SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2023] SC EDIN 43

PIC-PN201-23

JUDGMENT OF SHERIFF IAIN W NICOL

in the cause

CHARLES PATERSON

Pursuer

against

(FIRST) TOPEK LIMITED
(SECOND) MULTIPLEX CONSTRUCTION EUROPE LIMITED
(THIRD) SES (ENGINEERING SERVICES) LIMITED

Defenders

Pursuer: Chan, solicitor; Slater and Gordon (Scotland) Ltd, Edinburgh
First Defender: McMullen, Solicito; McMullen Law Limited, Edinburgh
Third Defender: Quinn, Solicitor; Keoghs Scotland LLP, Glasgow

EDINBURGH, 21 November 2023

Procedural background

[1] This case called on the opposed motions' roll of 30 October 2023 for determination of two motions. The pursuer's motion sought decree in terms of the first defender's tender and pursuer's acceptance with certification of a skilled person. It also sought decree of absolvitor in favour of the second and third defenders, a finding of no expenses due to or by the pursuer and second defender and to fix a hearing on expenses in relation to the third defender. Opposition was lodged by the third defender on the basis that, in effect, the pursuer was seeking to abandon his claim against the third defender and as such a minute of abandonment should be lodged. In advance of the hearing, the pursuer duly lodged a

minute of abandonment. The minute stated that there should be a finding of no expenses due to or by the pursuer and third defender. This aspect was opposed by the third defender.

[2] The third defender's motion moved the court in terms of OCR 31A.2 (2)(d) to dis-apply the rules on Qualified One-Way Cost Shifting on the basis that the pursuer was abandoning the action against the third defender. It sought an award of expenses of process against the pursuer in favour of the third defender.

[3] The pursuer's notice of opposition stated:

> "The first defender's position prior to issuing proceedings was that the galvanised ductwork had been provided by and left on the roof by the third defender, and that the accident was therefore the third defender's fault. They maintained that stance from inception of proceedings until settlement. The pursuer would be entitled to seek a probation on that."

[4] In response, the third defender submitted that, as the pursuer is abandoning his case against the third defender, the ground in OCR 31A.2(2)(d) is met. It was further submitted that, in the exercise of the court's discretion under OCR 31A.3 as to whether to make an award of expenses, the Court should consider the following factors:

(i) the pursuer did not intimate any claim to the third defender until around 17 January 2022, around 3.5 weeks prior to the triennium. When intimating the claim, the pursuer proposed to deal with same in terms of the Compulsory Pre-Action Protocol (CPAP). The third defender's solicitors responded on 18 January 2023 acknowledging the letter and confirming agreement to the matter proceeding under CPAP. The pursuer did not seek an extension of the impending triennium. The Initial Writ was served on the third defender on 26 January 2023, around 1 week later. In terms of para [9] of CPAP, the pursuer ought to have applied for a sist to allow the stages of the protocol to be followed as the matter was raised for limitation.

The pursuer failed to do so. The pursuer was therefore in breach of CPAP and the pursuer's failure and breach caused additional expense. In terms of OCR 3A.3, where a party fails without just cause to comply with the requirements of CPAP, the Sheriff may make an award of expenses against that party.

(ii) standing that it appears the pursuer had not finalised enquiries into liability at the point of litigation (given intimation of a claim to the third defender 3.5 weeks prior to the triennium), it would have been reasonable and sensible in any event for the pursuer to sist the action and allow responses from the respective defenders, disclosure of medical evidence (see point (iii) below) and enquiries into liability to be finalised. It appears the pursuer has, in essence, forced themselves against the triennium resulting in them convening various unnecessary defenders to the action and then taking no further action to mitigate the cost of the litigation. Their conduct per point (iii) below appears to have actually increased the cost of the litigation.

(iii) the pursuer delayed disclosing medical evidence in breach of the protocol and practice notes of this court. A report was available on 8 December 2022 but was not disclosed until 14 June 2023 – over 6 months later. Approximately 7 weeks after that the first defender lodged a tender which settled the action. It seems very likely that had medical evidence been disclosed timeously, the matter would have resolved at reduced expense to all parties at a much earlier stage. If the pursuer had sisted the matter per (i) & (ii) the cost to the parties would have been far less significant. The pursuer did not do so and accordingly caused significant increased expense in the cause.

