A3534/07

John Wilfred Bosa,

Pursuer

versus

The Bank of Scotland plc,

First Defender

and

Capital Oil & Gas Limited,

Second Defender

Edinburgh, 2nd February 2009

The Sheriff, having resumed consideration of the cause,

FINDS IN FACT that:

1. The pursuer is John Wilfred Bosa, aged 44 years, residing at 2400 Magnolia Drive, North Miami, Florida, USA. A former professional football player, he is involved in "small real estate transactions". The pursuer's practice is to form an individual limited liability company in relation to each of his business ventures.
2. The second defender is Capital Oil & Gas Limited, a company incorporated under the Companies Acts and having its registered office at Flat 4, Wimbledon close, The Downs, London SW20 8HW.
3. Fred Otto Bohn, aged 63 years, resides at 34522 North Scottsdale Road, Scottsdale, Arizona, USA, AZ 85262. Although he is not a director of Capital Oil & Gas Limited, the second defender, he owns fifty per cent of the shares in the company. He describes himself as 'chairman' of the company. In some of the documents in process he is designed as the company's 'CEO'.
4. Robert McCreery resides at Flat 4, Wimbledon Close, the Downs, London, SW20 8HW. He is Bohn's business partner and he owns the remaining fifty per cent of the shares in Capital Oil & Gas Limited.
5. Robert Ernest Addinell, aged 73 years, resides at 1701 Cedarhill Crossroad, Victoria, British Columbia, Canada. He has been involved in the oil business for some 50 years. At one time he was a non-executive director of a company called Moustaf Petroleum Limited.
6. Luis Gus Brito is an accountant with a place of business at Suite 311, 407 Lincoln Road, Miami, Florida, USA. His firm, Brito & Brito, is involved in cost accounting and tax preparation, although not for the pursuer. He advises the pursuer in relation to business matters.
7. In about May 2004, Brito was introduced to Addinell. Addinell told Brito that he proposed to arrange the sale of one million barrels of crude oil; that the seller and supplier was Moustaf Petroleum Limited and the buyer was the second defender; and that he needed to find someone to post a performance bond in the sum of 300,000 US Dollars on behalf of Moustaf Petroleum Limited and in favour of the second defenders. Addinell did not tell Brito that he was, or had been, a non-executive director of Moustaf Petroleum Limited.
8. Addinell told Brito that once the oil had been bought and transferred to the second defender Moustaf Petroleum Limited would pay a sum of money to Addinell, who would then pay the sum of US$150,000 to Brito.

9. In June 2004 the cost of chartering a ship capable of load and transporting one million barrels of crude oil was approximately US$1,950,000
10. In June 2004 the worldwide purchase price of one million barrels of crude oil was approximately US$35 million.
11. Unknown to Brito, a fraudulent scheme had been formed by Addinell, Bohn, McCreery and two others (Hem Vakharia and Lazarus Tamana) to:
    (i) pretend that a company called 'Moustaf Petroleum Limited UK' intended to contract with the second defender for the sale and supply by 'Moustaf Petroleum Limited (UK)' to the second defenders of one million barrels of crude oil;
    (ii) pretend that as a condition of the contract that the second defender required 'Moustaf Petroleum Limited (UK)' to put in place a performance bond in favour of the second defender in the sum of US$300,000;
    (iii) induce by false pretences a dupe to put in place such a performance bond;
    (iv) falsely pretend to the second defender's bank and to the bank issuing the performance bond that 'Moustaf Petroleum Limited (UK)' was in breach of contract and that the conditions for calling up the bond had been met;
    (v) to instruct the second defender's bank to demand payment of the $300,000 from the issuing bank on the basis of such false pretences; and
    (vi) when the $300,000 had been paid into the second defender's bank, to make off with the $300,000.
12. In pursuance of the fraudulent scheme, in May 2004 Addinell met Brito in a hotel in London. At the meeting Addinell introduced Brito to Lazarus Tamana, who claimed to represent Moustaf Petroleum Limited. Addinell described Tamana as the London representative of Moustaf Petroleum Limited. Addinell told Brito that a Hem Vakharia was coordinating the transaction on Bohn's behalf.
13. At the meeting Addinell gave Brito a copy of what purported to be the second defender's 'company profile'. Bohn had signed it as 'chairman' of the company.
14. The information in the 'company profile' was almost completely false, was deliberately misleading, and was intended to give Brito the impression that the second defender was a wealthy company.
15. At the meeting Addinell showed Brito a draft contract in the same terms as the purported contract between 'Moustaf Petroleum Limited (U.K.)' and Capital Oil & Gas Limited dated 4th June 2004 that now forms 6/2/1 of process. According to the draft contract, Moustaf Petroleum Limited (the seller) contracted to sell and deliver to the second defender (the buyer) one million barrels of 'Forcados Blend Crude Oil as a spot buy', the oil to be delivered by ship to ship transfer in international waters off the coast of Nigeria.
16. The draft contract was a sham. Moustaf Petroleum Limited did not have any crude oil to sell and never intended to sell or supply any oil to the second defenders. The second defender did not have money with which to pay for the charter of a ship capable of loading and transporting one million barrels of crude oil. The second defender did not have money or other means with which to purchase one million barrels of crude oil, nor did the second defender, Bohn or Vakharia ever intend to purchase any oil.
17. Before Bohn and Tamana had even signed a purported contract document, Vakharia assured Brito that the second defender had already chartered a ship; that the second defender would give Brito the vessel's name, the captain's name and information about the manifesto; and that the second defenders had paid

$2.1 million for the charter. Later, Vakharia assured Brito that that the chartered ship was already on its way to the rendezvous point. All these assurances were false, as Vakharia well knew.

