



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 69

CA74/19

OPINION OF LORD BANNATYNE

In the cause

STIRLING DEVELOPMENTS LIMITED

Pursuer

against

GRACEWELL HOLDINGS LIMITED AND ANOTHER

Defenders

Pursuer: Thomson QC, Brown; Burness Paull LLP
Defenders: MacColl QC, Tyre; Thorntons Law LLP

6 September 2019

Introduction

[1] This matter came before me in respect to the defenders' motions seeking expenses on an agent and client basis and an additional fee. These motions followed on from the pursuer having lodged a minute of abandonment. Both motions were opposed on behalf of the pursuer. The expenses of process on the normal scale were conceded by the pursuer.

Background

[2] Reading short the pursuer sought in the action a declarator:

“that, in terms of the cross options agreement between the pursuer and the second defender (as amended), the first defender: was obliged to sign and deliver to the pursuer the engrossed copy of the agreement, which is in the terms the pursuer and Fife Council have approved, recording the agreement the pursuer and Fife Council have reached under section 75 of the Town and Country Planning (Scotland) Act 1997 in relation to the pursuer’s application for planning permission in principle for the development of land at Broomhall, Dunfermline.”

Further the pursuer sought decree ordaining the first defender to execute and deliver the section 75 agreement to the pursuer within 14 days of the date of decree failing which payment by the first and second defender jointly and severally of a sum of £25,000,000 as damages. Fife Council in respect of this matter were acting in their capacity as the relevant planning authority.

Submissions on behalf of the defenders

[3] Mr MacColl began his submissions in support of his motion for expenses on an agent and client basis by setting out in some detail the procedural background. He did so as it was the timeline which in his submission justified the granting of this motion. The background was as follows:

- On 7 March 2019 the terms of a section 75 agreement were agreed between the pursuer and Fife Council.
- The first defender did not sign this.
- After it became apparent that obtaining the signature of the first defender was not straightforward the pursuer then followed an alternative strategy.
- On 25 April 2019 there was a meeting between the pursuer and Fife Council at a high level and he submitted that what was agreed was an alternative strategy, namely: the use of a section 69 agreement and an alternative section 75 agreement (“the Stirling section 75 agreement”).

- It was also agreed that Fife Council would issue to the pursuer a letter (see article 13 of the summons as adjusted).
- Mr MacColl submitted that this letter (6/13 of process) did not tell the full story.

[4] 6/13 of process is in the following terms:

“I refer to the above application, which was approved at committee, subject to conclusion of a Section 75 Agreement, on 5 December 2019. It is noted that the Section 75 Agreement has been in a finalised form for some time. I am concerned that the legal agreement has not progressed further, given the length of time since the Planning Committee and the length of time the Agreement has been in its finalised form.

I would be grateful if you would confirm your timescales for the processing of this agreement. If the agreement does not progress it may be necessary to refer the proposal back to committee with an officer recommendation of refusal owing to lack of progress. Alternatively, you may wish to withdraw this application if it will not be possible to conclude the agreement.

I would be grateful if you would advise me within 5 days of the date of this letter how you wish to progress the legal agreement.”

- Mr MacColl submitted that what is absent from the said letter is any reference to the alternative approach agreed between the pursuer and Fife Council. He submitted that the sole purpose of the letter was to put pressure on the defenders and to provide a basis for the action. It was the foundation stone of the action.
- The summons in this action was signetted on 10 May 2019 and lodged for calling on 17 May 2019. The summons was silent about the alternative approach which was the subject of discussion between the pursuer and Fife Council. Defences were lodged on 24 May 2019 and a preliminary hearing was fixed for 6 June 2019.
- On 24 May 2019 the pursuer and Fife Council had a further meeting and the section 69 agreement was redrafted.
- By 28 May 2019 the terms had been agreed of both the section 69 and the Stirling section 75 agreements and the pursuer executed them on that date.

