mr Gollits and VDH AG.

[65] However, what was said by the judges who considered the recoveries in those contexts requires to be carefully read and considered in order properly to evaluate that submission. Considering first the BVI proceedings, Wallbank J dealt first, on 24 September 2024, with the applications of MBFX and Mr Taher to be discharged from the worldwide freezing order granted against MBFX at the instance of VDHI by Jack J on 26 April 2021, and from related undertakings on the part of Mr Taher. No formal written judgment was issued, and I was simply provided with an official transcript of what was said by Wallbank J in granting those applications. His Lordship was evidently much exercised by that fact that a Herr von Boetticher, the owner of VDHI (which by then was in an insolvency process), was no longer providing it with funds to conduct the BVI litigation, but that the worldwide freezing order and undertakings remained in place while the litigation itself was, as his Lordship put it, in stasis. That was plainly an unacceptable situation and appears to have been the driving force behind the decision which was made to grant the applications. There was also an issue about the fullness and frankness of the disclosure which VDHI had made in obtaining the order in the first place. Neither VDHI nor its noteholders were able to make

any substantive submissions at the hearing. What was said about the documentary recoveries in the section 1 petition here was that they showed that it was not true that Mr Smith was in collusion with Mr Taher. The relationship between Mr Smith and Mr Gollits was described as "complicated and ambiguous in many respects" (an observation which in my view might usefully be generalised into a comment about the Scottish proceedings as a whole) and it was said about the Scottish recoveries that "It may very well be that when taken in the round, there are interesting details and nuances to the story on both sides that might slightly color the notes that various people are singing". I respectfully agree, but that stage of the BVI proceedings takes Mex nowhere for my purposes, since the rebuttal of the suggestion that Mr Smith and Mr Taher were in cahoots in no way establishes the truth of the competing narrative that the conspiracy alleged by Mex actually took place.

[66] Matters might be thought to improve somewhat for Mex on a consideration of the next episode before Wallbank J, when on 14 November 2024 he struck out VDHI's claim in the BVI application altogether. The Mex interest was represented at the hearing, and affidavits from Mr Kattoura and Mr Taher relied upon, but VDHI itself remained unable to make any representations and an application on behalf of its noteholders to do so was refused on the basis that they had left it too late to apply for that privilege. The result, as his Lordship noted, was that "the application to strike out is unopposed and that is grounds enough in which the primary relief being sought ought to be granted". Wallbank J went on to say that the application to strike out would also have been granted on its substantive merits, but the transcript is, to my eyes at least, somewhat unclear as to which of his Lordship's comments are a recapitulation of the arguments advanced by the Mex interest in that connection and which represent his own conclusions. If one treats all of what was said as conveying the view which his Lordship took of the import of the recovered documents,

then it would indeed appear that he regarded them as in substance supporting the existence of the alleged conspiracy. On the other hand, his Lordship clearly stated that "VDHI's case that the Dubai agreement and the Consent Order were the result of collusion is untenable. That's all the documents show" and that "the documents completely shoot the basis out from underneath the VDHI claim and that is what they do". If that truly represents the substance of Wallbank J's own views as to what the documents established (and it will be borne in mind that that was all he needed to decide in order to strike out VDHI's claim) then matters are not in substance moved on from the position which pertained after the September hearing; VDHI's claim was displaced, but that in itself establishes little or nothing about the veracity of Mex's claim in these proceedings.

[67] Turning to the judgments in the English Court of Appeal, Males LJ concluded that the documents recovered by way of the section 1 process cast considerable doubt on the truthfulness of Mr Gollits' evidence (i.e. effectively the same conclusion as had been reached by Wallbank J). The passage in his judgment most supportive of the Mex position was set out by its counsel in his submissions to me, and has been quoted above. Immediately before that passage, however, his Lordship had said this:

> "[57] For my part, I agree that there are clear difficulties with both sides' case theories. The claimant's case is that it advanced money to Mex Securities by way of loan and that it was entitled to demand repayment when the request was made for withdrawal of funds from the VdHI Notes. That is the premise for the Consent Order in the BVI, which is said to be a genuine settlement. But no loan agreement has been produced, let alone an agreement providing for repayment to be accelerated in these circumstances. Moreover, it is not clear why proceedings in the BVI were necessary at all if Mex Securities was willing to concede the claim within a matter of days as the claimant says that it was. I am therefore sceptical about the claimant's claim. I agree that there are some indications that the Consent Order was not the result of a genuine settlement, but (as the respondents allege) a device to enable the claimant to withdraw funds at the expense of Noteholders after Mr Naser Taher was annoyed to be told that investment in gold and precious metals was no longer allowed and that funds would as a result have to be withdrawn from the Notes."