18. On the 4th of June 2004 'Moustaf Petroleum Limited (U.K.)' and the second defenders purported to contract for the sale, supply and purchase of one million barrels of crude oil. The pursuer reviewed the purported contract document after Bohn and Tamana had signed it. The purported contract (№ Cog-Moustaf-1MB.15-FOB) was a sham.
19. The intention and effect of (a) presenting the false 'company profile' to Brito; (b) giving Brito false assurances about having chartered a ship at a cost of 2.1 million US dollars; (c) showing Brito the draft contract; and (d) purporting to enter into a contract for sale, supply and purchase of one million barrels of oil was to give Brito the false impression that the second defender was a rich, thriving, legitimate and entirely sound company that genuinely intended to enter into such a contract, and by these false pretences to cause Brito to find and persuade someone to put in place a performance bond in the sum of $300,000 in favour of the second defender in order that the second defender could claim falsely that Moustaf Petroleum Limited was in breach of its obligations under the contract, call up the performance guarantee bond, and make off with the $300,000.
20. As Bohn, McCreery, Vakharia, Addinell and Tamana intended, Brito and the pursuer, Bosa, were duped by these false pretences. Having unwittingly passed on the false and misleading information to the pursuer, Brito advised him to put in place a performance bond in the form of a standby letter of credit in the sum of $300,000 in favour of the second defender. Acting on the false and misleading information, and on Brito's advice, the pursuer agreed to do so. As a consideration for the use of the money, Brito agreed to pay $30,000 to the pursuer. Brito signed a written personal guarantee for $330,000 in favour of the pursuer. In terms of the guarantee, were the bond to be drawn down, Brito would pay to the pursuer the sum of $300,000 as well as the fee of $30,000.
21. In accordance with his usual business practice, the pursuer formed a limited liability company in Florida (Havana Trading Limited Liability Company) with a view to putting in place a performance bond in favour of the second defender. The pursuer owns all the shares in the company. He is the only authorised signatory for the company, which is now inactive.
22. Having raised $300,000 personally with Union Planters Bank of Miami, Florida, and having provided supporting collateral to the bank personally, the pursuer transferred that sum to his company, Havana Trading Limited Liability Company. Thereafter, on behalf of Havana Trading Limited Liability Company he signed a performance bond in the terms required by the purported contract.
23. Unless called upon, the bond was to subsist for a maximum of thirty days. Addinell assured Brito that the bond "would not be touched."
24. On 9th June 2004 Union Planters Bank issued a standby letter of credit on behalf of Havana Trading Limited Liability Company in the sum of $300,000 and in favour of the second defenders.
25. On 10th June 2004 Union Planters Bank intimated the standby letter of credit to the second defender's bank, the Bank of Scotland plc at 50 West Campbell Street, Glasgow (the first defender). The money was payable against the second defender's 'authenticated Swift message confirming that Messrs Moustaf Petroleum Limited UK has not fulfilled their *[sic]* obligation in conformity with the terms and conditions of the contract № Cog-Moustaf-1MB.15-FOB'.

26. By letter of 11th June 2004 McCreery, on behalf of the second defender, alleged falsely to the second defender's bankers, The Bank of Scotland in Glasgow that 'Moustaf Petroleum Limited (UK)' was in breach of its contract with the second defender. He asked the Bank of Scotland to call up the standby letter of credit and demand payment of the $300,000 from Union Planters Bank.
27. The intention and effect of the second defender's false representations were that The Bank of Scotland (a) called up the standby letter of credit; (b) repeated the false representation to Planters Union Bank, Miami, Florida; and (c) thus (after an unsuccessful attempt by the pursuer to prevent transfer of the money by civil action in the USA) caused Union Planters Bank to transfer (via the Bank of New York) the sum of $300,000 to The Bank of Scotland in Glasgow.
28. Bohn told Brito that the second defender had called up the standby letter of credit because he had spent $1.2 million on chartering a vessel, the vessel had arrived at the transfer point, but there was no oil there. On several occasions Brito asked both Bohn and Vakharia for documentary evidence of the alleged charter. Despite promises by Bohn and Vakharia to furnish details of the charter, they failed to do so, because the second defender had chartered no such vessel, as Bohn and Vakharia well knew.
29. Brito asked Bohn for the name of the vessel and why the vessel's captain had not anchored and communicated with him and the pursuer. Bohn hung up the phone.
30. The pursuer's collateral was forfeited in satisfaction of his obligations to Union Planters Bank.
31. While certain enquiries were carried out The Bank of Scotland placed the $300,000 in a suspense account. Thereafter by agreement of the pursuer and the second defender the money was placed in the hands of the Sheriff Clerk at Edinburgh.
32. Brito has paid the sum of $30,000 to the pursuer.

FINDS IN FACT and LAW that:

1. This Court has jurisdiction.
2. The Second Defender, Moustaf Petroleum Limited (also known as Moustaf Petroleum Limited (UK)), Robert Ernest Addinell, Fred Bohn, Robert McCreery, Hem Vakharia and Lazarus Tamana induced the Pursuer by fraud to:
   (i) raise the sum of US$300,000 (Three Hundred Thousand United States Dollars) personally;
   (ii) provide, personally, collateral to Union Planters Bank in support of the advance of US$300,000;
   (iii) form a company called Havana Trading Limited Liability Company in Florida, U.S.A.;
   (iv) transfer the sum of US$300,000 from the Pursuer's personal account into that company's account; and
   (v) instruct Union Planters Bank, Florida, U.S.A. to issue in the name of that company and in favour of the Second Defender a performance bond in the form of a standby letter of credit to the value of US$300,000.
3. The Second Defender induced the First Defender by fraud to demand from the issuing bank, Union Planters Bank, payment of US$300,000 under the standby letter of credit, and on the basis of the Second Defender's false pretences thus caused the issuing bank to transfer to the First Defender the sum of US$300,000 for payment to the Second Defender.

FINDS in LAW that:

1. The Second Defender having, in concert with others, induced the Pursuer by fraud to raise personally the sum of US$300,000 (Three Hundred Thousand United States Dollars) and to cause a standby letter of credit in that amount to be issued in favour of the Second Defender, and the Second Defender having, on the basis of fraudulent false pretences, caused the First Defender to demand payment under the standby letter of credit and the issuing bank to transfer US$300,000 to the Second Defender's bank, is not entitled to the fund *in medio.*
2. (a) The Second Defender and others having induced the Pursuer by fraud to:
   (i) raise personally the sum of US$300,000 (Three Hundred Thousand United States Dollars);
   (ii) provide to Union Planters Bank, personally, collateral in support of the advance of $300,000;
   (iii) incorporate Havana Trading Limited Liability Company;
   (iv) transfer the sum of US$300,000 into that company's bank account; and
   (v) cause Havana Trading Limited Liability Company to put in place a standby letter of credit to the value of US$300,000 in favour of the Second Defender; and