- On 30 May 2019 Fife Council confirmed to the pursuer that it would sign the section 69 and the Stirling section 75 agreement and planning permission would be issued.
- On 3 June 2019 Fife Council signed the section 69 and the Stirling section 75 agreements.
- At the preliminary hearing on 6 June at the urging of the pursuer, an accelerated timetable was fixed by the court. In terms of the Lord Ordinary's interlocutor of 6 June 2019, a two day determinative diet was allocated for 16 and 17 July 2019. By 24 June 2019 parties were required to lodge copies of their respective pleadings as adjusted, together with detailed notes of argument, a chronology including the key documents, a joint statement of agreed legal principles, a joint note of the areas of agreement and disagreement and a joint bundle of authorities.

[5] Mr MacColl then outlined the factors which had been relied on by the pursuer in order to persuade the court to adopt the above accelerated timetable.

[6] The pursuer sought at the preliminary hearing to place stress on a number of issues which it maintained justified adopting an accelerated approach. In particular, in the course of the preliminary hearing, the pursuer placed significant weight upon the importance of the expiry of the long stop date under the cross option agreement of 5.00pm on 10 August 2019. The pursuer's position was that: (a) the section 75 agreement which it was seeking to have the first defender execute was a necessary prerequisite to obtaining planning permission for the proposed developments; (b) planning permission was, in turn, a necessary prerequisite to the pursuer being able to serve notices exercising its option rights under the cross option agreement; and (c) if no such notices were served by 10 August 2019, the pursuer would

lose the ability to take forward the development. In these circumstances and against these representations, the foregoing fast-tracked timetable was fixed. Further at the preliminary hearing the defenders accepted that, in light of the position being advanced by the pursuer, the quick determination of the issues as they understood them at that date would be appropriate. This was the case notwithstanding that the action raised a number of potentially complex factual and legal issues.

[7] At the preliminary hearing there was no reference by the pursuer to the foregoing alternative strategy and in particular there was complete silence regarding the section 69 and the Stirling section 75 agreement having been agreed between the pursuer and Fife Council and having been executed by the pursuer.

[8] Mr MacColl then turned to look at the developments following the preliminary hearing and to make certain submissions arising therefrom.

[9] On 12 June 2019 two further documents were uploaded to Fife Council's planning portal: (a) a grant of planning permission with regard to the relevant development; (b) a contract that bears to be a section 75 agreement among Fife Council, the pursuer and Peter Stirling (its principal) (the Stirling section 75 agreement). That section 75 agreement bore to have been signed on 28 May and 3 June 2019. In addition two option notices were also served on the defenders on 12 June 2019 bearing to exercise certain of the pursuer's rights in terms of the cross option agreement.

[10] Mr MacColl reiterated that the existence of the Stirling section 75 agreement was not disclosed to the court or the defenders at the preliminary hearing, even although its existence was on the dates of the document, within the knowledge of the pursuer by that time. He submitted that in the light of the failure to disclose it the hearing on 6 June had proceeded upon a false premise.

[11] In light of the fact that planning permission had in fact been obtained by the pursuer by 12 June 2019 and as option notices had been served, on the pursuer's hypothesis of fact, there appeared to be no necessity or basis for persisting with the action. The defenders drew this to the attention of those acting for the pursuer, both in correspondence and by way of adjusted pleadings. The defenders thereafter enrolled a motion to have the matter put out by order to openly canvas matters before the court.

[12] At the by order hearing on 21 June 2019, the pursuer's position, notwithstanding it had acknowledged that planning permission had indeed been granted, was that the action was nonetheless necessary. Mr MacColl submitted that the reasons for this were entirely unclear. It appeared that the reason the pursuer put forward for this was that, put simply, it would be easier for the pursuer if the defenders executed the section 75 agreement.

[13] By interlocutor dated 21 June 2019 the Lord Ordinary discharged the determinative diet reserved for 16 and 17 July 2019, allowed the parties a one day diet of debate on 16 July 2019 on the pursuer's hypothesis that the action was still necessary; allowed the pursuer until 26 June 2019 to adjust their pleadings; allowed the defenders until 1 July 2019 to adjust their pleadings together with a further mutual adjustment period until 5 July 2019. All questions of expenses arising from the date of the raising of the action up to, and including that hearing on 21 June 2019, were reserved.

