Easter Term
[2010] UKSC 18
On appeal from: 2009 CSIH 35

JUDGMENT

Farstad Supply AS (Appellant) *v* Enviroco Limited and another (Respondents) (Scotland)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lord Mance
Lord Clarke

JUDGMENT GIVEN ON

5 May 2010

Heard on 9 and 10 March 2010

Appellant	*Respondent*
Alistair Clark QC Paul O'Brien	Robert Howie QC Almira Delibegovic-Broome
(Instructed by HBJ Gateley Wareing LLP)	(Instructed by Paull & Williamsons)

LORD CLARKE (with whom Lord Phillips agrees):

The assumed facts

1. On 7 July 2002 the oil rig supply vessel *Far Service* ('the vessel') was damaged by fire while berthed in Peterhead harbour. She was owned by the pursuer, Farstad Supply AS ('the owner'), and was under charter to the third party, Asco UK Limited ('Asco'). Asco had engaged the defender Enviroco Limited ('Enviroco') to clean out some of the tanks on board the vessel. Enviroco was carrying out the work. On Asco's instructions the master of the vessel started up the engines, preparatory to moving to another berth. At the same time an employee of Enviroco inadvertently opened a valve which released oil into the engine room near hot machinery. The oil ignited and caused the fire.

The claims

2. The owner sued Enviroco for damages in negligence. Enviroco denies liability but for the purposes of the appeal it is to be assumed that it is liable. Enviroco says that the fire was materially contributed to by the contributory negligence of both the owner and Asco. Those allegations are denied but for the purposes of the appeal it is to be assumed that Asco would be liable in negligence to the owner for the consequences of the fire but for any defence Asco might have under the terms of the charterparty.

3. Although there is a contract between Enviroco and Asco, the terms of that contract are not before the Court and, so far as I am aware, Enviroco has not alleged any breach of that contract against Asco. Enviroco's claim is solely for contribution. It says that, if it is liable to the owner, it is entitled to a contribution from Asco under section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 ('the 1940 Act'). If it is entitled to such a contribution, it is agreed that Asco will (at the least) be entitled to an indemnity from the owner under clause 33(5) of the charterparty. Asco has played no part in the debate at any stage. That is no doubt because, whatever the result, it will not ultimately be liable. It either has a defence to Enviroco's claim for contribution or it is entitled to an indemnity from the owner under the terms of the charterparty. The owner accepts that that is the case and has accordingly made the submissions which Asco would have made.

4. After a debate on the assumed facts, on 23 April 2008, the Lord Ordinary, Lord Hodge, held that Enviroco was not entitled to a contribution from Asco: see 2008 SLT 703. Enviroco enrolled a reclaiming motion and on 1 May 2009 an Extra Division allowed the reclaiming motion by a majority, comprising Lady Paton and Lord Carloway, with Lord Osborne dissenting: see 2009 SC 489. With the judicial score being two all, the owner appeals to this Court in order to restore the interlocutor of the Lord Ordinary.

The issues

5. As set out in the agreed Statement of Facts and Issues the issues in this appeal are these:

> i) What is the meaning and effect of section 3(2) of the 1940 Act?
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> ii) In particular, can a defence provided by a pre-existing contract such as the charterparty be taken into account in determining whether a person "if sued, might also have been held liable" for the purposes of section 3(2)?
>
> iii) If the answer to question ii) is yes, does clause 33(5) of the charterparty have the effect that Asco is not a person who, if sued, might also have been held liable to the appellants for the purposes of section 3(2)?

The 1940 Act

6. It is convenient to consider the first two questions together because they both involve the construction of the 1940 Act. It is common ground that at common law the position in Scotland (unlike in England) was that, where more than one wrongdoer was jointly and severally liable to pay damages in respect of any loss or damage, and where that wrongdoer had paid more than his *pro rata* share, each such wrongdoer was liable *inter se* to pay a *pro rata* share of the damages. Thus if there were two such wrongdoers, A and B, the contribution of each would be 50 per cent and, if A paid, say, 75 per cent of the damages, he was entitled to recover the 25 per cent excess from B. That was so, whether or not a claim had been made by the pursuer against B. The common law position is explained by Lord Keith of Kinkel in *Comex Houlder Diving Ltd v Colne Fishing Co Ltd* 1987 SC (HL) 85 at 120-1.

7. The 1940 Act was enacted to reform the common law position. Section 3 is entitled "Contribution among joint wrongdoers" and provides, so far as relevant, as follows:

> "(1) Where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses, they shall be liable *inter se* to contribute to such damages or expenses in such proportions as the jury or the court, as the case may be, may deem just: Provided that nothing in this subsection shall affect the right of the person to whom such damages or expenses have been awarded to obtain a joint and several decree therefor against the persons so found liable.
>
> (2) Where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid, he shall be entitled to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded, such contribution, if any, as the court may deem just.
>
> (3) Nothing in this section shall –
>
> ….
>
> (b) affect any contractual or other right of relief or indemnity or render enforceable any agreement or indemnity which could not have been enforced if this section had not been enacted."

8. The essential purpose of the section was to replace the common law *pro rata* rule with a flexible rule of apportionment according to the court's view of what was just. In the instant case the claim for contribution is made under section 3(2) but in my opinion section 3(2) must be construed in the context of the section as a whole and, in particular, subsection (1).