   (b) the Second Defender and others having induced the issuing bank by fraud to transfer the sum of US$300,000 to the First Defender, and the Pursuer having forfeited collateral in satisfaction of his obligations to Union Planters Bank, in the absence of a competing claim by Havana Trading Limited Liability Company the Pursuer is entitled to the fund *in medio.*

THEREFORE HOLDS the fund *in medio* to be correctly stated as US$300,000 (THREE HUNDRED THOUSAND UNITED STATES DOLLARS) and any interest accrued thereon, but under deduction of the sums already excepted and ordered to be paid out of the fund *in medio* in terms of the interlocutor of 23rd November 2007; **REPELS** the Second Defender's pleas in law; **SUSTAINS** the Pursuer's First plea in law, **FINDS** the Pursuer entitled to the fund *in medio* and **ORDERS** distribution of the fund *in medio* to the Pursuer; **CERTIFIES** the cause as suitable for the employment of junior counsel; **RESERVES** meantime the question of expenses except insofar as already determined and **APPOINTS** parties to be heard thereon at 10.00 am on 16th February 2009 within the Sheriff Court House, Chambers Street, Edinburgh.

J.P. Scott

NOTE

In this action of multiplepoinding the second defender, Capital Oil & Gas Limited ['CO&G'], a company registered in England, purported to contract with 'Moustaf Petroleum Limited (UK)' for the purchase of crude oil from 'Moustaf Petroleum Limited (UK).' The latter is also referred to in documents, and was referred to in testimony, as Moustaf Petroleum Limited. The names were used interchangeably, and I refer to both versions as 'MPL'.

Under the purported contract MPL was obliged to put in place a performance bond guarantee in the sum of US$300,000 in favour of CO&G. An intermediary, Luis Gus Brito persuaded the pursuer, John Wilfred Bosa, to arrange for a performance guarantee bond to be put in place on behalf of MPL. Unless called upon, the bond was to subsist for a maximum of thirty days, after which the pursuer expected return of the $300,000, plus $30,000 as consideration for the use of his money.

The pursuer raised the sum of $300,000 personally; provided collateral personally to his bankers (Union Planters Bank of Florida, USA); formed a company in Florida, USA, called Havana Trading LLC ['HT'], a limited liability company wholly owned by him; put the $300,000 into the account of HT and, as sole signatory for HT, caused his American bankers to issue on behalf of HT a performance guarantee bond in the form of an irrevocable standby letter of credit in favour of CO&G and payable at CO&G's Scottish bank, The Bank of Scotland plc, Glasgow. The money was payable:

> '...against [CO&G's] authenticated Swift message confirming that "Messrs Moustaf Petroleum Limited UK has not fulfilled their obligation in conformity with the terms and conditions of the contract".'

The American bank intimated the standby letter of credit to CO&G's bankers in Glasgow. On the very next day CO&G instructed its bankers to demand payment of the $300,000 on the ground of breach of contract by 'Moustaf Petroleum'.[1] An attempt by the pursuer (in a court action in the USA) to prevent transfer of the $300,000 from Florida to Scotland having failed, the American bank transferred the money to the Bank of Scotland plc (the first defender, now discharged by agreement of the pursuer and CO&G). The pursuer's bankers forfeited his collateral.

The pursuer raised the present action of multiplepoinding while the money was still in the hands of The Bank of Scotland. The fund *in medio* ($300,000, less certain sums already deducted in terms of a prior interlocutor) has been lodged with the sheriff clerk.

The pursuer avers on record that 'either with or without the connivance of MPL"[2] he is the victim of fraud by CO&G, having been induced by its false pretences to put up the money in support of the letter of credit. He submits that CO&G never intended to purchase oil; it had no money with which to purchase oil or pay for charter of a ship; and it never chartered a ship in order to receive delivery of oil. No oil was ever delivered by MPL.

At proof, counsel for the pursuer presented three arguments on the substantive issues. First, on an ordinary reading of the contract, CO&G was not entitled to call up the bond. Second, the contract was induced by fraud and was therefore voidable. CO&G repudiated the contract, and the performance bond did not survive the repudiation. One cannot treat a contract as ***partly*** void. Third, and in any event, MP and CO&G were attempting to defraud each other. The contract was a sham and is therefore void.

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[1] Letter dated June 11, 2004, comprising 6/2/3 of process

[2] Amended record, article 2 for pursuer, p 5

Counsel for CO&G submitted that (i) the action is incompetent; (ii) the pursuer has no title or interest to sue; (iii) the pursuer has no right to the fund in medio; (iv) the defender was entitled to draw down on the performance bond; (v) CO&G did not commit a fraud on the pursuer; and (vi) CO&G is the only party entitled to the fund *in medio*.

The pursuer's responses to CO&G's arguments are that CO&G has no case on record concerning the pursuer's title to sue: there is no plea in law, there are no averments, and there is no notice on the pursuer to support such a case. But there is a positive averment by CO&G (Article 2 for the 2nd defender, p 8 of record) which falls to be treated as an admission in the pursuer's favour, *viz:*

> 'Believed to be true that The Union Planters Bank honoured its letter of credit and sent $300,000 to the First Defender. Believed to be true that the Pursuer's collateral was forfeited in satisfaction of his obligations to his bank.'

Moreover the action is competent. And CO&G has no rule 22 note, no averments and no plea in law to support this leg of its case.

(a) The Witnesses

I found the pursuer, ***John Wilfred Bosa***, to be a perfectly straightforward, honest and reliable witness. The contrary is not suggested and I have no hesitation in accepting his testimony. Most of the findings in fact are based on his testimony, and that of the next witness, ***Brito***.

Luis Gus Brito is an accountant who advises the pursuer in business matters. I found Brito to be both honest and reliable. The contrary is not suggested. I have no doubt that he was duped into advising the pursuer to raise $300,000 and put in place a performance bond in favour of CO&G. He gave the pursuer a written personal guarantee to the value of $330,000. Most of the findings in fact are based in his testimony, and that of the pursuer.