[14] The pursuer produced further adjustments on 26 June 2019. In short, the justification contained within those adjustments for persisting with the action was that it would be easier for the pursuer if the defenders executed the section 75 agreement. In reality, this was a concession that the action was not in fact necessary. The pursuer also referred to a number of meetings and discussions that the pursuer had had with Fife Council during the relevant period and up to the date upon which the section 75 agreement had been delivered to the

defenders. As a result of these adjustments a specification of documents was intimated to the pursuer on behalf of the defenders on 27 June 2019. In light of the pursuer's adjustments the defenders also adjusted their pleadings ahead of the deadline on 1 July 2019. Before these were intimated on 1 July, however, the defenders received a minute of abandonment from the pursuer.

[15] Mr MacColl's position in summary was that having regard to the above the defenders should be awarded the expenses of process on an agent and client basis.

[16] In respect to the above submission Mr MacColl referred to the well-known propositions of Lord Hodge in *McKie v Scottish Ministers* [2006] SC 528. Those propositions are framed at paragraph 3 of Lord Hodge's opinion as follows:

"First, the court has discretion as to the scale of expenses which should be awarded. Secondly, in the normal case expenses are awarded on a party and party scale; that scale applies in the absence of any specification to the contrary. But, 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. Fifthly, where the court has awarded expenses at an earlier stage in the proceedings without reserving for later determination the scale of such expenses, any award of expenses on the solicitor and client scale may cover only those matters not already covered by the earlier awards."

[17] It was Mr MacColl's submission that having regard to the background which he had outlined the present action fell squarely within the third and fourth propositions outlined by Lord Hodge. He invited the court to take into account: (1) the pursuer's behaviour before the action commenced (2) the strengths (or he submitted the lack thereof) of the pursuer's position on the substantive merits of the action; (3) the use of a court action for an

unreasonable purpose and the way in which the pursuer had used court procedure in circumstances which were clearly untenable and unnecessary. In putting forward the above submissions Mr MacColl relied not only on the guidance of Lord Hodge in *McKie* but on the following: *Tods Murray WS v Arakin Limited* [2013] CSOH 134 per Lord Woolman at paragraph 37; *Aird Geomatics and others v Richard Stevenson and another* [2016] CSOH 85 per Lord Bannatyne at paragraph 24.

[18] In conclusion he said this: the action from the outset had been fought by the pursuer in a manner which lacked candour in respect to matters which went to the root of the case. He described the actions of the pursuer as a classic example of a case which fell within the ambit of the said propositions set out by Lord Hodge.

[19] Turning to the issue of the additional fee he submitted in respect to head (a) that he conceded that this matter could have fallen within the bracket of a straightforward contractual interpretation claim, with elements of planning law which should have been capable of being resolved either by way of debate or proof before answer at the determinative diet previously fixed for 16 and 17 July. However, matters did not unfold in a straightforward manner. Indeed, during the course of the action, complex issues with regard to the interrelation between planning agreements, both those agreements involving the defenders and otherwise, had to be considered. Further to that, the question arose as to the relationship between the section 69 and the Stirling section 75 agreements executed by the pursuer and Fife Council, and the subsequent planning permission granted by Fife Council. The solicitors had required to spend a considerable amount of time analysing these questions and providing advice to the defenders. He contended that some of the points which required to be considered were novel and that an additional fee was accordingly justified under this head.

[20] So far as head (b) was concerned he maintained that it was evident from the background as he had above set out, that the defenders required to undertake urgent work in line with the very tight deadlines fixed by the court. This resulted in the agents spending a considerable amount of time urgently considering the claim raised against their clients, obtaining all relevant information possible, framing the defence and taking all necessary steps to best protect their clients' interests (see: *Tods Murray WS v Arakin Limited* at paragraph 42). The action also related to a highly specialised area of the law, namely: development land agreements and their interface with planning applications. The requisite skill of the defenders' agents was necessary in order to achieve a successful outcome.

[21] In respect to head (e) Mr MacColl relied on the fact that a considerable amount of time, expense and work was undertaken by the defenders from at least 2006 to facilitate the development. Further the alternative conclusion for payment in the amount of £25,000,000 instantly placed great pressure on the second defender who was an individual.

[22] As regards head (f): this overlapped with head (e) and reliance was placed once more on the alternative conclusion for payment of £25,000,000.