9. Subsection (1) deals with the case where the pursuer (here the owner) proceeds against two defenders in respect of loss or damage caused by both and a judgment is given against both, so that they are both "found jointly and severally liable in damages or expenses". This might have been the case here if the owner

had sued both Enviroco and Asco and had obtained a decree against Enviroco and Asco in respect of loss and damage arising out of the fire. The effect of subsection (1) would then have been that Enviroco and Asco would have been liable to contribute to such damages and expenses in such proportions as the court deemed just.

10. It is important to appreciate that in such an action, in order for the owner to obtain a decree against Asco, it would have had to establish that Asco was liable to it in damages. That would have involved establishing that Asco was liable for damages for breach of duty, which in turn would have involved the court considering whether Asco had a defence under the charterparty. That is so whether the alleged duty was a contractual duty or a duty of care at common law. Although the Statement of Facts and Issues says that, for the purposes of this appeal, it is to be assumed that Asco would have been liable to the owner in negligence jointly and severally with Enviroco but for any defence arising from the terms of the charterparty, that assumption would not have carried the owner far enough. That is because the right to contribution under section 3(1) depends upon there being a decree that Enviroco and Asco were jointly and severally liable in damages and the owner could not have obtained such a decree against Asco if Asco had a contractual defence, whether the source of the alleged liability was in contract or delict. The relations between the owner and Asco were governed by the charterparty and I can see no basis upon which Asco could have been liable to the owner in negligence, and thus in delict without reference to the terms of the charterparty. The question in a case to which section 3(1) applied would be whether Asco had a defence under the charterparty to the owner's claim.

11. I turn to section 3(2). It applies to a claim for contribution by a person who has been held liable "in any such action as aforesaid". The reference to "any such action" is a reference to the action identified in subsection (1) and is thus a reference to an action by a pursuer against a defender "in respect of loss or damage arising from any wrongful acts or negligent acts or omissions" by the defender. If a defender, as such a wrongdoer, has been held liable to pay damages or expenses to a pursuer and if he pays the damages he has a right to recover such contribution, if any, as the court may deem just from "any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded".

12. As I see it, the subsection is specifically intended to deal with the position where there are two actions. In the first action a wrongdoer A is held liable in damages or expenses to the pursuer and A then pays the pursuer and begins a separate action against a second person B who, if sued in the first action, might have been held liable to the pursuer in the first action. However, no-one suggested that the subsection was limited to such a case. It was not suggested that the claim

for contribution could not be made by third party proceedings in the same action, even though no liability for contribution can arise until A has paid the pursuer.

13. In the instant case A is Enviroco and is assumed to be liable in delict to the owner in respect of loss and damage caused by the fire. Let it also be assumed that it has paid the pursuer the amount of damages awarded against it. Enviroco is entitled under subsection (2) to recover a contribution to its liability from Asco if it shows that Asco is a person who, "if sued, might also have been held liable" in respect of the same loss. It is clear that the expression "if sued" means if sued by the owner. So the question is whether, if Asco had been sued by the owner, it might have been held liable to the owner in respect of the loss or damage caused by the fire.

14. There has been some consideration of the expression "if sued" in the cases. For example, in *Dormer v Melville Dundas & Whitson Ltd* 1989 SC 288 at 298, the Inner House followed earlier *dicta* of Lord Keith in *Central SMT Co Ltd v Lanarkshire CC* 1949 SC 450 at 461 to the effect that those words assume that the person in Asco's position had been

> "relevantly, competently and timeously sued; in other words, that all the essential preliminaries to a determination of the other party's liability on the merits have been satisfied."

In that sentence "the other party" in this case is Asco. It is not suggested that all such preliminaries had not been satisfied on the facts of this case. So it is not necessary to consider possible problems which might arise on the facts of specific cases, some of which are considered by Lord Hodge in his clear and concise analysis at paras 8 to 19 of his judgment.

15. It follows that the question under section 3(2) is whether, if Asco had been sued by the owner, it would have been liable to the owner. The answer to that question is thus the same as it would have been if the owner had sued both Enviroco and Asco and the case had fallen within section 3(1) and not section 3(2). For the reasons already given, however the duty is formulated, that depends upon whether Asco would have had a defence to the owner's claim for damages arising out of the fire. It follows therefore that, in my opinion, the outcome of this appeal depends upon the true construction of the charterparty.

16. In this regard I entirely agree with the conclusions and reasoning of Lord Mance. In particular I agree with him that, if Asco is not liable to the owner because it has a contractual defence under the charterparty, Enviroco will not be

entitled to contribution from Asco and that the reason for that cannot be described as the result of a 'whim' on the part of the owner but is the result of deliberate contractual arrangements apportioning risk between them as owner and charterer under the charterparty.

17. I make two points by way of postscript on this part of the case. The first is that it is submitted on behalf of Enviroco that it would be unjust to allow Asco to rely upon a contractual defence of which Enviroco was unaware. I would not accept that submission. For the reasons I have explained, the whole basis of the right to contribution under subsections (1) and (2) of section 3 is that both Enviroco, as the defender, and Asco, as second defender or third party as the case may be, are liable to the owner. If Asco is not liable to the owner, the whole basis of its liability to contribution is removed. I see nothing unjust in such a result. In this regard too I agree with Lord Mance. Enviroco carried out its work pursuant to a contract with Asco and must have known that there was a charterparty governing the relationship between the owner and Asco. It could of course have refused to contract with Asco without obtaining and considering the terms of the charterparty. Moreover, if Enviroco wished to recover a contribution or indemnity on facts such as these, the way to do it was to make provision for it in its contract with Asco.