(iv) the third defender lodged defences on 2 March 2023 denying liability and expressly averred that ductwork, which fell and caused injury as pled on Record,

was stacked by the first defender and that the first defender (the pursuer's employer) should not have commenced work if materials were in their surrounds. The third defender adopted a consistent position from the outset of proceedings in denying any breach of duty.

(v) the third defender's position was that the claim as directed against them was without merit. Accordingly, in the spirit of compromise the third defender invited the pursuer to consider abandoning the claim against the third defender on a no expenses basis as early as 21 April 2023. That proposal was rejected.

(vi) the above invitation was restated/refreshed to the pursuer on 26 May 2023 following a change of handler at the pursuer's agents, again in the spirit of compromise to allow the new handler to take a fresh view. The pursuer was again not minded to abandon the claim at this second opportunity.

(vii) at no stage did the first or second defenders aver factual averments to allege there was any fault on the part of the third defender.

The court was referred to the following authorities on behalf of the third defender:

i ***Mackintosh* v *Galbraith and Arthur* (1900) 3 F. 66*:***

[5] It was argued by a successful defender that the pursuer was not entitled to convene several defenders and leave them to fight out, at their own expense, the question of which was liable. He was bound to know and select his proper objector and if he convened a defender against whom he had no claim, he must pay the [successful] defender's expenses himself.

[6] The pursuers argued that conflicting positions taken by the two defenders rendered it necessary to call both. The pursuers could not know until the proof as to which was liable and were not bound to put themselves in the position of having to decide between the two.

[7] The Lord Justice Clerk stated at page 68:

> …."the pursuer might, had he exercised due care in his inquiries, have ascertained that the case he truly had was not against G but solely against A. I do not therefore think that the case is one in which the one defender who was in the wrong should be made to pay the expenses of a defender who should not have been convened in the case, and if convened should have been allowed to be set free of the case at once.
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> ….the proper person to pay G's expenses is the pursuer who brought and pressed the case against him."

[8] Lord Trayner at page 70 stated:

> "….the pursuer having before him the conflicting views of the two defenders, should have informed himself of where the truth lay, and directed his claim, and insisted on his claim, against the person (and him only) who according to his information, was responsible. I do not think a pursuer is entitled to convene two or more defenders who each and all deny liability and say that liability lies on one or other of them. He must select his debtor and proceed against him. If he takes the other course – the course adopted here – he does so at the risk of being found liable in expenses to those defenders who were not his debtors and against whom consequently no action should have been brought."

[9] Lord Moncrieff at page 71 stated:

> "Where the pursuer convenes two defenders, I do not doubt that in certain circumstances it is in the discretion of the court in the event of one defender being found liable and the other not, to find the unsuccessful defender liable in expenses not only to the pursuer, but to the successful defender.
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> ……..such practice as to expenses is exceptional though not incompetent, the general rule being that if a pursuer convenes two defenders and one is assoilzied, the pursuer, and not the unsuccessful defender, pays the expenses of the successful defender."

ii ***McRae* v *Screwfix Direct & Royal Mail* [2023] SC EDIN 28:**

[10] Sheriff Fife confirmed in his decision at paras [13] and [15] that the determination of an application under rule 31A.2(1) is at the discretion of the sheriff and that discretion is not

qualified in any way. The court was not satisfied that, in the circumstances of that case, it's discretion should be exercised in the pursuer's favour.

iii McPhail (4th Edition) paras [14.19] – [14.34]:

[11] The following paragraphs were highlighted:

> "14.19 As soon as the initial writ is served the action is in dependence, and the pursuer, and when defences are lodged the defender, "become subject to the procedure of the court and neither can escape from its toils until the action is judicially disposed of". If either party wishes to withdraw from the action, it is not merely discourteous but imprudent simply to default, for example, by failing to implement an order of court or failing to appear or to be represented at a peremptory diet, since to do so is to invite the consequences of default. The correct practice is to withdraw according to the established forms of procedure and subject to such conditions as to expenses and the like as the sheriff may lawfully impose. A pursuer may initiate his withdrawal by abandonment of the cause.
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> 14.20 A pursuer may abandon an action either at common law (although this is unusual in modern practice) or more frequently in terms of r.23.1. The pursuer may wish to abandon for a variety of reasons. There may be no right of action at all, the wrong form of action has been adopted, or that the evidence in support of the claim cannot be produced. In order to determine which is the appropriate mode of abandonment, it is necessary for the pursuer to decide whether to reserve the right to raise a further action against the defender. If the pursuer need not do so, the pursuer should abandon either at common law or under r.23.1(1)(a), when the court may grant the defender decree of absolvitor.
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> 14.22 The pursuer may give up his action at common law without reservation at any stage of the cause before decree of absolvitor or dismissal is pronounced. The sheriff has, however, a full discretion when allowing abandonment to pronounce decree of absolvitor or dismissal and to attach any condition to the decree. The appropriate decree is normally, but not invariably, one of absolvitor, and the pursuer is normally found liable in expenses. Along with the minute should be lodged a motion stating exactly what it is the pursuer wishes the court to do. A pursuer may abandon at common law against one of several defenders.
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> 14.23 It is also possible for there to be constructive abandonment, as where the pursuer lodges a minute which is not quite accurately framed, or where the pursuer intimates at the bar that he does not intend to proceed further in the action and moves the sheriff to assoilzie the defender."

