OPINION OF LORD GLENNIE OUTER HOUSE, COURT OF SESSION. 19th December 2007

[1] On 30 November 2007 I allowed a proof before answer in this case, to be heard concurrently with a proof in a related action. Allowance of the proof came at the end of an amendment procedure which had begun at the instance of the pursuers on 4 October 2005. There was not time on that date to deal with the question of expenses. This came before me on 7 December 2007.

[2] The defenders moved for an order finding the pursuers liable to them in the expenses of process from the beginning of the amendment period to date on an agent/client, client paying basis; and for certification of Mr Rowand, Chartered Accountant, as a skilled witness. The defenders lodged a Paper Apart in support of the motion setting out the procedural history relevant thereto. This was amplified at the hearing.

[3] There was no dispute as to the legal test to be applied. It was accepted, under reference to ***Plasticisers Limited v William R Stewart & Sons (Hacklemakers) Ltd*** 1972 S.C.268, 282, that it was within the discretion of the Court "in exceptional circumstances" to make such an order. I was referred to the unreported Opinion of Lord Penrose in ***North East Ice & Cold Storage Co Ltd v Andrew Third*** (4 June 1996) where the matter is discussed at pages 12-15. The Court must take into account the facts of each case on a case by case basis. Factors such as unreasonable conduct of the litigation resulting in waste of time and unnecessary procedure will be relevant. As Lord Penrose puts it: "*criticism of the conduct of the party found liable is characteristic of the exercise of the discretion*". He emphasised the significance of the proceedings before him being commercial proceedings, at which the preliminary hearing stages provided an opportunity for early identification of and focussing of the issues. I should note in this context, though I was not referred to it, the summary of the relevant principles by Lord Hodge in ***McKie v Scottish Ministers*** 2006 SC 528 at para.[3], cited with approval by Lord Macphail in ***Appa (UK) Ltd v The Scottish Daily Record & Sunday Mail Ltd*** (unreported 12 December 2007, [2007] CSOH196). The analysis of the principles in those cases appears to me to be entirely consistent with the above.

[4] Pleadings in the action were finalised on 6 June 2005 after a fairly lengthy adjustment or amendment procedure during the course of 2004 and 2005. The action was sent to debate on the defenders' note of arguments and a diet of debate was fixed for 4 October 2005. On the morning of that diet the pursuers move to have a minute of amendment received. The diet of debate was discharged and the pursuers were found liable in the expenses occasioned by the discharge.

[5] The pursuers' claim in the action had originally included a small claim for loss of profit. The amendment introduced on 4 October 2005 increased that claim to about £1.4 million. During the course of the amendment process, in mid-December 2005, the pursuers further adjusted their minute of amendment and increased the sum claimed for loss of profit to more than £2.5 million. No accountancy report was produced in support of the new averments until 16 January 2006. The defenders required to instruct their own forensic accountancy report from Mr Rowand. His investigation was extensive and involved solicitors for the defenders making extensive requests for documentation and causing other inquiries to be made into the pursuers' corporate structure. In May 2007 the defenders' expert report was completed. He concluded, based upon an analysis of the pursuers' corporate structure, that the pursuers had no title to sue in respect of the loss of profits claim. In November 2007 the pursuers adjusted their minute of amendment to delete the entire loss of profits claim. No explanation was provided as to why the claim was dropped. It is to be inferred that they accepted that they had no title to sue in respect of the loss of profits.

[6] I was told by Mr Buchanan, who appeared for the pursuers, that the amendment procedure in fact dealt with five matters. I accept this. However, he candidly accepted that, had it not been for the loss of profit claim, that amendment procedure would have been very considerably shorter, less complicated, less expensive and less disruptive to the process of the proceedings.