[23] Finally in respect of head (g) Mr MacColl said this: at the preliminary hearing, the defenders acknowledged the pursuer's concerns regarding the long stop date and indicated that they were prepared to comply with the necessarily urgent timetable fixed by the court in order to resolve matters judicially so that, in the event the pursuer was correct, the pursuer would not lose its rights under the contracts between the parties. The defenders attempted to engage in a meaningful way in the process. In contrast, the pursuer failed to disclose relevant and important information and documentation to the defenders which as has now occurred would have resulted in matters resolving much earlier without significant expense being incurred.

The reply on behalf of the pursuer

[24] Mr Thomson began his submissions in respect to the scale on which expenses should be awarded by saying this: discussions had taken place between the pursuer and Fife Council in order to seek to identify other ways of obtaining planning permission in the absence of the section 75 agreement being signed by the first defender. However, this did not detract from the pursuer's entitlement to seek to enforce its contractual right to have the section 75 letter signed by the first defender until planning permission was granted by Fife Council. Accordingly, as I understood it, he argued that the pursuer was entitled at all material times to act in the way which it had done. In particular it was entitled to raise the action; it was entitled not to disclose in the summons or at the preliminary hearing the said discussions and the stage they had reached. The pursuer at no point had acted unreasonably.

[25] He argued that timeous adjustment had been made to the summons, namely: on 13 June setting out the position which had come about on the conclusion of negotiations between the pursuer and Fife Council. It was his position that it was not until 12 June 2019, ie when the planning permission had been granted, that the pursuer could be satisfied that it had achieved a way around the failure by the first defender to sign the section 75 agreement. It was only at that point that the negotiations between the pursuer and Fife Council had come to fruition.

[26] Disclosure of these discussions had properly been withheld from the defenders: in that it was feared that if the defenders were aware of these discussions they would take the opportunity to interfere with them.

[27] Mr Thomson made one concession: that it was an error of judgment not to disclose to the court on 6 June the signing by the pursuer of the section 69 and the Stirling section 75

agreements and that it was accordingly anticipated that planning permission would be granted in early course. He did not however accept that this could properly be described as unreasonable behaviour and accordingly it was not a relevant consideration in respect of whether expenses should be awarded on the agent and client scale.

[28] He submitted generally that it flowed from his above submissions that there had been no unreasonable actions on behalf of the pursuer.

[29] Beyond the above he submitted that in any event no unnecessary expense had been incurred from what the defenders characterised as unreasonable conduct. Even if, the court had been made aware of the above background of negotiations and in particular the signing of the section 69 and Stirling section 75 agreements at the preliminary hearing the pursuer's submissions would have been the same as to what further procedure was required and the court would have made the same order.

[30] In summary Mr Thomson contended that the third proposition of Lord Hodge in *McKie* had not been satisfied and the defender's first motion should accordingly be refused.

[31] In respect of the first motion Mr Thomson had a fall-back position: if the court took the view that any conduct on the part of the pursuer was sufficiently egregious and did cause unnecessary expense then the period of time for which the defenders' motion should be granted ought to be confined to the period from 6 June or 12 June to 1 July.

[32] In respect to the defenders' second motion Mr Thomson commenced by advancing three propositions:

- It was not enough to grant an additional fee to say that one or more elements set out in the Rule of Court were present.
- In order to grant an additional fee the elements had to be present to an abnormal degree.

- The focus was on the work of agents not on that of counsel.

[33] He then submitted that the case involved a straightforward, short and sharp issue of contractual construction which could be decided at debate. There was nothing novel or complex in the issues raised in the case. The damages claim he accepted was a substantial sum but it had been adjusted out of the pleadings at a very early stage, namely: when the planning permission was granted. As regards the importance of the subject matter this did not impact on the work carried out by agents and did not justify an additional fee. In conclusion he submitted that there was no basis for granting an additional fee under any of the heads.

Discussion

Primary motion regarding the scale upon which expenses should be granted

[34] It was not a matter of dispute that the law in respect of this was well settled and was set out in the passage from the opinion of Lord Hodge in *McKie v Scottish Ministers* earlier quoted.