iv *Mitchell* v *Redpath Engineering Ltd* 1990 SLT 259:

[12] A steel erector injured in a fall at work raised an action against his employers. Thereafter by minute of amendment the pursuer convened the owners of the site where the accident had occurred as second defenders. The first defenders lodged a minute of tender offering £5,000 "with the taxed expenses of the action to date". The tender was accepted and decree pronounced against the first defenders. The second defenders were assoilzied and the pursuer found liable in their expenses. The pursuer contended that he was entitled to relief from the first defenders in respect of those expenses.

[13] It was held:

(1) that where a pursuer convened two defenders and one was assoilzied, the general rule was that the pursuer, and not the unsuccessful defender, was liable for the expenses of the successful defender (p. 260E);

(2) that the general rule did not apply where the first defender in his defence of the case induced the pursuer to convene a second defender as a matter of prudent tactics (p. 260E-G);

(3) that the words used in the minute of tender would not exclude any right of relief of the pursuer for expenses (p. 260G);

(4) that there was nothing in the first defenders' averments which should have caused the pursuer, as a matter of prudent tactics, to call the second defenders, the pursuer's case against the two defenders being separate and distinct and the first defenders making no averment of fault directed against the second defenders (p. 261C and E); and pursuer found not entitled to relief.

Submissions for pursuer:

[14] The pursuer's agent accepted that OCR 31A.2 (2)(d) was engaged because the pursuer was abandoning against the third defender. It was accepted that in normal circumstances that would justify the dis-application of QOCS and lead to an award of expenses in favour of the third defender. However, it was argued, that exceptional circumstances arose in this case which should lead to the court exercising its discretion not to dis-apply QOCS.

[15] The pursuer proposed that the issues be looked at in two stages, firstly whether exceptional circumstances exist and, if so, whether they justify the court exercising its discretion not to find the pursuer liable for the third defender's expenses.

[16] The pursuer argued that exceptional circumstances could take the form of being induced to raise against one defender by another defender as per *Young* v *Aviva Insurance*, (considered below at paras [33] to [39]).

[17] It was argued that exceptional circumstances did arise in the present case because the first defender repudiated the claim pre-litigation and expressly blamed the third defender for causing the accident. Reference was made to pursuer's productions, 5/12 of process, consisting of an e-mail chain between the pursuer's agent and first defender's agent commencing on 18 May 2022, summarised below.

[18] Reference was made to an Accident Investigation Report, prepared on behalf of Topek, lodged as part of pursuer's inventory, 5/3 of process, which included:

i in section 2:

> "A substantial quantity of galvanised ductwork had been poorly stored on the roof area by SES Engineering Services (SES). Various previous requests for improved segregation of materials from the work area had been made by Topek. The Topek labourers had begun to relocate the ductwork sections themselves. However upon doing so were stopped by Multiplex Site Management who intervened and arranged

for the appropriate sub-contractor (SES), responsible for the ductwork, to attend and re-locate to make the work space available for Topek."

ii in section 5: The ducting pieces were double stacked. The ducting was not safely tethered by SES.

[19] This was said to clearly point the finger of blame at the third defender, thereby inducing the pursuer to include them in the litigation which followed. The first defender's position did not change post litigation and they maintained a consistent approach of blaming the third defender.

[20] In relation to the criticism levelled by the third defender that the claim was only intimated 3½ weeks prior to the triennium and that no steps were taken to sist the action, this made no difference to the extent of the court procedure required as the third defender was always going to deny liability. The same court procedure would have been required even if CPAP had been fully complied with.