Robert Ernest Addinell proposed the deal to Brito and encouraged him to proceed and find a party willing to put up $300,000.
Addinell gave unchallenged testimony to the effect that he had been involved in the oil business for 50 years. Although he asserted that his expertise was in oil production, it was clear from the evidence that I accept that he was intimately involved in setting up the transaction that gave rise to the present action. He admitted that he had been (albeit for what he claimed was only a period of about a week) a non-executive director of MPL, the company with which CO&G purported to contract. But he did not tell Brito about his connection with MPL.
In 2004 Addinell did not express any doubts to Brito. But in his testimony he claimed to have had substantial concerns about the transaction, and CO&G in particular. When he was asked in cross-examination "So concerned that you contacted Mr Brito to get a performance bond put in place?" he declined to answer on the ground of self-incrimination. I am entitled to take that matter (as well as Addinell's demeanour) into account in considering Addinell's credibility.[3]

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[3] *Dickson on Evidence, Grierson's Edn., 1887, para 1790*

I do not accept Addinell as truthful or reliable and I reject his testimony except insofar as unchallenged and coinciding with the evidence that I accept. The inference that I draw from the evidence as a whole is that Addinell acted in concert with others in attempting to obtain $300,000 by fraud.

Detective Sergeant Robert Burke is 49 years old and has 28 years' service in the Metropolitan Police in London. He has been a detective for 24 years.
In 2004 he served in a money-laundering investigation team. Another detective was tasked to investigate the transfer of the $300,000 from Florida to The Bank of Scotland in Glasgow. Following that officer's long-term absence on sick leave, DS Burke took over the investigation. The money had been 'frozen' by order of an English court, but eventually that restraint order was rescinded.
DS Burke's conclusion was that MPL was attempting to defraud CO&G. While I accept DS Burke as a credible witness, and as reliable on the limited facts in respect of which he gave testimony, I do not accept his conclusion, which cannot be justified on the evidence before me.

Fred Otto Bohn owns 50% of the shares in CO&G (the other 50% being owned by his business associate, ***Robert McCreery***, who did not give evidence).
Although he is not a director of CO&G he described himself as "chairman" of the company, asserting that the title "chairman" had been given to him by the directors of the company "for the purposes of acting on the company's behalf." He denied that he is 'C.O.E' of the company. He asserted that in 2004 "typically" he would sign oil contracts for the company, which he had the authority to do.
I did not find Bohn to be remotely credible or reliable. On the contrary, from his demeanour, his responses to questions, and the many conflicts between his testimony and other evidence that I accept, I am in no doubt that Bohn lied on material issues.
Only in cross-examination did his composure desert him. For example counsel for the pursuer put to him in cross-examination that the CO&G 'company profile' (5/2 -5/4 of process) bore no relationship to the true standing of CO&G. He replied, "The only numbers I'd question are turnover numbers. The other information is fairly accurate." Thereafter he was forced to admit that material parts of the information in the document were entirely inaccurate or misleading. Counsel for the pursuer submitted that during cross-examination Bohn was almost doubled up, and that his body language indicated that he was under pressure and telling lies. I accept that submission as coinciding with my own observations and conclusions.
I reject Bohn's testimony except insofar as unchallenged and coinciding with other evidence, which I accept.

Jeremy Thomas is a solicitor aged 62 years. He has been a partner in a London firm since about 1979. He is in charge of a group that specialises in maritime cases and international trade. Although he was involved (as an articled clerk) in (unspecified) criminal business some 35 to 40 years ago, his forte is commercial law.
He has known ***Robert McCreery*** for some time. A client who had done business with McCreery and trusted him introduced McCreery to him.
CO&G instructed his firm in relation to a restraint order, which prevented The Bank of Scotland in Glasgow from releasing the $300,000 to CO&G.
According to Thomas the police "exonerated" CO&G, which "came away with a clean bill of health."

While I accept Thomas as a truthful witness, I do not accept that CO&G was entitled to exoneration or a "clean bill of health" in relation to the transaction at the centre of this action.

(b) The Fraudulent Scheme

A standby letter of credit is an irrevocable, binding undertaking by an issuer (here, Union Planters Bank of Miami, Florida, USA) given at the request of an applicant for the benefit of a beneficiary. Such a letter may be used to provide a guarantee of good faith in commercial transactions. It can be called upon provided that the conditions set out in the letter are met, and without the issuing bank concerning itself with relations between the principal contracting parties. Once called upon, provided the conditions of the letter of credit are met, the issuing bank must honour it and release the money to the beneficiary unless the bank has notice of clear fraud.[4]
Fraud involves a false pretence made dishonestly in order to bring about some definite result. Where the practical result is achieved, the fraud is complete.[5] Thus every case of simple fraud must contain three elements: (1) a false pretence; (2) a definite practical result; and (3) a causal link between the pretence and the result.[6]
At the heart of this action of multiplepoinding is the sum of US$300,000 that was lodged with the second defender's bank in Glasgow when a performance bond in the form of a standby letter of credit was called upon by the second defender. The pursuer avers that he was induced by fraud to put the standby letter of credit in place.

In about May 2004 one of Brito's clients introduced him to Addinell, who told Brito of a business proposition involving an oil transaction. Addinell told Brito that he proposed to sell one million barrels of crude oil and that he needed somebody to post a performance bond in the sum of 300,000 US Dollars. He asked Brito to find someone who would put up $300,000 for the bond. Addinell told Brito he would pay the sum of $150,000 to Brito, which payment would be triggered by the purchase and transfer of the crude oil. He told Brito that the parties to the proposed contract were the seller, Mustaf Petroleum Limited ['MPL'], and the buyer, Capital Oil & Gas Limited ['CO&G']. MPL would pay Addinell for his services.

Brito agreed to find someone to put up $300,000 for the bond. Brito approached the pursuer, Bosa, and proposed to him that he put up the $300,000 to serve as collateral for a performance bond in the form of an irrevocable standby letter of credit in favour of CO&G. He told the pursuer that the bond would remain in place for a maximum of 30 days, after which the $300,000 would be released to the pursuer and, in addition, Brito would pay to the pursuer 10% of the value of the bond, i.e. $30,000.

The 'Draft Contract'
In May 2004 Brito met Addinell in London. At the meeting Addinell introduced Brito to one ***Lazarus Tamana*** as the representative of MPL. At their meeting Addinell and Tamana showed Brito a copy of a draft contract for the sale and supply by MPL to the

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[4] *Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anr, 1977 1QB 159, per* Lord Denning @ *169*
[5] Macdonald, *The Criminal Law of Scotland, 5th Edn, p 52*
[6] Gordon, *The Criminal Law of Scotland, 3rd Edn, p129*

buyer, CO&G, of one million barrels of crude oil to be delivered by ship-to-ship transfer in international waters off the coast of Nigeria.