18. The second point is related. It is that the case pleaded against Asco is put in negligence. As Lord Hodge put it at para 2, Enviroco alleged that Asco failed in its duty as charterer and base operator to direct and supervise the operations carried out on the vessel while the vessel was in port. He added that, although it is not expressly averred, the pleadings imply that Asco failed in its duty to the owner to take reasonable care to avoid causing physical damage to the vessel. As stated above, however the duty is framed, the question whether Asco would have been liable to the owner depends upon whether it has a defence to the claim by reason of the terms of the charterparty. I turn to that question.

The charterparty

19. The charterparty is dated 4 February 1994. By clause 48, it is governed by English law and the parties agreed that the High Court in London should have exclusive jurisdiction over any dispute arising out of it. It was between Asco as charterer and Farstad Shipping A/S as owner, but it was agreed in the Statement of Facts and Issues that Farstad Supply AS was and is to be treated as the owner under the charterparty. In the light of that agreement it is not necessary for me to trace the route to that conclusion. The charterparty was for an original period of five years but was subsequently extended by agreement. By clause 18 the owner was to provide and/or pay for "all requirements, costs or expenses of whatsoever nature relating to the Vessel and Owner's personnel …".

20. The critical provisions of the charterparty for present purposes are to be found in clause 33, which is set out in full in the Appendix to this judgment. The owner submits that on the true construction of clause 33.5 the parties agreed that Asco was not to be liable in respect of loss or damage to the vessel even if caused by its negligence. Alternatively the owner submits that, if clause 33.5 is not an exclusion clause but is, as Enviroco submits, an indemnity clause (without being an exclusion clause), the owner would not have obtained a decree to the effect that Asco was liable to it within the meaning of section 3(1) because of what has been described as the Scottish brocard *frustra petis quod mox es restiturus* (which is the same principle as the English law defence of circuity of action) and therefore Enviroco cannot establish that, if sued, Asco might have been liable in respect of the loss or damage caused by the fire. All depends upon the true construction of the charterparty.

21. Like any other term in a contract, clause 33.5 must be construed in its context as part of clause 33 as a whole, which must in turn be set in its context as part of the charterparty, which in its own turn must be considered against the relevant surrounding circumstances or factual matrix. The vessel was chartered for work in the oil rig supply industry and was a comparatively long term contract. Clause 33 contains a division of responsibility between the owner and charterer of a type which has become familiar. However, that fact is no more than part of the factual matrix. Ultimately all depends upon the true construction of the language of the particular clause in its context.

22. The features of clause 33 which are of particular importance seem to me to be these. Clause 33 as a whole is entitled "EXCEPTIONS/INDEMNITIES" and clause 33.1 expressly provides that specific clauses are to be unaffected by the "exceptions and indemnities" set out in clause 33. With that introduction one would expect the clause to contain both exceptions and indemnities. Each of the clauses except clauses 33.7 and 33.10 provides that the owner or charterer as the case may be "shall defend, indemnify and hold harmless" the other against various events.

23. The critical clause is clause 33.5, which provides:

> "Subject to Clause 33.1, the Owner shall defend, indemnify and hold harmless the Charterer, its Affiliates and Customers from and against any and all claims, demands, liabilities, proceedings and causes of action resulting from loss or damage in relation to the Vessel (including total loss) or property of the Owner, including personal property of Owner's Personnel or of anyone for whom the Owner may be responsible on the Vessel, irrespective of the cause of loss or damage, including where such loss or damage is caused by, or

> contributed to, by the negligence of the Charterer, its Affiliates or Customers."

24. The question is whether clause 33.5 excludes the charterer's liability to the owner in respect of damage to the vessel caused by the charterer's negligence. In my opinion it plainly does. As appears below, the word 'indemnify' is capable of having a wide meaning but, even assuming that by itself it might (depending upon the context) have a narrow meaning, it does not stand alone in the clause. The owner must 'defend ... and hold harmless' the charterer, not only against liabilities and causes of action, but also against 'all claims, demands' and 'proceedings'. The natural meaning of that expression is that, since the owner must hold Asco harmless from a claim by the owner in respect of damage to the vessel caused by Asco's negligence, Asco cannot be liable to the owner in respect of such damage.

25. The Lord Ordinary analysed this point with admirable clarity and brevity at paras 24 to 27 of his judgment, to which I would like to pay particular tribute. I entirely agree with him that, as he put it at para 27, the obligation to hold harmless goes further than the obligation to reimburse because they are words of exception.

26. In some contexts the words 'indemnify' and 'hold harmless' have the same meaning. So, for example, in the second edition of the Oxford English Dictionary 1989, 'indemnify' is given three meanings, two of which are these:

> "1. *trans*. To preserve, protect, or keep free *from*, secure *against* (any hurt, harm, or loss); to secure against legal responsibility *for* past or future actions or future actions or events; to give an indemnity to.
> …
> 2. To compensate (a person etc) *for* loss suffered, expenses incurred, etc)"

It is of interest to note that one of the sources quoted, dated 1651, gives the definition of 'indemnify' as "Save harmless and keep indemnified." See also the discussion by the Lord Ordinary of the position in the United States at paras 24 and 25.