[21] It was further argued that at no time did the third defender propose an extension of the timebar to enable CPAP to be complied with, nor did they ask for a sist once the action was raised. It was open for them to do so if they felt there was time required to investigate.

[22] In relation to the late disclosure of medical evidence, there was a dispute on liability and, as such, the pursuer's agent had no instructions to disclose medical evidence. The medical evidence was disclosed on 31 May 2023, 14 days after the timetable was varied. Even if the medical evidence had been disclosed earlier, it would have made no difference to the outcome and no additional or avoidable expense was created.

[23] The pursuer's agent sought to distinguish (or adopt) the defender's authorities by arguing that:

i. The *McIntosh* case related to a situation where the pursuer had failed to carry out any enquiries into which of two defenders was liable and had approached the case on the basis that it was up to the two defenders to sort out the liability position. That was not the case here. The pursuer had investigated the liability position and had received documentation from the first defender's accident investigation company which clearly pointed the finger of blame at the third defender.

ii. In the *McCrae* v *Screwfix* case, the pursuer failed to satisfy the court that he had been induced into raising against both defenders because of the conduct of one of them. In the present case, the first defender has averments directed against the third defender blaming them. The pursuer also had averments to the effect that ducting should not be double stacked and ought to be tethered which stemmed from the stance being taken by the first defender.

iii. The *Mitchell* case was relied upon as authority for the proposition that a pursuer could exercise a right of relief against an unsuccessful defender, A, if found liable to pay successful defender B's expenses, if the pursuer had been induced to bring in defender B by defender A.

[24] The pursuer referred to two additional authorities:

i. *Young* v *Aviva Insurance Limited & Anr* [2022] SAC (Civ) 32, a decision of Sheriff Principal Ross in the Sheriff Appeal Court. It was submitted that this was further authority for the proposition that inducing a pursuer to bring an additional defender into an action could be justification for departing from the normal rule that a pursuer should pay the successful defender's expenses.

It was held that when determining whether a successful defender caused or induced the pursuer to convene another party as a defender, the question for the court is:

through whose fault was it that the additional defender was brought into court? para [21].

ii. Hastings: Expenses in the Supreme and Sheriff Courts of Scotland 1989 states, at page 27:

> "Where there are several defenders and the pursuer and one of the several defenders is successful, there are usually no complications regarding the taxation of expenses. However, when the pursuer is unsuccessful, the position is not always straightforward. Broadly a pursuer is liable in expenses to any successful defender, but if a party convened as a defender, either expressly or by implication, blames another party and that party is convened as a second defender and is assoilzied, the first defender who is thus responsible for the second defender being called into the arena, is normally liable for the second defender's expenses. If the facts are such that a pursuer fails to establish fault against any defender, there is no authority for one successful defender being found liable to another successful defender unless one defender has unnecessarily or vexatiously blamed another defender or is guilty of some fault in his pleadings or conduct of the case."

Discussion

[25] The third defender's basis for seeking to dis-apply QOCS is under OCR 31A.2(2)(d) ie abandonment of the cause. The motions before the court do not relate to a dis-application of QOCS under Section 8(4)(b) for manifestly unreasonable behaviour. Therefore any consideration of how the litigation was conducted only arises in the context of abandonment and must be read in that context.

[26] All case-law and legal texts quoted in submissions, with the exception of the *McCrae* v *Screwfix* case, pre-date the eras of QOCS and CPAP or are not written with QOCS in mind. They too have to be read in that context. The correct approach to be taken is, in my opinion, the approach taken in *McCrae:* does a QOCS exception arise and if so, should the court, none-the-less, exercise its discretion not to dis-apply QOCS. I do not consider it necessary to establish exceptional circumstances – to lay down such a requirement would

interfere with the court's unfettered discretion. McIntosh, decided in 1900, can be distinguished from the present case to the extent that it stated that exceptional circumstances were required to avoid a pursuer being found liable for a successful defender's expenses. Breaches of CPAP and considerations of the QOCS rules were not considerations for the court at that time. There are no doubt many different reasons why actions are abandoned either against one defender or in its entirety eg a skilled person changes their finely balanced opinion on sight of detailed defences containing information which had not been previously available to the pursuer, an essential witness for the pursuer dies rendering it impossible for the pursuer to prove their case or After The Event insurers withdraw indemnity because their view on prospects of success reduce below 50%, to name but a few. Whether any of these, or the myriad of other possibilities, would justify the court exercising its discretion not to dis-apply QOCS on abandonment will depend on the particular circumstances of each case.