The 'Company Profile'

At the meeting in May 2004 Addinell told Brito that one ***Hem Vakharia*** (described by himself and by Bohn as Bohn's associate) was coordinating the transaction on behalf of CO&G. Vakharia told Brito that he represented CO&G, and that Brito could not speak to Bohn because Bohn was 'in transit.'

Addinell gave Brito a copy of the document (comprising **5/2 – 5/4** of process) that bore to be a 'company profile' of CO&G dated 23rd March 2004. Under the words 'Name of Senior Company Personnel' appear the words

'CHAIRMAN MR. FRED BOHN
DIRECTOR MR. BOB MCCREERY'

The document bears to be signed by 'Fred Bohn, Chairman' and appears to bear a CO&G stamp with the written initials 'F.B.' in the same hand as the signature 'Fred Bohn'.

Unknown to Brito, the information in this document was almost entirely false and, where not actually false, was intentionally misleading in material respects.

(i) The "prestigious"[7] address of the company is given as Eaton House, 39-49 Upper Grosvenor Street, London. In fact, the company did not operate from that address. The caretaker at that address allowed McCreery to use it as a delivery address for the company.[8] The company's registered office is ***McCreery's*** home at Flat 4, Wimbledon Close, The Downs, London, SW20.

(ii) 'Date business re-registered' is given as February 2002; reference is made to turnover and profit in the year 2002; but according to the directors' report for the year ended 29th February 2004 (**5/3/27** of process) the company began trading in the year to 29th February 2004.

(iii) The company's turnover in US dollars is given as '$153 million (est.) year 2002.' But during the proof Bohn admitted that from 28th February 2004 the company never had any turnover.[9]

(iv) The total capital invested is given as '$6.35 million (US dollars)'. That information is entirely false.[10]

(v) The total number of company employees is given as '14'. In fact, there were no employees.[11]

(vi) The net profit in US dollars is given as '$7.7 million (est.) year 2002'. In fact, the company has never made any profit at any time.[12]

(vii) 'Business Activities' are said to be 'Exploration of crude oil, natural gas, refining, trading of crude oils, and refined petroleum products. Specification of business activities is given as 'COG purchases crude oils, refines under terms of third party contracts and markets the refined petroleum products it produces and that of others'. Company 'Activity' is given as 'Crude Oil Exploration Licenses for blocks 37 and 39 in Yemen', as well as 'Past and current refining agreement with refineries in North Korea (via UN),

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[7] *per* Detective Sergeant Robert Burke
[8] *ibid.*
[9] *per* Bohn, cross-examination
[10] *ibid.*
[11] *ibid.*
[12] *ibid.*

Romania, Turkey, Thailand, Croatia and Bulgaria'. But not only did the company have no turnover from 29th February 2004 onwards, during the proof it emerged[13] that in fact:

(a) No activity at all has been recorded in the company accounts since 29th February 2004.
(b) In the year to 29th February 2004 (the first year of trading) the company incurred net liabilities of £35,102.
(c) In the year to 28th February 2005 the company incurred net liabilities of £55,274.
(d) In the year to 28th February 2006 the company incurred net liabilities of £67,155.

It follows that the company could not have carried out the activities set our in the 'company profile', and that the information concerning such activities was false.

I infer from the evidence as a whole that Addinell knew very well that the information contained in the 'company profile' was false. But at his meeting with Brito, Addinell did not express any doubts about the information contained in the 'company profile'. On the contrary, he told Brito that he was very impressed by the 'company profile'; that it was a very big company; it had 14 employees; it had total capital invested of $6.35 million.

Assurances by Addinell and Vakharia

Prior to the performance bond being put in place, Addinell and Vakharia (whom Bohn referred to as his "associate"[14]) assured Brito that "the money would not be touched" and that Bohn had given them such an assurance.

Further Assurances by Vakharia

Before MPL and CO&G purported to sign a contract, Vakharia assured Brito that CO&G had already chartered a ship; that CO&G would give Brito and the pursuer the name of the ship, the name of the captain and information about the manifesto; and that CO&G had paid $2.1 million in respect of the charter. In fact CO&G never chartered a vessel.

Further Assurances by Addinell

In June 2004, before MPL and CO&G purported to sign a contract, Addinell told Brito that Vakharia had called him and told him that CO&G had already chartered a vessel that was on its way to the transfer point. In fact CO&G never chartered a vessel and did not have funds or other means with which to pay for such a charter.

The Purported Contract between MPL and CO&G

Later, Addinell showed Brito a signed copy of the purported contract (**6/2/1** of process) dated 4th June 2004. The contract extends to six pages and bears to be signed on page 6 by Mr Lazarus Tamana for MPL and by Mr Fred Bohn for CO&G. Page 7 contains information about oil specifications. Page 8 contains what appears to be a draft of a 'Bank Guarantee'. In terms of clause 9 of the contract the seller is to provide a performance bond guarantee to the buyer's bank. On all eight pages the initials 'LT' and 'FB' appear beside the words 'Seller' and 'Buyer' respectively.

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[13] *ibid.*

[14] *per* Brito, cross-examination)

Clause 3.3 of the purported contract provided that:

> 'The buyer's vessel shall begin loading **within two (2) calendar** days from the confirmation of the arrival of buyer's nominated vessel at trans-shipping location and the receipt of the Performance Bank Guarantee by the Buyer. **Failure to fully load buyer's vessel within Eight Calendar (8) days when buyer's vessel is in position for trans-shipment, seller shall incur demurrage at the ship owners standard daily rates until the 15 day, at which time will result in forfeiture of Seller's $300,000.00 Operative PBG unless Force Majeure is the cause.**'

At p 8 under 'The Text Of USD $300,000 Bank Guarantee' the purported contract document provided that:

> '...we (seller's bank name), address (bank address) hereby irrevocably, unconditionally undertake to pay to you, upon first demand without examining the underlying legal situation and waiving all rights of objection and defense arising from the aforesaid contract any amount up to $300,000 (Three hundred thousands only) upon receipt of your swift request for payment and your written confirmation stating that Messrs Moustaf Petroleum Ltd. UK have not fulfilled their obligation in conformity with the terms and conditions of the above-mentioned contract.'