27. The word 'indemnify' can sometimes mean indemnify a third party. As ever, all will depend upon the context. Here the context is plain. The expression 'defend, indemnify and hold harmless' is used in both senses and is wide enough to include the exclusion of liability for loss incurred by the owner or charterer as the case may be. This is plain from clause 33.11(a), which, as appears in the Appendix, provides that the

> "Owner shall defend, indemnify and hold harmless Charterer from any consequential or indirect losses that Vessel Owner may suffer as a result of the performance of the Charter."

Clause 33.11(b) is a mirror of clause 33.11(a) but provides for the charterer to 'defend, indemnify and hold harmless' the owner in respect of consequential or indirect losses. The significance of clauses 33.11(a) and (b) for present purposes is that they each plainly operate as an exceptions clause against liability for loss and that the language used is the same as in clause 33.5. They thus show that in this charterparty the expression 'defend, indemnify and hold harmless' is wide enough both to provide a defence for one party to claims made by the other party and to provide an indemnity in respect of the claims of third parties.

28. Further, as can plainly be seen from the Appendix, the same expression, namely 'defend, indemnify and hold harmless', is used throughout clause 33, whether for the protection of the owner or the charterer. Clause 33 as a whole represents a carefully considered balance between the interests of the owner on the one hand and those of the charterer on the other. I entirely agree with Lord Mance's analysis of the clause and was particularly struck by his point at para 58 below that Enviroco's submissions can be tested by looking at the opposite sides of the coin.

29. In all the circumstances, I would hold that the effect of clause 33.5 is *inter alia* to exclude the charterer's liability in respect of damage to the vessel caused by its own negligence. It follows that, on the assumed facts, Enviroco is not entitled to contribution from Asco under section 3(2) of the 1940 Act because it cannot establish that 'if sued' Asco might have been liable to the owner in respect of damage to the vessel (and other losses) caused by the fire: Asco would have had a defence to the owner's claim because any such liability was excluded by clause 33.5 of the charterparty.

30. The conclusion that Asco would have such a defence makes the remaining question which formed part of the argument irrelevant. That question was whether, if clause 33.5 is not an exclusion clause but only an indemnity clause, the position would be different. The argument, accepted by the majority in the Inner House, was that in such a case the owner would have been entitled to judgment against Asco because clause 33.5 did not afford it a defence but would have been liable to indemnify Asco against that liability under the clause. It was said that in those circumstances, if the action had been brought by the owner against both Enviroco and Asco, as contemplated in section 3(1) of the 1940 Act, it would have been entitled to a joint and several decree against both and thus both would have been 'found jointly and severally liable in damages' within the meaning of section 3(1).

31. Again I agree with Lord Mance that that argument cannot be accepted. The charterparty is governed by English law and such a claim by the owner would be met by the defence of circuity of action and judgment would be given, not for the owner, but for Asco. There would thus be no order of the court that Asco pay damages to the owner. I agree with Lord Mance that that would be a matter for English law as the proper law of the charterparty.

32. However, if it were a matter of Scots law, the position would be the same. It has been held, at any rate in England, that the principle encapsulated in the phrase *frustra petis quod mox es restiturus* is the same as the English doctrine of circuity of action: see eg *Post Office v Hampshire* [1980] QB 124 per Geoffrey Lane LJ at page 134. The principle is clear from the example of its application given by Lord Normand in *Workington Harbour and Dock Board v Towerfield (Owners)* [1951] AC 112 at 148, where he said:

> "But if the shipowner might have recovered as damages in an action in negligence the sum paid to the harbour authority under section 74, … the decision would be saved *frustra petis quod mox es restiturus*."

In *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 AC 494 at 510 Lord Dunedin described the principle as a 'brocard' of the civil law and held that judgment for the full charter hire should not be given where, although the hire had been due, it could be shown that it would be repayable in part, because, as Lord Dunedin put it, "it would be useless to give judgment for the respondents" for more than the sum which was not repayable.

33. That principle would apply here if, contrary to the view expressed above, clause 33.5 was no more than a narrow indemnity clause. Even if Asco was in principle liable to the owner, it would be entitled to be immediately indemnified by the owner, which would be bound the repay the amount of the liability. In these circumstances it would, as Lord Dunedin put it, be useless to give judgment for the owner against Asco. Accordingly, if Asco had been sued by the owner, no such judgment would have been given for damages against it. It follows that for these reasons, which are the same as those given by Lord Mance, clause 33.5 protects Asco against the possibility of a judgment being given against it, whether it is construed as an exceptions clause or as a narrow indemnity clause.

CONCLUSION

34. For the reasons I have given I would construe the 1940 Act as set out above. I would reject the submission that the terms of the charterparty between the owner

and Asco are irrelevant and would hold that, whether Enviroco is entitled to a contribution in respect of any liability it would, if sued, have had to the owner arising out of the fire depends upon whether Asco would have had a defence under the charterparty. The answer to that question depends upon the true construction of the charterparty. As to the construction of the charterparty, I would hold that any liability of Asco to the owner in negligence, or based on its negligence, is excluded by clause 33.5. If, contrary to that view, clause 33.5 is not an exclusions clause but a narrow indemnity clause, I would hold that Asco would not, if sued, have been liable to the owner because it would have had a defence of circuity of action or of *frustra petis quod mox es restiturus*.