[27] In the present case, there is no doubt that OCR 31.A.2(2)(d) is engaged. The pursuer is abandoning his claim against the third defender. A QOCS exception therefore arises. It follows that the only issue for the court is whether the circumstances are such that the court's discretion should be exercised to any extent in favour of the pursuer so as not to find the pursuer wholly or partly liable for the third defender's expenses.

[28] I will approach that question by considering i) upon what basis the pursuer had for including the third defender in the action, ii) whether the first defender did anything to induce the pursuer to include the third defender and, if so, iii) whether that justifies the discretion being exercised in the pursuer's favour.

[29] Unfortunately the pursuer did not provide a detailed written timeline of events in advance of the opposed motion hearing. It would have been useful to have (See ASSPIC

Guidance Para 19: 17 August 2022). Some key dates were referred to in submissions and some can be gleaned from the pursuer's third inventory of productions. However, of note, little was said in submissions about the information supplied by Multiplex when the claim was first intimated and there are significant gaps when it is not clear what was happening if anything during the pre-litigation stages. The information available suggests the following:

- 11.3.20 - CPAP intimation made to Multiplex, the second defender / main contractor.
- 31.7.20 - E-mail from Sedgewick to pursuer's agent "We have tried to contact you by telephone but have been unable to reach you"
- 24.8.20 - Letter from Sedgewick to pursuer's agent repudiating liability, blaming Topek for stacking the ducting on top of one another to gain access to gravel which they were dispersing. "This would undoubtedly have contributed towards the index accident occurring when the severe gale force wind struck." It goes on to state Topek ought to have notified the principal contractor [of any access issues] so they could be addressed and the work should have stopped until the issue had been addressed. Of importance, Sedgewick attached by way of CPAP disclosure, witness statements, weather records, Multiplex' Investigation report and Topek's Investigation report prepared by Project Health & Safety Services Limited in March 2020 (around one month post-accident). The report collates a number of witness statements, photographs, weather data and other documentation. It reviews the material and lists, in Section 5, under the heading "Incident Causation":

Immediate Causes:

- *The ducting pieces were double stacked.*
- *The ducting was not safely tethered by SES.*

- *A strong gust of wind caused them to fall.*
- *Lack of segregation of subcontractors by Multiplex.*

System Causes:

- *Failure to implement arrangements for safe storage of materials – Multiplex / SES*
- *Failure to respond to Sub-contractor safety concerns*
- *Failure of arrangements for stopping work in adverse weather conditions.*

- 23 December 2020 - pursuer's agent intimated a claim in terms of CPAP to Topek Ltd, the first defender, care of Aviva Insurance. In that intimation it is stated that:

> "Our client was working on the roof of the building and has been struck on the back by a section of metal ducting. We understand this had been stacked by a Topek member of staff but was blown by the wind."

The intimation goes on to make general allegations of breach of common law duties and breaches of the Management Health and Safety at Work Regulations 1992 and the Construction (Design and Management) Regulations 1994 without making any allegation that there was a failure to tether the ducting or make reference to any specific regulation which they were alleging had been breached.

- 18 May 2022 - It is not clear what happened between 23 December 2020 and 18 May 2022 but on that date the agent for Topek sent an e-mail to the pursuer's agent denying that the ducting had been stacked by Topek staff as alleged. Liability was denied. On the same date the pursuer's agent replied, challenging the denial and providing a copy of the Sedgewick letter suggesting the Topek employees had moved the ducting.

- Undated e-mail – response from Topek's agent stating:

  "It remains our client's position that they did not move the ducting. The statements provided suggest this was done by SES employees. Our client was not responsible in any way for the presence or placement of the ducting. In view of this we must maintain our denial of liability."

- 7 November 2022 – the pursuer's agent indicates that he believes Topek have a non-delegable responsibility for his client whilst working on the roof. A request is made for Topek's risk assessment and method statement for the job. Confirmation of Topek's precise designation was sought for the purposes of serving proceedings.

- Undated e-mail – Topek's agent accepts that a non-delegable duty exists but cannot see how Topek had failed in that duty. The risk assessment and "other supporting documentation" was supplied and Topek's designation was confirmed.