The Effect of the False Pretences

Brito was unaware that information concerning companies is in the public domain in the UK. Duped by the fraudulent information in the 'company profile' and by Addinell's duplicitous encouragement, not only did Brito fail to carry out any investigation of CO&G, he advised the pursuer, Bosa, to put in place a performance bond in favour of CO&G to the value of $300,000.

The false pretences concerning the 'company profile', the draft contract and the charter of a ship were made dishonestly by Vakharia, Bohn, Addinell and Tamana with the intention and effect of (a) causing Brito to advise a business associate (as it happened, the pursuer) to put the bond in place and (b) causing that business associate (the pursuer) to raise and lodge $300,000 of money in support of a standby letter of credit, in order that CO&G and others could, on the basis of a false allegation of breach of contract by MPL, draw down the letter of credit and make off with the $300,000. Brito gave the pursuer a written personal undertaking to pay to him the sum of $30,000, which undertaking Brito has since honoured.

Assurance by Bohn

After the bond was put in place, but before it was drawn down, Bohn assured Brito that the bond was a formality to "guarantee performance by both sides."[15]

Assurances by Vakharia and Bohn

On many occasions Brito asked both Vakharia and Bohn for the name of the chartered vessel, the name of its captain, and details of the satellite phone at which the captain

[15] *per* Brito, cross-examination

could be contacted. On each occasion Vakharia or Bohn promised to supply the details on the following day, but never did.[16]

The Bond Called up

On 10th June 2004 Union Planters Bank intimated the standby letter of credit in favour of CO&G to The Bank of Scotland in Glasgow. On the very next day, 11th June 2004, McCreery wrote to the Bank of Scotland on behalf of CO&G, demanding payment under the standby letter of credit. He alleged that MPL was in breach of contract and that the conditions for calling up the bond were therefore satisfied.[17]

Bohn's Purported Reason for Calling Up the Bond

After CO&G claimed payment under the standby letter of credit, Brito participated in a conference telephone conversation during which Brito asked Bohn why the bond had been called up. Bohn said that he had spent $1.2 million on chartering a vessel and there was no oil. As he had done several times before, Brito asked Bohn for the name of the chartered vessel. He also asked why the captain of the vessel had not anchored and attempted to contact MPL. Bohn "got a little nasty and hung up the phone..."[18]
In fact, as Bohn well knew, no vessel had been chartered by CO&G, which did not have the means with which to pay for such a charter.

Submissions for the Pursuer

Notwithstanding that the pursuer avers on record that 'either with or without the connivance of MPL'[19] he is the victim of fraud by CO&G, his primary submission on the issue of fraud is that MPL and CO&G were attempting to defraud each other. The contract is a sham. There is no contract. It is void and does not exist.
The second defenders wanted the money from the performance bond. It is more difficult to say what MPL were going to get out of it. But DS Burke that such companies would try to get an advance of $40,000 to $50,000.
It is not part of the pursuer's case that there was a 'direct' fraud on the pursuer. The pursuer's position is that the each party was trying to defraud the other, therefore the contract is a sham.

Submissions for the Second Defender

The second defender's submissions on the question of fraud fell into two main parts. Taking the second part of his submissions first, counsel for the second defender submitted that there was no fraud by CO&G on the pursuer. If MPL had no oil, and there was no collusion between MPL and CO&G, the bond would always have been lost. Moreover if CO&G chartered a ship and waited at the transfer point it would have been $1.9 million out of pocket and still be able to claim the performance bond.

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[16] *per* Brito, examination in chief
[17] *per* Bohn, cross-examination
[18] *per* Brito, examination in chief
[19] Amended record, article 2 for pursuer, p 5

Opinion

In my opinion, far from assisting the second defender, these points support the inference that the purported contract was part of a fraudulent scheme in which both MPL and CO&G were involved.

The second defender's position is that the bond was intended not to be a mere token of good faith, but to be a guarantee of performance by MPL. Indeed Bohn asserted[20] that the performance bond "... was the catalyst that made us sign the contract..."
But the value of the bond was $300,000 and on the undisputed evidence in June 2004 the cost to the second defender of chartering a ship capable of loading and transporting one million barrels of crude oil would have been approximately $1,950,000.[21] Clearly a bond to the value of $300,000 was no guarantee of performance at all. If CO&G had found the means to charter a ship and MPL had failed to deliver the oil, even if the value of the bond were paid in full, CO&G would still be out of pocket by $1,650,000. In my opinion these circumstances alone suggest that this was not a genuine transaction.

Moreover, CO&G had no money or other means of paying either for a charter of such a ship or for the purchase of a million barrels of crude oil, which in June 2004 would have cost approximately $35,000,000.
Bohn's explanation is that CO&G would have transferred its contract rights to one of CO&G's "associated firms" (by which he meant a major oil company or large trading house) that would "issue a letter of credit"... "that we have done a number of times."
Had I heard credible evidence from a representative of such a major oil company or large trading house that confirmed Bohn's claim of such a relationship with CO&G, different considerations might apply. But in the absence of such evidence I do not accept Bohn's explanation. In my opinion this is further evidence from which it may be inferred that the transaction was not genuine.

As to MPL, counsel for the pursuer found it more difficult to say what MPL were going to get out of such a fraudulent transaction.
In cross-examination for the second defender, DS Burke deponed that the police thought that MPL was attempting to defraud CO&G. To his knowledge there was no evidence that MPL ever owned one million barrels of crude oil. On being asked how much that fraud would be worth he replied, "Not the value of the oil. Similar cases show attempts to get advances as little as $40,000 or $50,000. But it's still in their interests because they didn't have the oil in the first place." Counsel did not explore this issue. Consequently there is no evidence before me concerning how MPL might have extracted an 'advance' of $40,000 or $50,000 by fraud from CO&G.
On the evidence before me in this case I am driven to the conclusion that MPL could not hope to gain anything unless it was involved with CO&G and others in a fraudulent scheme.