35. It follows that I would allow the appeal, recall the interlocutor of the Inner House dated 1 May 2009 and restore the interlocutor of the Lord Ordinary dated 23 April 2008 and remit the cause to the Lord Ordinary to proceed as accords.

APPENDIX

33 EXCEPTIONS/INDEMNITIES

33.1 Clauses 4, 6, 7, 18, 19 and 20 and any provisions for the cessation of hire under any Charter shall be unaffected by the exceptions and indemnities set out in this Clauses 33.

33.2 Subject to Clause 33.1, the Charterer shall defend, indemnify and hold harmless the Owner from and against any and all claims, demands, liabilities, proceedings and causes of action resulting from the loss of or damage to cargo irrespective of the cause of such loss or damage, including where such loss or damage is caused, or contributed to, by the negligence of the Owner.

33.3 Subject to Clause 33.1 the Owner shall defend, indemnify and hold harmless the Charterer, its Affiliates and Customers from and against any and all claims, demands, proceedings and causes of action resulting from the death or illness of, or injury to, any Owner's Personnel or anyone for whom the Owner may be responsible on the Vessel, irrespective of the cause of such death, illness, or injury including where such death, illness or injury is caused by, or contributed to, by the negligence of the Charterer, its Affiliates or customers.

33.4 Subject to Clause 33.1, the Charterer shall defend, indemnify and hold harmless the Owner from and against any and all liability, and against any and all claims, demands, proceedings and causes of action resulting from the death or illness of, or injury to, any of the Charterer's and its Affiliates' and Customers' officers and employees.

33.5 Subject to Clause 33.1, the Owner shall defend, indemnify and hold harmless the Charterer, its Affiliates and Customers from and against any and all claims, demands, liabilities, proceedings and causes of action resulting from loss or damage in relation to the Vessel (including total loss) or property of the Owner, including personal property of Owner's Personnel or of anyone for whom the Owner may be responsible on the Vessel, irrespective of the cause of loss or damage, including where such loss or damage is caused by, or contributed to, by the negligence of the Charterer, its Affiliates or Customers.

33.6 Subject to Clause 33.1, the Charterer shall defend, indemnify and hold harmless the Owner from and against any and all claims, demands, liabilities, proceedings and causes of action resulting from the loss of or damage to the property of the Charterer, its Affiliates and Customers.

33.7 Immediately on execution of the Charter, and prior to commencement of Services, the Owner undertakes to exchange mutual hold harmless indemnities in respect of property and personnel with the owner of any Offshore Installation providing services under contract to any Customer and to which the Vessel may be ordered by the Charterer.

33.8 Without prejudice to the provisions of Clauses 33.2, 33.4 and 33.6 hereof, and

subject to Clause 33.1 above, in order that Owners are effectively indemnified pursuant to said clauses 33.2, 33.4 and 33.6 hereof:

a) Charterer as agent on behalf of Customers shall indemnify and hold Owners free and harmless from and against any and all claims, demands, liabilities, proceedings and causes of action or costs thereof arising out of or in connection with;

i) Loss of or damage to cargo carried on behalf of Customers irrespective of the cause of such loss or damage including where such loss or damage is caused, or contributed to by the negligence of the Owners.

ii) Death or illness of, or injury to any of Customers officers and employees.

iii) Loss of or damage to the property of the Customers.

33.9 Without prejudice to the provisions of Clauses 33.3 and 33.5 hereof and subject to Clause 33.1, in order that Customers are effectively indemnified pursuant to sub-clauses 33.3 and 33.5 hereof:

a) Owners shall defend indemnify and hold harmless Charterer as agent on behalf of Customers from and against any and all claims, demands, liabilities, proceedings and causes of action or costs thereof, whether arising in contract, tort or in any other way out of or in connection with:-

i) Death or illness of, or injury to any Owner's Personnel or anyone for whom the Owner may be responsible on the vessel, irrespective of the cause of such death, illness or injury including where such death, illness or injury is caused by, or contributed to by the negligence of the Charterer, its Affiliates or Customers.

ii) Loss or damage in relation to the Vessel (including total loss) or property of the Owner, including personal property of Owner's Personnel, or of anyone for whom the Owner may be responsible on the vessel, irrespective of the cause of loss or damage, including where such loss or damage is caused or contributed to by the negligence of Charterer, its Affiliates or Customers.

33.10 Charterer confirms and owner accepts that it is empowered to act as agent on behalf of Customers only for the purpose of giving, receiving and when necessary enforcing indemnities pursuant to sub-clause 33.8 and 33.9 and confirms that in all other respects and for all other purposes of this Charter Party, it is acting as principal.

33.11 Notwithstanding any other provision of this Clause 33 or any other provision of

this Charter:-

a) Owner shall defend, indemnify and hold harmless Charterer from any consequential or indirect losses that Vessel Owner may suffer as a result of the performance of the Charter.

b) Charterer shall defend, indemnify and hold harmless Vessel Owner from any consequential or indirect losses that Charterer may suffer as a result of the performance of the Charter.

c) The expression "consequential or indirect losses" includes by way of example but is not limited to loss of anticipated profits, loss of use, loss of production and business interruption whether or not foreseeable at the date hereof and irrespective of the cause of such loss or damage, including amongst other things where such loss or damage is caused by or contributed to by the negligence on the part of either Vessel Owner or Charterer.

d) For the avoidance of doubt, the provisions of this Sub-Clause 33.11 shall remain in full force and effect notwithstanding any breach of, or termination of, this Charter on any grounds whatsoever.