[30] The timeline of events, as prepared by the third defender's agent, is as follows:

- 12 Feb 2020 Accident
- 17 Jan 2023 Protocol Letter of claim received by third defender
- 18 Jan 2023 third defender's acknowledgement of letter and confirming agreement to Protocol applying
- 25 Jan 2023 Initial Writ served on third defender
- 26 Jan 2023 third defender's NID lodged
- 02 Mar 2023 third defender's defences lodged
- 7 March 2023 court timetable issued
- 21 Apr 2023 third defender offers pursuer to consider abandonment
- 26 May 2023 third defender makes further abandonment offer
- 31 May 2023 pursuer unopposed motion varying timetable granted by Court
- 14 Jun 2023 Medical report prepared on 08 Dec 2022 disclosed

- 10 July 2023 pursuer's unopposed motion for proof granted by Court
- 03 Aug 2023 first defender lodges tender
- 21 Sep 2023 pursuer intimates minute of acceptance of tender
- 21 Sep – 12 Oct various email exchanges between pursuer and third defender re abandonment of the cause

[31] Looking at the Record, it is obvious from the various statements of fact and answers from each defender that there was no consensus as to who stacked the ductwork or who had the responsibility for keeping it secure. All that can be said is that the pursuer blamed all defenders, the first defender blamed the third defender and the second and third defenders blamed the first defender.

[32] In MacPhail*: Sheriff Court practice* 4th edition at para [9.13], it states:

> "It is of cardinal importance that they [the pleader] should draft the pleadings in good faith, with candour and honesty. They should state matters as facts only if they have before them evidence to support their averments, and they should never make averments for which they have no evidence in the hope that something may turn up in the course of the case to justify them".

Based on the foregoing the obligation to make averments with a proper evidence base arises from the outset ie from the moment that the decision is taken to include a particular defender in the action. That obligation can only be fulfilled if diligent enquiries are made pre-litigation to ascertain whether a proper basis exists for bringing an action against a particular party.

Implications of failing to follow CPAP

[33] The court has an unfettered discretion in whether to dis-apply QOCS. It should however be borne in mind that there is an obligation on a sheriff, hearing expenses motions where the claim was subject to the Compulsory Pre-Action Protocol, to undertake the

analysis set out in the *Young* v *Aviva Insurance* case, mentioned above if it is relevant to the expenses issues under consideration. *Young* was a case where the issue of inducement was argued because one opponent, at the pre-litigation stage, failed to respond to the CPAP intimation. The consequence was that the pursuer had to raise proceedings and it was months later that the defender introduced into their defences a case of fault against another party. This in turn induced the pursuer into convening the other party as an additional defender.

[34] Sheriff Principal Ross was of the view that the action was raised because the first defender did not engage with the Protocol. Had they done so, the parties would have engaged in meaningful communication. The first defender would have investigated the incident. It would have sent a reply within three months, stating whether liability was admitted or denied, and giving reasons, including any alternative version of facts relied upon. It would have disclosed any relevant documents. Valuations would have been discussed, and settlement considered. There is an express stocktaking period for the pursuer to consider the position. All of these matters are set out in the Protocol (OCR Appendix 4). The court found it difficult, if not impossible, to see that this process would have ended without the second defenders being convened, with consequences for the rest of this action. Non-engagement meant an action was raised. Expense started to be incurred. The aims of the Protocol were completely defeated by the first defender. The court held that there was no principled reason why the first defender should receive any form of contribution towards their expenses for the part of the action up to the time the second defender was convened.

[35] The court went on to consider the approach the sheriff at first instance must take when dealing with alleged breaches of the Protocol. SP Ross stated:

> "In cases which are raised in terms of Chapter 3A and which are subject to the Protocol, certain duties arise. There are consequences for failure to observe the Protocol. Rule 3A.3 imposes certain duties upon the sheriff to consider parties' conduct, where the sheriff 'considers that a party … failed, without just cause, to comply with the requirements of the Protocol'. Modification is available as a discretionary remedy, or step (Rule 3A.3(2)(c))."

[36] While any remedy was discretionary, the sheriff is obliged by Rule 3A.3(4), to take into account:

> "(a) the nature of any breach of the requirements of the Protocol; and (b) the conduct of the parties during the stages of the Protocol. In terms of Rule 3A.3(5), the conduct must be assessed by regard to the extent to which that conduct was consistent with the aims of the Protocol."
>
> ie
>
> "to assist parties to avoid the need for, or mitigate the length and complexity of, civil proceedings, by encouraging: the fair, just and timely settlement of disputes prior to the commencement of proceedings."