His Lordship's view was that Mex had a good arguable case in the context in which that phrase is used in proceedings in England concerning the grant and discharge of worldwide freezing orders, but he also observed (at [7]) that the true facts would be for this court to determine.

[68] Coulson LJ's judgment dealt principally with matters other than the import of the Scottish documents, but he agreed at [190] with what I had said in my opinion [2024] CSOH 51, 2024 SLT 901 at [45(5)], that "decisions made by judges in other jurisdictions in litigation between different parties and dealing with different material can have but very limited weight in informing the decisions of this court, especially in procedural matters", adding that he deprecated the notion that courts should be asked to "undertake a laborious textual analysis of another judgment, in another case, in a different jurisdiction, based on different documents and different arguments, advanced by different parties". I in turn respectfully agree with him. Sir Julian Flaux C agreed with both of the other judges constituting the court.

[69] Turning to the more specific issues reflecting on the merits of Mex's case which the defenders raised before me, it was conceded on its behalf that the original narration that Mex had advanced loans which the Mex Clearing BVI action was designed to recover was incorrect. Again, however, the impact of that concession on the issue I have to decide is less than clear cut. Mex claims that it was told by its then general counsel, Adam Duthie, that it should characterise the sums which it had laid out in getting to the position in which it found itself in late 2020 as such loans. Although I do not think that it has ever been said directly in the Scottish proceedings that Mex now treats Mr Duthie as a co-conspirator, it is plain that it regards him as having at least facilitated the conspiracy which it alleges, in connection with which view even more satellite litigation was launched – *Mex Group*

Worldwide Ltd v *Duthie* [2025] EWHC 426 (KB). The result is that it is difficult to take very much, if anything, in isolation, from the change of position on the true basis of the Mex Clearing BVI claim which was forced upon Mex in the course of the action.

[70] The submission by Mr Gollits and VDH AG that the claims underlying the Mex Clearing BVI action had been compromised by way of a settlement agreement, and therefore could never have validly been assigned to Mex Clearing in the first place, is similarly difficult to deal with separately from the merits of the action and the defences as a whole. Mex eventually advanced a position on why no such settlement in fact barred its claim which may or may not have transpired to have force when all of the relevant surrounding facts were established. That was why I declined, when asked to do so in November 2024, to allow this particular matter to be debated independently of a proof of the averments of the parties at large, although it was made clear that it would have to be addressed specifically in the Mex witness statements which in the event never came. As matters stand, then, any of the parties to this element of the dispute might ultimately have succeeded in its contentions, but none yet has. Establishment of the binding effect of the settlement agreement could have had a significant impact on the outcome of the litigation more generally, but that too must now remain a matter of speculation.

[71] In summary on the question of the merits of the action, at an early stage in these proceedings, at least by the close of the hearing on the recall applications in April 2024, I formed the provisional view that there was likely to be a great deal more to the dispute than that which the positions taken up in the parties' pleadings disclosed, and that the whole truth would, if ever, only be expiscated once the materials presented to the court had been put through the crucible of proof. Nothing that I have seen or heard since then, whether in the Scottish proceedings or otherwise, has caused me to alter that view. For present

purposes, that means that I should not proceed on the basis that, if a proof had taken place, Mex would probably have failed in making out its case to at least some material extent.

[72] Turning to Mex's stated reasons for abandonment, it is difficult to see that the travails of the VDH companies would have led a reasonable person to abandon the action in March 2025. VDHI had become insolvent nearly a year previously, in April 2024. VDH AG's restructuring was much more recent, but it is unclear that it made any difference to what might have been expected to be recovered from it by a person in Mex's position, and no undertaking not to return funds to shareholders, such as that which had been offered in the BVI litigation, was even sought by Mex in the context of the Scottish proceedings. The apparent misunderstanding on the part of Mex as to the worth of Engenera Green Bonds plc and the consequent effect on the value of Melville Consulting Partners Limited might have given it pause for (mistaken) thought, but looking at matters only slightly more deeply, the lack of any vouching by the point of abandonment for Mex's claimed losses and the causative link between any actions of the defenders and any actual losses raises clear and unanswered questions as to whether an obligation on the part of the defenders to make reparation would in any event have been made out, if so to what extent, and whether Mex actually ever genuinely thought that it stood to receive very substantial sums from the prosecution of the action in the first place.