LORD HOPE

36. I agree with Lord Clarke and Lord Mance, for the reasons they give, that the appeal must be allowed and I too would restore the interlocutor of the Lord Ordinary.

37. The meaning to be given to the words "if sued" in section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 has puzzled generations of Scots lawyers ever since that provision was enacted. No doubt the draftsman saw no need to elaborate. He must have assumed that section 3(1) and section 3(2) would be read together, and it is obvious that the second subsection takes its meaning from the first. Although section 3(2) does not say this in so many words, the phrase "found liable in any such action as aforesaid" is a sufficient indication. It must refer back to the phrase "in any action of damages" in section 3(1). So the situation that is contemplated in both cases is one where the party who seeks the relief has been sued to judgment. "If sued" in section 3(2) must therefore mean, in regard to the third party, that it is to be assumed that he has been sued to judgment also. But this approach to the meaning of these words still leaves some questions unanswered.

38. It is normal practice for the third party procedure to be used, as it has been in this case, by a defender to claim relief under section 3(2) from a party whom the pursuer has not called as a defender in the same action. This procedure cannot have been in contemplation in 1940, as it had only recently been abolished by an Act of Sederunt of 25 May 1937 (SR&O 1937/180). The reasons for this are obscure, as the procedure which was first introduced only a short time previously by rule 20(d) of the Rules of the Court of Session 1934 (SR&O 1934/772) had been found to work well. It has been suggested that it was unpopular with the judges, perhaps because they found it difficult to retain control of an enquiry into the facts where the interests involved were many and varied: see *Third Party Notice*, 1937 SLT (News) 98. However that may be, the procedure was re-introduced by rule 85(c) of the Rules of Court of Session 1965 (SI 1965/321): see now chapter 26 of the Rules of the Court of Session 1994 (SI 1994/1443). It is also available in the sheriff court under the Ordinary Cause Rules 1993 (SI 1993/1956), chapter 20.

39. This procedure enables questions arising out of one matter including claims by a defender for relief against a third party to be dealt with in one action, thus saving time and expense, even if this deprives a pursuer of his right to jury trial: *Beedie v Norrie* 1966 SC 207. As Lord Clarke points out, section 3(2) contemplates that no liability for contribution can arise until the defender has paid the pursuer. But that is not how the third party procedure works in practice. It is not necessary for the defender first to be found liable and then to pay the pursuer before making his claim for contribution in the same action.

40. As the Lord Ordinary has shown in his admirably succinct opinion, several points arising from the phrase "if sued" have been settled by judicial decision. First, as "if sued" means "if sued to judgment", the defender is not deprived of his right of relief if the pursuer, having originally sued the third party as well, abandons his action against the third party so that he is released from the process without having a judgment pronounced in his favour: *Singer v Gray Tool Co (Europe) Ltd* 1984 SLT 149. As Lord President Emslie described this situation in that case at p 151, the third party has merely been the beneficiary of a formal order pronounced as a result of the pursuer's decision to prosecute the action against him no further. Secondly, the defender is not disabled from seeking relief against the third party by reason of the fact that the pursuer's claim against him has been held to have been, or would be, time-barred: *Dormer v Melville Dundas & Whitson Ltd* 1989 SC 288. This is because the words "if sued" assume that the third party has been "relevantly, competently and timeously sued" by the pursuer – in other words, that all the essential preliminaries to a determination of the other party's liability have been satisfied: *Central SMT Co Ltd v Lanarkshire County Council* 1949 SC 450, 460, per Lord Keith; see also *Singer v Gray Tool Co (Europe) Ltd* 1984 SLT 149, 151; *Comex Houlder Diving Ltd v Colne Fishing Co Ltd* 1987 SLT 13, 19; *Taft v Clyde Marine Motoring Co Ltd* 1990 SLT 170, 175, per Lord

Dervaird. The question whether the third party has been sued "relevantly, competently and timeously" falls to be tested at the date when the pursuer sued the person who is seeking relief. It is enough that he could have sued the third party at that date: *George Wimpey & Co Ltd v British Overseas Airways Corporation* [1955] AC 169, 186, per Lord Reid; *Dormer v Melville Dundas & Whitson Ltd*, pp 299-300.