[37] The SAC confirmed that the first defender's conduct fell below that required by the Protocol. That failure commenced with the non-engagement with the Protocol. That non-engagement meant that the pursuer had little choice but to serve an initial writ. Ultimately, when the first defender blamed the second defender a minute of amendment was lodged to convene the second defender. All of this procedure was wasted, and served to defeat the aims of the Protocol.

[38] The court concluded that following the amendment procedure convening the second defender, the action proceeded as it would have done if the protocol had been complied with. The normal rule per *Mitchell* then applied. Indeed, the pursuer accepted that it may have been prudent to serve a claim against the second defender.

[39] The *Young* case related to failures on the part of a defender to engage with CPAP. In the present case there is no such failure. The defenders, without fail, engaged, or indicated a willingness to engage with CPAP and provided the pursuer with their views on liability.

The third defender argues that it is the pursuer who has failed to engage with the protocol or at least has failed to timeously investigate matters which would have allowed a CPAP intimation to be issued at a much earlier stage to the third defender. I consider the third defender's submissions on this point to be well founded and require to be taken into account when considering whether to dis-apply QOCS.

[40] It can be concluded that:

i. Multiplex had provided the pursuer with extensive disclosure on 24 August 2020. Multiplex believed Topek were responsible for the failures in relation to the ducting although provided copies of accident investigation reports which they had prepared and which had been provided to them by Topek, setting out conflicting positions. This was just over 8 months post-accident. It should have been readily apparent to the pursuer that further investigation was required to verify which of the two conflicting positions was the correct one. There was ample time to do that more than 2 years prior to the triennium.

ii. There is a dearth of information to clarify what was happening from the point the claim was intimated to Topek in December 2020 and the e-mail correspondence referred to above from May 2022.

iii. No information has been provided to suggest what steps the pursuer took to investigate SES Engineering Services' culpability prior to intimating a CPAP claim to them on 12 January 2023, a month prior to the triennium. Investigation is not achieved by simply relying on one version of conflicting information as to who is liable when two different versions have been supplied to the pursuer. There was a failure to afford the third defender an opportunity in terms of the timescales laid down in CPAP or during a period of sist to investigate and set out their position.

There ought to have been ample time, well in advance of the triennium, to have done that. Given the information in the possession of the pursuer in August 2020, the matter should have been investigated. Those investigations would have informed the pursuer as to which of the competing versions was likely to form the basis of a reparation claim. They would have either revealed a proper basis for intimating a claim under CPAP to the third defender, or they would have led to the conclusion that there was no such basis and the action should proceed against Topek.

iv. A fortiori, in terms of *MacIntosh* v *Galbraith* and MacPhail, there is clear duty on the part of a party bringing a claim to take reasonable steps to investigate the basis for the claim and, having done so, only make allegations of fault against a party where diligent enquiries suggest they have a case to answer. Here the conflicting positions were factual. Only one version of who stacked and failed to tether the ducting could be correct. That does not permit a pursuer to simply sit back and do nothing to determine which version was likely to be correct.

v. The position may have been different if there was one investigation report which clearly diverted fault away from the party to whom the claim had been initially intimated. But that is not the case here. Two reports, disclosed at a relatively early stage, came to opposing conclusions on who was at fault. That requires the pursuer to diligently investigate liability prior to litigation to establish who is probably liable for damages. If those investigations are not timeously carried out, when there was an opportunity to do so, or not carried out at all, and there was simple reliance on conflicting information which led to multiple defenders being sued, a pursuer cannot expect the court to exercise its discretion not to dis-apply QOCS when they abandon against one or more defenders.

Decision

[41] For all of those reasons I do not consider that a) the first defender has induced the pursuer to convene the third defender into the proceedings and b) there is any basis for the court to exercise its discretion not to dis-apply the QOCS rule on abandonment.

[42] I shall therefore pronounce an interlocutor granting the pursuer's motion under deletion of the words "and to fix a hearing on expenses in relation to the third defenders' expenses" as that has been superseded; grant the third defender's motion in terms of OCR 31A.2 (2)(d) and make an award of expenses of process against the pursuer in favour of the third defender to include the expenses occasioned by the opposed motion hearing of 30 October 2023.