Further, counsel for the second defender submitted that the pursuer's case amounts to speculation and innuendo. There are no 'hard' facts. The pursuer never had any 'direct' discussions with anyone from CO&G. The pursuer never had any 'direct' discussions

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[20] examination in chief
[21] *per* Bohn, examination in chief

with a director or employee of CO&G. There is no evidence of a 'direct link' between Vakharia and CO&G. Any fraud was perpetrated by MPL and, in particular, Addinell — who declined to answer questions on the ground of self-incrimination. Addinell and Vakharia had a 'direct incentive' to get this deal done.

While I accept that both Addinell and MPL were participants in the fraudulent scheme, I reject the remainder of this part of the second defender's submissions. There are several facts from which, in combination, it may be inferred that CO&G and others committed fraud on the pursuer and others. 'Direct' links and 'direct' discussions are not required to establish the pursuer's case of fraud against CO&G, which is largely circumstantial. The proper approach is to consider the whole of the relevant evidence, and each piece of evidence in its proper context, before deciding what inferences in favour of the pursuer, if any, fall to be drawn from the evidence as a whole.

As noted above, fraud involves a false pretence, made dishonestly with the intention and effect of bringing about a practical result. Although pecuniary loss is averred in this case, that is not an essential element of the crime. What is required is that the victim is induced deliberately by false pretences to do something that he would otherwise not have done.[22] Nor is it necessary in the present case that CO&G or its representatives should have had 'direct' discussions with the pursuer. Here it is alleged that CO&G was involved in a fraudulent scheme to induce a third party (as it turned out, the pursuer) to do something that he would not otherwise have done. In that situation Brito (albeit unwittingly) and others became instruments in the inducement.[23]

My impression of Bohn's testimony was that he was making every effort to distance himself from all aspects of the purported transaction. While he admitted that he signed the purported contract document (6/2/1 of process) on behalf of CO&G, he never suggested that he had negotiated contract terms, nor was he pressed on the question of how he came to sign the document. But he admitted that "perhaps" he authorised Vakharia to co-ordinate the negotiations. He was asked, "Did you ever authorise Hem Vakharia to co-ordinate and bypass you?" He replied, "Co-ordinate, perhaps. Bypass, no. Absolutely not." I regard that as an admission by Bohn that he authorised Vakharia to negotiate on behalf of CO&G. That admission is confirmed not only by the testimony of Brito, but also by the unchallenged testimony of Addinell, who deponed that:

- Vakharia had a mandate to purchase oil for CO&G[24];
- Vakharia was appointed by CO&G[25]; and
- Vakharia "was mandated for Capital to find them oil.[26]"

In addition Bohn deponed that before the performance bond was put in place he discussed "the transaction" in "two or more" conference calls with Brito, Addinell and Vakharia[27]. Vakharia and Bohn promised repeatedly to give Brito details of the chartered ship, including the name of its captain, but never did. In fact, no ship was ever chartered by CO&G.

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[22] see, *e.g.*, *Adcock v Archibald, 1925 JC 58*
[23] see, *e.g.*, *Richards v Her Majesty's Advocate, 1971 JC 29*, per Lord Wheately @ p 34
[24] *per* Addinell, examination in chief
[25] *per* Addinell, cross-examination
[26] *ibid.*
[27] *per* Bohn, examination in chief

Moreover DS Burke gave unchallenged testimony to the effect that "at least three versions" of the purported contract document were recovered by the police, one from Tamana's home and two from McCreery's home.
But the links do not stop there. The 'company profile' (5/2 – 5/4 of process) was found in McCreery's flat, which is the registered office of CO&G. McCreery is Bohn's business partner and owns 50% of the shares in CO&G. According to a note on the third page of the document Vakharia is co-ordinating the transaction on behalf of Bohn.

Bohn claimed that:

- he had not seen the document before his arrival in Scotland a few days before the proof;
- the signature above the printed words, 'Fred Bohn, Chairman' looks like his signature; but
- it is not 'an original signature'; and
- he does not know how the signature got there.

In cross-examination Bohn asserted that the signature and the whole document are forgeries. When asked if evidence was to be led from an expert regarding the authenticity of the document, he replied, "Not to my knowledge." He was asked if he had ever seen other documents bearing his signature, but which he had not signed. He replied, "If I have, I can't recall." He attempted to blame Vakharia for making the document. He suspected Vakharia because "Brokers sometimes are driven to doing things that I deem less prudent in an attempt to organize a transaction."
I found Bohn's demeanour, his denial of his signature and his attempts to distance himself from the 'company profile' to be wholly unconvincing.

But the incriminating evidence is not restricted to events prior to the bond being put in place. As noted above, on many occasions Brito asked both Vakharia and Bohn for the name of the chartered vessel, the name of its captain, and details of the satellite phone at which the captain could be contacted. On each occasion Vakharia or Bohn promised to supply the details on the following day, but never did.[28]
In my opinion these promises were made with a view to reassuring Brito and the pursuer that all was well and preventing discovery of the fraud until the bond had been drawn down, __ clear fraud being the only ground upon which the issuing bank could decline to honour the bond.[29]

Moreover in my opinion CO&G also caused The Bank of Scotland to call up the bond, and Union Planters Bank to transfer $300,000 to the Scottish bank, by means of false pretences.
As noted above, Clause 3.3 of the purported contract provided that:

> 'The buyer's vessel shall begin loading **within two (2) calendar** days from the confirmation of the arrival of buyer's nominated vessel at trans-shipping location and the receipt of the Performance Bank Guarantee by the Buyer. **Failure to fully load buyer's vessel within Eight Calendar (8) days when buyer's vessel is in position for trans-shipment, seller shall incur demurrage at the ship owners standard daily rates until the 15 day, at which time will result**

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[28] *per* Brito, examination in chief
[29] *Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anr, supra*

in forfeiture of Seller's $300,000.00 Operative PBG unless Force Majeure is the cause.'

Although the grammar is not perfect, in my opinion the language and its meaning are perfectly plain, *viz:*

(i) the buyer is to nominate a vessel to receive the oil;
(ii) the buyer is to confirm to the seller the arrival of the nominated vessel at the trans-shipping location;
(iii) the buyer's vessel is to begin loading within two days of such confirmation being given and 'receipt' of the 'performance bank guarantee' by the buyer.

Thereafter Clause 3.3 deals with failures and penalties for failures, *viz:*

(a) If the seller fails to load the buyer's vessel within eight days of the buyer's vessel being in position for trans-shipment, the penalty is demurrage at a specified rate; but
(b) if such failure continues until the 15th day of the buyer's vessel being in position the $300,000 bond will be forfeited unless force majeure is the cause of the failure.