[73] What had undoubtedly changed by early 2025 was the situation in the BVI. VHDI's claim there had been seen off, first by the discharge of the worldwide freezing order against MBFX and the release of Mr Taher's undertakings in September 2024, and then by the striking out of the claim generally in November of that year. It followed that the reputational risk and practical inconvenience arising from the formal allegation in the BVI proceedings that Mr Taher had set up the Dubai agreement and the consequent consent

order for nefarious purposes were, at last, no longer live considerations. Having had at least some opportunity in the course of the proceedings before me to observe the apparent characters of and driving forces behind its main players, I consider that the removal of that bone of contention from the overall dispute is likely to have played at least as much of a role in the abandonment of the Scottish proceedings as the financial considerations which were actually put forward as being its cause. However, exactly why the abandonment took place when it did falls to be added to the long list of unanswered questions surrounding the litigation as a whole.

[74] Turning from imponderable elements in the sequence of events to clear facts, the allegations made by Mex in the action were of a very serious kind, amounting to claims of the deliberate commission of economic delicts in the shadow of several varieties of fraud. Although it is fair to say that the defenders enjoyed a range of reputations at the start of proceedings, each might reasonably have been expected to resist those allegations as forcefully as they could, and – so far as their resources permitted – not to be particularly circumspect about whether every penny spent in doing so was spent necessarily and prudently.

[75] The amount sought from the defenders jointly and severally as damages was, equally, such that it does not lie in Mex's mouth to say that they ought not to have done everything they properly could to resist it, even if they may have harboured doubts, as I do, as to whether and if so how far Mex might succeed in establishing its pecuniary claim.

[76] Moreover, the adverse effect of the action's very existence on the businesses of the defenders (and, in the case of those against whom the dawn raids were mounted, their personal lives and privacy) was very considerable, as each submitted. The action was used as a basis for the dawn raids, for the diligence on the dependence which this court granted,

and for the worldwide freezing order granted (though eventually discharged) in England. I also see no reason to doubt the defenders' claims that, to some extent at least, Mex weaponised the existence of the action by reporting its existence to the markets in which they were active, with a view to discouraging those who might otherwise have dealt with them from doing so.

[77] All of these features of the litigation, considered in the round, far remove it from the general run of commercial cases where a dispute arising in the ordinary course of trade is ventilated and determined in a fittingly moderate and restrained manner. That is the first pillar supporting the conclusion that an award of expenses on the ordinary, party/party scale may not justly reflect the sums appropriately spent by the defenders in seeking to advance their own positions.

[78] The other pillar supporting that conclusion is that, relatively late in the day, and thus after a great deal of trouble and expense had been caused to the defenders, Mex decided for no demonstrably satisfactory reason not to attempt to establish its allegations. Had it been able to show, for example, that a central witness had unexpectedly changed his position on a decisive matter in the course of precognition, or that a document had emerged from a previously unsearched repository which seriously undermined the facts said to give rise to the inferential existence of the alleged conspiracy, then it might have been possible to regard its abandonment as proper and responsible. What in fact was said, albeit not in quite so many words, was that it had reassessed the situation in the light of ongoing developments and had decided that, from its own point of view, the game was no longer worth the candle. That was its prerogative, but it had the effect that the interests of the defenders in establishing their position could no longer be vindicated and were effectively subordinated

to Mex's assessment of where its own interests lay. Again, in such circumstances an award of expenses on the party/party scale risks failing to reflect the justice of the situation.

[79] It is the combination of these specific matters, rather than any of the wider range of considerations put before me by the parties, which results in the conclusion that the interests of justice require an award of expenses on a scale which will not leave the defenders out of pocket to any significant extent, and for those reasons that I allowed recovery on the agent and client, client paying scale.