[7] The effect of this mainly abortive amendment procedure on the proceedings, and the related proceedings to which I have referred, was very considerable. The diet of debate was discharged. During the course of November 2005 there were discussions between parties to this action and the related proceedings regarding the possibility of tripartite mediation to resolve all matters. The pursuers appeared willing to go down this route. It was anticipated that at the next calling of the action a proof would be fixed and mediation arranged. The action was continued until 19 December 2005 for pleadings to be finalised. The pursuers' adjustment of their minute of amendment to double the sum sued for by way of loss of profit to £2.5 million occurred shortly before the calling on 19 December 2005. Without any supporting accountancy report, the prospect of any fruitful mediation disappeared. Nor was it possible to fix any further procedure. At the same time, the defenders in this action took the view that they should introduce averments in the related action to pass on the loss of profits claim advanced by the pursuers. This prompted the defenders in that related action to debate the relevancy of that claim in terms of the collateral warranty which was the subject of that action. That matter subsequently went to the Inner House who issued an opinion on 6 June 2007. Although this procedure happened in the related action, it was, in my view, and I do not understand this to be disputed, a readily foreseeable consequence of the introduction of the loss of profits claim in the present action.

[8] In moving his motion for expenses on an agent/client, client paying basis, Mr Murphy, QC said that the pursuers had opted to rely upon an unverified claim for loss of profit of some £1.4 million, later increased to £2.5 million, when they knew or ought to have known that any loss of profit was suffered by another legal entity and was unrecoverable by them in this action. They had persisted in that amendment until the very recent adjustments. The claim for loss of profit caused the defenders significant expense in the form of abortive investigations and waste

of time. Without an award on this special basis, there would be a large element of expenses which would be unrecoverable. The pursuit of the significant loss of profits claim had caused unrecoverable expenses in the related proceedings. Even though they had an award of expenses in their favour from the debate, both in the Commercial Court and the Inner House, they recovered those expenses only on the ordinary party/party basis. In the context of the management of the action, two years had passed without any progress. The proof which had now been fixed to run concurrently with that in the related action could have been fixed very considerably earlier.

[9] For the pursuers, Mr Buchanan conceded the expenses of the amendment process from 4 October 2005 and, since he accepted that the amendment process was all that had been happening in this action since then, accepted liability for the expenses of process from that date to the present. Nor did he object to certification of Mr Rowand. However, he submitted that the award of expenses should be on a party/party basis. He said that the pursuers had been willing to go to mediation but it had been put off because of doubts as to whether the loss of profits claim would be part of the agenda for mediation. He explained that it had not been possible to produce an expert report earlier. They had had an oral report on the basis of which the loss of profits claim in the sum of about £1.4 million had been raised and it had been increased on the basis of further advice from their expert. He pointed out that although the pursuers lodged their expert report on 16 January, there had been a further 16 months which had elapsed before the defenders' expert report. The pursuers could not be held liable for the expenses incurred by the defenders in the related action. The pursuers had taken the decision to abandon the loss of profits claim in the light of the analysis of their business structure and for other reasons. He said that it was a responsible decision to abandon the loss of profits claim once it was realised that it would fail.

[10] I accept that the pursuers cannot be held responsible for the delay in the related action, nor for the defenders' unrecoverable expenses of passing on in that related action the loss of profit claim made against them by the pursuers. However, the fact remains that at a stage when the action was ready to progress after detailed pleadings and adjustment, when the issues were thereby well focused, the pursuers introduced into the proceedings a significant claim for loss of profits which had the effect of completely derailing the proceedings and which meant that some 2 years were wasted in terms of the progress of the action. Not only that, but the defenders were put to very considerable expense both in terms of their own legal team and also in terms of the work which Mr Rowand had to carry out on their behalf. This has all happened because of the introduction of a claim which was ill thought out and had no legal basis whatsoever, as is ultimately accepted on behalf of the pursuers. In those circumstances, which I consider (and hope) can properly be regarded as exceptional, the pursuers' conduct of the litigation since 4 October 2005 is properly to be regarded as unreasonable. It would be quite unfair to the defenders that they should be left to recover expenses only on a party/party basis for this period.

[11] Accordingly, I shall accede to the pursuers' motion, certify Mr Rowand as a skilled witness and find the pursuers liable to the defenders in the expenses of the process from 4 October 2005 to date on an agent/client, client paying basis.

Pursuers: Buchanan; Semple Fraser
Defenders: Murphy, Q.C., Gardiner; Brodies, LLP