[35] It seems to me that the pursuer was entitled to raise the present action even though by that stage discussions relative to an alternative strategy between the pursuer and Fife Council were underway. The pursuer was under considerable time pressures given that it required to exercise its option before the long stop date. By the point at which the summons was raised the discussions with Fife Council had not gone beyond discussion of the alternative strategy. I do not consider, when that background is had regard to, that the pursuer was acting in an unreasonable manner in raising the action.

[36] The next point at which I believe the pursuer's actions require to be considered is in the period leading up to and as at 6 June, namely: the date of the preliminary hearing.

[37] By that stage according to the pursuer's adjusted pleadings at page 13 of the summons (article 13) the following was the position:

"Following that call (on 28 May), emails were exchanged between the pursuer and the council finalising the draft terms of the section 69 agreement. The pursuer and Peter Stirling signed the Stirling section 75 agreement and the section 69 agreement later that day. The pursuer delivered both agreements as signed by it and Peter Stirling, to the council. On 30 May 2019, the council confirmed receipt of both agreements and that it was arranging to have the agreements signed. The council also confirmed later in the day that planning permission would usually be issued once it had received the formal acknowledgment from the Land Register of Scotland in respect of the Stirling section 75 agreement and the formal receipt from the keeper of the books of council and session in respect of the section 69 agreement. The council thereafter signed both documents."

[38] Mr Thomson, who was the senior counsel appearing on behalf of the pursuer, at the preliminary hearing was not informed of what is set out in the above averments prior to appearing on 6 June. Thus on 6 June the defenders were not made aware of the above and in addition the court was unaware regarding these matters.

[39] The context of the hearing was that the pursuer was seeking a very much accelerated procedure and a very early determination of the issues between the parties. As set out by Mr MacColl the defenders did not oppose this given their understanding of the factual position and in particular the backstop date.

[40] Given the foregoing, the initial question for the court seems to me to be this: was the pursuer conducting the litigation unreasonably in not disclosing the above information at the preliminary hearing?

[41] First I am clearly of the view that the above information should have been disclosed at the preliminary hearing. By that stage the pursuer was aware that but for the carrying out of certain formal steps which should be achieved within a matter of a few days planning permission would be granted. At the heart of the pursuer's action was its asserted position

that until the defenders signed the section 75 agreement it could not obtain planning permission and thus could not exercise its option prior to the backstop date.

[42] By 6 June the pursuer was aware that in all real senses that aforementioned asserted position was no longer the case and in a few days time planning permission would be granted by the means of this alternative strategy which had been followed.

[43] In order to give the court a proper picture, namely: a full picture regarding the factual background to the action and in particular the basis for the action the pursuer I believe had to disclose the foregoing at the preliminary hearing. Moreover in order to present a full picture as to why the court should grant an accelerated diet the pursuer I believe should have disclosed the above. Lastly I consider that the defenders were entitled to this information in order to properly consider first the position they should take in their defence to the action and second their response to the pursuer seeking an accelerated timetable. In not disclosing the foregoing information the pursuer was entirely failing to be candid in respect of matters which went to the core of the action.

[44] The court expects and I consider is entitled to expect that in particular at a preliminary hearing it will be presented with a full and candid picture of a party's case and its position as known to the party at that time. I believe the court cannot properly fulfil its function at the preliminary hearing, if the foregoing is not a correct understanding of the position. Equally the defenders were entitled to have the information disclosed to them at that point. Where the information was not disclosed at that point the pursuer was not acting with the necessary candour.

[45] Moreover, in the present case at the preliminary hearing the court was being requested by the pursuer to fix an accelerated timetable, in these circumstances it must be incumbent on the party seeking such an accelerated timetable to give a full picture as to why

such a course is necessary. In assessing whether to grant such an accelerated timetable and in order to make a correct decision on that issue the court would require to have disclosed to it the matters to which I have earlier referred and which were eventually put on record by the pursuer on 13 June.

[46] I can identify no good reason why this information was not disclosed to the court and thus to the defenders at the point of the preliminary hearing. Rather for the reasons I have set out I believe that the information should have been disclosed to the court and the defenders.

[47] Mr Thomson advanced an argument that the pursuer feared that the defenders would in some way interfere with these negotiations. First I observe that no real basis was put forward for this apprehended fear. Secondly and perhaps more importantly by the stage of the preliminary hearing all essential matters in respect of the alternative strategy had been agreed between the pursuer and Fife Council and there was no way I am able to identify in which the defenders could have interfered with the alternative strategy being followed by the pursuer.