Therefore in terms of the purported contract document the performance bond can only be forfeited if the seller fails to load the buyer's vessel by the 15th day after the buyer's vessel is in position for trans-shipment. It is not suggested that such a failure occurred here, therefore CO&G were not entitled to payment of $300,000.
But on the very next day after the bond had been intimated to The Bank of Scotland McCreery wrote to The Bank of Scotland on behalf of CO&G, claimed falsely that MPL was in breach of contract, and asked the bank to call up the standby letter of credit and demand payment of the $300,000 from Union Planters Bank. The Bank of Scotland having called up the bond on the basis of CO&G's false pretence, the money was eventually transferred to the Scottish bank.

After the bond had been called up Bohn told Brito that the reason for calling up the bond was that he had spent $1.2 million on chartering a vessel (which was a lie) and there was no oil.

It follows that in my opinion the second part of the second defender's submissions also falls to be repelled. There is a substantial body of (mostly unchallenged) evidence linking Addinell, Vakharia, Bohn, Tamana, MPL and CO&G, and from which it may be inferred that they were all engaged in a fraudulent scheme in which Brito, the pursuer and the banks were the dupes.

I am satisfied (on the facts admitted or proved, and by inference from those facts) that the pursuer, The Bank of Scotland and Union Planters Bank were victims of a fraudulent scheme perpetrated not only by CO&G, Bohn, McCreery and Vakharia, but also by MPL, Addinell and Tamana, with whom Bohn, McCreery and Vakharia were in league. By false pretences and the furnishing of misleading information, and with assistance from the unsuspecting Brito, their aims were to:

(i) induce the pursuer to put up the performance bond and leave it in place until it could be called up;
(ii) claim falsely that the conditions for calling up the bond had been met;
(iii) call up the bond at the earliest opportunity; and
(iv) make off with the $300,000.

Their first three aims were achieved. Only the Bank of Scotland's delay in handing over the money to CO&G prevented the fraudulent scheme from bearing fruit.

I am in no doubt that the pursuer and Brito are innocent parties in this affair. The contrary is not suggested.
Brito gave the pursuer a written personal undertaking to the effect that after a period of thirty days he would pay to the pursuer the sum of $300,000 plus 10% (*i.e.* $30,000) as a consideration for use of the money. Brito has already paid the sum of $30,000 to the pursuer. In terms of his undertaking he is still due to pay $300,000 to the pursuer, but the pursuer has decided not to insist on such payment until he knows the outcome of the present action.

Moreover in my opinion the pursuer's claim on the fund *in medio* is not precluded by the fact that HT lodged the $300,000 with Union Planters Bank. The pursuer was induced by fraud to borrow $300,000; provide collateral personally in respect of the loan; incorporate HT; put the money into HT's account; and (as sole signatory for HT) lodge the money in order that the standby letter of credit could be issued in favour of CO&G. When CO&G called up the bond, the pursuer's personal collateral was forfeited. Therefore the pursuer, personally, is a victim of the fraudulent scheme and is entitled to recompense. It follows in my view that he has a personal claim on the fund *in medio* that is distinct from any claim that HT might have made. HT not having made a claim on the fund, in my view the pursuer is entitled to it.

What is beyond doubt, in my opinion, is that CO&G is not entitled to the fund *in medio* or any part of it.

(c) Other Submissions

Submissions by counsel for the pursuer and for the second defender are set out more fully in Appendix A to this note.

The Competency of the Action
Counsel for the second defender submitted that:

- the pursuer does not have title or interest to raise an action of multiplepoinding;
- no 'double distress' has been identified; and
- another form of action would have been appropriate.

On the question of title and interest, counsel for the pursuer submitted that:

- this is new matter;
- for which there are no averments;
- there is no supporting plea in law; and
- there is no notice to the pursuer or to the Court.[30]

But article 2 of condescendence for the second defender contains a positive averment which shows that the pursuer does have right, title and interest:[31]

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[30] *Macphail, Sheriff Court Practice, 3rd Edn.*, 9.05, 9.07
[31] *ibid*, 9.23

'Believed to be true that The Union Planters Bank honoured its letter of credit and sent $300,000 to the First Defender. Believed to be true that the Pursuer's collateral was forfeited in satisfaction of his obligations to the bank.'

The pursuer has right, title and interest because he put money into HT, which put up the bond. The Court can simply infer that HT has assigned the debt to him.

As to competency of the action, counsel for the pursuer submitted that:

- there is no plea in law;
- there are no pleadings;
- there is no rule 22 note; and
- no notice of such a case has been given.

It is too late to raise this issue.[32]

Put shortly, in my opinion the pursuer's submissions on these issues are well founded. Title and interest, competency and the form of the action are not raised in the second defender's pleadings or in a rule 22 note and it is far too late to raise such issues at proof. In any event, for the reasons given above I am satisfied that the pursuer has suffered personal loss as a result of fraud perpetrated by the second defender and others. Therefore in my opinion it follows that he is entitled to claim the fund in his own right, without reference to an assignation by HT.

As to the form of the action, apart from any other consideration the second defender admits on record[33] that a question having arisen as to the respective rights of the pursuer and the first and second defenders, this action is necessary. The second defender's submission seems to be that since the first defender has been discharged by agreement, and only two parties are left in the action, an action of multiplepoinding is no longer appropriate. If that is the submission, I reject it.

In addition, for the reasons given above I do not consider that under Clause 3.3 of the purported contract document the second defender was entitled to draw down the performance bond, in that the event which would have given the second defender the right to do so (*i.e.* failure to load the buyer's vessel by the 15th day after the buyer's vessel was in position for trans-shipment) had not occurred. Further, and in any event, I accept as sound the pursuer's argument to the effect that one cannot treat a contract as partially void. Even if I had held that there was a genuine contract between MPL and the second defender, CO&G, I would have sustained this part of the pursuer's argument.

I have granted the pursuer's unopposed motion for sanction for the employment of junior counsel.

Having reserved expenses in a previous interlocutor, I have assigned a hearing on that issue.

J.P. Scott
Edinburgh, 31st January 2009

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[32] *Walker, Civil Remedies, p 1234*
[33] Article 3 for the second defender, p 11