Additional fee

[80] Mex accepted – in my view, rightly – that the various circumstances narrated by the affected defenders would in the abstract justify the allowance of an additional fee by reference to each of the factors relied upon in terms of the 2019 Act of Sederunt, but objected that to allow such a fee along with an award of expenses on the agent and client scale would be liable to over-compensate the defenders. However, that contention is too broadly stated. As Lord Justice Clerk Gill observed in *Trunature* at [9], "a taxation of an account of fees and outlays on an agent and client basis and an assessment of an additional fee are two separate exercises carried out on different principles" (see also Lord Marnoch at [22]). An award of expenses on the agent and client scale is designed, as already explained, to allow the taxation of an account of expenses to proceed on a basis, and to make the paying party responsible in an amount, which will meet the interests of justice in all the circumstances of the case, and a decision to make an award on that scale is capable of being influenced by a wide and indefinite range of factors. The allowance of an additional fee, on the other hand, is designed to allow the fees charged by a party's solicitor to reflect the responsibility undertaken by him in the conduct of the proceedings (as Rule 5.2(3) of the Act of Sederunt

states), and the decision to allow such a fee is capable of being influenced only by the factors set out in Rule 5.2(6).

[81] For my own part, I would slightly gloss the suggestion that an additional fee is simply reflective of the responsibility undertaken by the solicitor; factor (c) and to some extent (b) might more accurately be described as reflective of burdens on the solicitor rather than responsibility *per se*, and factor (g) seems to me to be, rather, a secular reflection in this context of the beatitude bestowing grace on the peacemakers. Be that as it may, as a matter of generality at least the two expedients of an award on the agent and client scale and the allowance of an additional fee are designed to deal with different situations and there is no necessary overlap between them. There may be exceptional cases where the reasons for an award on the agent and client scale are mirrored by a factor listed as potentially justifying an additional fee, for example where a party has acted unreasonably in refusing to engage in attempts to settle or limit the scope of proceedings, and where the solicitor for the other party also seeks an additional fee under factor (g), but even in such situations careful consideration would be needed as to whether there would truly be an unacceptable overlap in granting applications for both of the available expedients. No such question arises in this case, however, and there is accordingly no reason why the additional fee motions should not be granted in relation to each of the requested factors in combination with the agent and client general award. Each of the relevant factors was copiously reflected in the facts of the case, and that justified a correspondingly ample enhancement of 15% in respect of each such factor with no discount to reflect the multiple grounds allowable. The total enhancement of 75% is well within the acceptable overall bounds for the allowance of an additional fee.

Caution and interim fee order

[82] Mex found caution in the sum of £100,000 at a relatively early stage in proceedings on the motion of the Scottish defenders, and their application for the release of that sum to defray their expenses was unopposed by the other defenders and not capable of being effectively resisted by Mex.

[83] The Scottish defenders also sought an interim expenses award against Mex in the sum of £150,000 in each of the action and petition processes. Although no Rule of Court deals with the matter, and such awards are by no means the norm in our courts, they are competent: *Martin & Co, Petitioners* [2013] CSOH 25. The rationale for making them, as explained in *Mars UK Ltd* v *Teknowledge Ltd* [1999] 2 Costs LR 44, [2000] FSR 138 per Jacob J, is that a party entitled to payment of his expenses is left standing out of them only because of the delays inherent in concluding any necessary taxation, and that it may well be just in such circumstances to order a payment on account in a sum which he will almost certainly be found entitled to collect when the assessment process is completed. If it is necessary to show special reasons for making such an award, then in this case the likely complexity and length of any necessary taxation, coupled with the fact that Mex is formally domiciled in Hong Kong but may not have any realisable assets there, represent such reasons. I was provided with documentation showing that the Scottish defenders have incurred liabilities to their agents in the amount of £544,415 over the two processes, with a further element of unbilled work in progress. Given that an award of expenses in favour of the Scottish defenders is being made on the agent and client scale, and that a total uplift of 75% is to be allowed on that element of their total outlays which represents the solicitors' own fees (amounting at present to around £280,000 before any enhancement), an interim award of expenses in the sum of £300,000 is very comfortably below any sum likely to be agreed or

found due after taxation. Although Mex opposed the grant of an order for interim payment, it was unable to advance any cogent reason why such an order should not be made. I made the order requested by the Scottish defenders and understand that, as at the date of the writing of this opinion, it has already been satisfied by Mex. None of the other defenders sought a similar interim order.