[48] Mr Thomson submits that it was no more than an error of judgment that this information was not brought to his attention prior to the preliminary hearing and that accordingly the information was not disclosed to the court and to the defenders at that point. I do not agree that this was a mere error of judgment which thus does not amount to unreasonable behaviour. Mr MacColl argued that this was a deliberate decision not to bring these matters to the attention of the court. As I have said I am unable to identify any reason which would justify the non-disclosure of this information at the preliminary hearing. I do not think this omission can be characterised as just an error of judgment. There is simply no proper basis for this failure to bring these matters to the court's attention.

[49] I am persuaded that the correct characterisation of this failure to bring these matters to the attention of the court is unreasonable behaviour as argued by Mr McColl. I am persuaded that this material should have been put on record or otherwise disclosed on 3 June 2019 (being the later of the two dates in which the Stirling section 75 agreement was signed) and that if not disclosed at that point it required to be disclosed on 6 June at the preliminary hearing and the failure to do this amounted to unreasonable behaviour.

[50] Separately and in addition once the planning permission was granted I think the pursuer's position that the action was necessary was untenable and that its continuation of the action from then until the minute of abandonment was lodged was unreasonable.

[51] Mr Thomson went on to argue that in any event no unnecessary expense had resulted from the unreasonable behaviour founded upon by the defenders.

[52] I do not agree with that submission. I am satisfied that the court would have followed an entirely different course on 6 June if this information had been disclosed to it. I believe the court would have acted in this way if the information had been disclosed to it: it would not have granted the pursuer's motion for an accelerated timetable; it would not in particular have ordered adjustment to be concluded by 20 June or ordered notes of argument to be lodged by 24 June. In addition I do not believe it would have made the supplementary orders set out in the interlocutor of 6 June. Rather, I think the court would have continued the matter for a few days to see if planning permission was granted and for the pursuer in the light of that to consider whether there was any necessity for the present action to proceed. I do not think that the court would have made any other orders. I think in these circumstances that on the granting of planning permission the action would have been abandoned, as it was no longer necessary. It appears to me that it was unreasonable for the pursuer to continue with the action after planning permission was granted. There

was no reasonable basis for continuing with the action once planning permission was granted.

[53] Accordingly in my view but for the unreasonable behaviour of the pursuer as above identified, no further work on the part of the defenders would have been required after 6 June. It would have been unnecessary to conform with the terms of the interlocutor of 6 June including adjusting on 16 and 19 June. Lastly I believe the by order hearing of 21 June would not have been necessary.

[54] Accordingly it appears to me that from 3 June until the date of the lodging of the minute of abandonment the defenders' primary motion should be granted. I do not think it appropriate for expenses on an agent and client basis prior to that date to be awarded against the pursuer. I believe in that period, for the reasons given, it cannot be said that the pursuer was behaving in an unreasonable manner. Accordingly for that period the expenses should be awarded on a party/party basis.

The defenders' second motion

[55] It was not a contentious matter that the approach to the awarding of an additional fee is as set out by Mr Thomson in the course of his submissions.

[56] Turning to the specific heads as relied on by the defenders I grant an additional fee under head (a). I believe Mr MacColl is correct that the issues which arose went beyond the mere consideration of a short contractual construction issue. Rather the issue became a complex one as described by Mr MacColl. I believe that the complexity was of such a degree as to justify an additional fee under this head.

[57] Equally I believe an award under head (b) is appropriate for the reasons as advanced by Mr MacColl. So far as heads (e) and (f) are concerned these to some extent overlap.

However, the amount of the damages claim in particular in respect of the second defender, an individual, and the value of the development itself I think justify me in holding that awards under both of these heads are appropriate.

[58] Turning to the final head (g) relied upon, for the reasons advanced by Mr MacColl I believe an award under this head is appropriate.

[59] Accordingly for the above reasons I make an award of an additional fee under each of the heads relied on by the defenders. So far as the expenses in respect of the hearing of these two motions the defenders have in large part been successful and I accordingly award the expenses to the defenders on a party/party basis.