41. The question which has arisen in this case was not resolved by these decisions. Cross-indemnities of the kind seen in this charterparty are no doubt commonplace in the oil and gas industry. But they are not usually met with in the situations that have given rise to most claims for damages for personal injury in the Court of Session. So that court has not had occasion until now to consider the effect of a contract between the pursuer and the party from whom a contribution is sought which provides that party with a defence to the pursuer's claim or entitles him to an indemnity from the pursuer under the contract. Difficulty has however been caused by Lord President Emslie's observation in *Singer v Gray Tool Co (Europe) Ltd* 1984 SLT 149, 150, that section 3(2) does not put into the hands of the pursuer at his whim to defeat the rights of a person to obtain relief against a joint wrongdoer. Lord Robertson had made a comment to the opposite effect in *Travers v Neilson* 1967 SC 155, 160 where, having held that as the pursuer had abandoned his action against the third party the defender's claim for a contribution by way of a third party notice was incompetent, he expressed regret at the fact that the right to a contribution was capable of being defeated at the pursuer's whim. The Lord President's statement in *Singer* disapproving what Lord Robertson had said was repeated by Lord Allanbridge when he was delivering the opinion of the First Division in *Dormer v Melville Dundas & Whitson Ltd*. At p 300 he said that it was never within the power or whim of an injured party to determine by his own actings whether or not one joint wrongdoer would be liable to relieve another in respect of damages payable to the injured party.

42. These rather sweeping observations were taken by Lord Carloway in the Inner House in this case to mean that the pursuer cannot exclude the right of relief by a contract which he enters into with the third party before the accident. In para 53 he said that the decisions which had analysed section 3 had all emphasised that the relevant right of relief was not capable of being discharged or extinguished by the actings of others, notably the victim of the wrongdoing. Referring to Lord President Emslie's statement in *Singer v Gray Tool Co (Europe) Ltd* 1984 SLT 149, 150 he said:

> "Although it could be said that entering into a contract prior to an accident forming the subject matter of a dispute ought not to be categorised as a 'whim', nevertheless the point is well made that a victim ought not, standing the existence of a general right of relief, to be able to extinguish that right by a private arrangement with other

potential wrongdoers, whether that arrangement is made before or after the accident."

43. There is nothing in the language of section 3 that supports this approach. There is no indication in either section 3(1) or section 3(2) that the ordinary rules by which parties are free to enter into a contract which apportions the risk of loss or damage between them are suspended. In this situation the words "found liable" are to be given their ordinary meaning, which places no restriction on the grounds on which the third party may be found not liable. Mr Howie QC for the respondent, Enviroco, had to accept that if the owner, Farstad, had adopted Enviroco's case against Asco, with the result that Enviroco's claim for a contribution from Asco would have been brought under section 3(1) of the 1940 Act, an exclusion clause in its contract with the owner would have provided Asco with a complete defence to the owner's claim. Asco would have been found not liable to the owner in that action. The owner's claim for damages would have been excluded by the exclusion clause. It follows from this concession, which I think he could not have withheld, that an exclusion clause in a contract between the third party and the pursuer will defeat the defender's claim for a contribution from the third party under section 3(2) too. This is because the third party, if he had been sued to judgment by the pursuer, would have been held not liable. The pre-requisite for a successful claim under section 3(2) would be incapable of being met.

44. I respectfully agree with Lord Clarke that the effect of clause 33.5 of the charterparty is to exclude any liability of Asco to the owner in negligence. That being so, Enviroco's claim for a contribution from Asco must be held to be irrelevant. I would have reached the same conclusion if, on a proper construction of the charterparty, the clause was to be regarded as providing Asco with an indemnity. The fact that the indemnity was provided for under a private contractual arrangement between the injured party and one of the alleged joint wrongdoers does not, for the reasons already given, provide a ground for disregarding its effect. The defence of circuity of action is not, in so many words, known to Scots law. But the underlying principle certainly is, though it was overlooked by the majority in the Inner House. Among the various examples of references to the brocard *frustra petis quod mox es restiturus* that could be mentioned is Lord Cameron's observation in *Nordic Travel Ltd v Scotprint Ltd* 1980 SC 1, 26, that the pursuer's counsel, Mr Bruce, did not suggest that a successful argument could be made founding upon it to defeat the defender's case that, as it was in control of his own assets, it was entitled to pay on demand the debt which was due. Asco's right to an indemnity from the owner for the losses claimed for would be sufficient to defeat the owner's claim upon the application of this principle. The result is that, for the purposes of section 3(2), Asco would, if sued, be found not liable to it in respect of the loss and damages on which the action against Enviroco is founded.

LORD RODGER

45. I am in complete agreement with the judgments of Lord Clarke and Lord Mance. This footnote simply indicates that the Court's construction of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 ("the 1940 Act") is in line with the established case law of the courts in New Zealand and Canada on similar provisions.

46. In *Herrick v Leonard and Dingley Ltd* [1975] 2 NZLR 566 the plaintiff's car was irreparably damaged while stevedores were unloading it from a ship. The plaintiff sued the stevedores, who were found liable in negligence. They blamed the first third party, the charterers of the ship, and the second third party, the agents of its owner. The third parties argued that the defendant stevedores were not entitled to any contribution from them because there were exclusion clauses in the contract of carriage which exempted them from liability to the plaintiff for loss or damage to his car. McMullin J held that the third parties had not been negligent. But he went on to consider the position if they had been. Under section 17(1)(c) of the Law Reform Act 1936, as amended by section 35(2) of the Limitation Act 1950, a tortfeasor "may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage…." His Honour observed, at p 572, lines 42-51:

> "Before a claim under that subsection can succeed, the person from whom the contribution is sought must be a tortfeasor vis-à-vis the plaintiff and, if sued, have been liable in respect of the same damage for which the other tortfeasor is held liable…. Had the plaintiff sued either of the third parties, he would have been met by conditions 1, 2 and 7 of the contract. Consequently, the defendant would not have been able to succeed against either of the third parties for contribution, even if negligence or breach of an implied term had been proved."

47. Moving on to Canada, in *Giffels Associates Ltd v Eastern Construction Co Ltd* [1978] 2 SCR 1346, engineers who had been found liable in damages for the plaintiffs' loss arising from a defective roof, sought contribution from the main contractor, Eastern Construction. Under a term in the plaintiffs' contract with Eastern, the plaintiffs could not sue Eastern for faulty materials or workmanship which appeared more than a year after the date of substantial completion. It was agreed that the period had elapsed several years before the problem with the roof emerged. Section 2(1) of the Negligence Act, RSO 1970, c 296 was in comparable terms to section 3(1) of the 1940 Act. The Supreme Court of Canada held that Giffels' claim for contribution from Eastern must fail. Laskin CJ said, at pp 1355-1356:

> "I am prepared to assume, for the purposes of this case, that where there are two contractors, each of which has a separate contract with a plaintiff who suffers the same damage from concurrent breaches of those contracts, it would be inequitable that one of the contractors bear the entire brunt of the plaintiff's loss, even where the plaintiff chooses to sue only that one and not both as in this case. It is, however, open to any contractor (unless precluded by law) to protect itself from liability under its contract by a term thereof, and it does not then lie in the mouth of the other to claim contribution in such a case. The contractor which has so protected itself cannot be said to have contributed to any actionable loss by the plaintiff. This result must follow whether the claim for contribution is based on a liability to the plaintiff in tort for negligence or on contractual liability. In either case there is a contractual shield which forecloses the plaintiff against the protected contractor, and the other contractor cannot assert a right to go behind it to compel the former to share the burden of compensating the plaintiff for its loss.
>
> What we have here is a case where the immunity of Eastern from liability did not arise from some independent transaction or settlement made after an actionable breach of contract or duty, but rather it arose under the very instrument by which Eastern's relationship with the plaintiff was established. Giffels had no cross-contractual relationship with Eastern upon which to base a claim for contribution; and once it was clear, as it was here, that Eastern could not be held accountable to the plaintiff for the latter's loss, any ground upon which Giffels could seek to burden Eastern with a share of that loss disappeared."

That approach was applied by Iacobucci J, on behalf of the majority of the Supreme Court, in *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* [1997] 3 SCR 1210, at para 123, and by Finch JA, giving the judgment of the British Columbia Court of Appeal, in *Laing Property Corporation v All Seasons Display Inc* (2000) 190 DLR (4th) 1, 16-20.

48. There is no doctrine or principle of Scots Law which would dictate, or even suggest, that a different approach should be applied to section 3 of the 1940 Act. On the contrary, the policy which underlies the decisions in these cases is equally applicable in Scots Law.

LORD MANCE

49. I agree with the judgment of Lord Clarke, as well as with his endorsement of the lucid and compelling judgment given by the Lord Ordinary ([2008] CSOH 63; 2008 SLT 703). Were it not for the opposite result reached by the majority in the Inner House, I would have thought it unnecessary for anything more to be said.

50. Enviroco is being sued in Scotland in delict for the damage to Farstad's oil supply vessel, *MV Far Service*. The issue before us is whether, assuming that Enviroco is held liable to pay and pays Farstad damages in this action, ASCO as charterer of *MV Far Service* is a "person who, if sued, might also have been held liable in respect of the [same] damage" within section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. That issue breaks down into two questions: (a) can Asco fall within section 3(2) if it was, under the terms of its charter of the vessel from Farstad, never under any liability to Farstad for such damage? (b) if the answer is negative, did the terms of the charterparty mean that Asco never had any such liability? The first question is one of Scots law. The second is one of English law, to which the charterparty was expressly subject (clause 48).

51. Before the Lord Ordinary, Enviroco conceded that the answer to question (a) was in the negative. But in the Inner House 2009 SC 489 Lord Carloway regarded the concession as misplaced. He said that "The fact that a party, had he been sued by the victim, had such a defence to the action, including one based on a contractual indemnity, or even an 'exclusion' of liability clause, is irrelevant" (paragraph 54). He cited statements in the case-law that, where a victim (A) obtains judgment against one wrongdoer (B), that wrongdoer may obtain contribution from any other wrongdoer (C) liable in respect of the same damage, even though any claim by (A) against (C) was barred by limitation before the date when (A) sued (B) (*Central S.M.T. Co. v Lanarkshire C.C.* 1949 S.C. 450, 461 per Lord Keith) and even though (B) has obtained a decree of absolvitor as the result of the abandonment by A of proceedings against him, or such proceedings have been struck out for want of prosecution (*Singer v Gray Tool Co. (Europe) Ltd.* 1984 S.L.T. 149, 150-151 per Lord Emslie).

52. These statements were based on the view that "Section 3(2) does not put it into the hands of the pursuer at his whim to defeat the rights of a person to obtain relief against a joint wrongdoer" and that "the words 'if sued' assume that the other party has been relevantly, competently and timeously sued" (*Central S.M.T.*, p. 461; *Singer*, 150). That view could be justified if the words "if sued" in section 3(2) could be read as referring to hypothetical proceedings brought against (C) immediately after the wrongdoing, rather than at the same time as (A's) actual proceedings against (B). It is unnecessary to consider the correctness or otherwise

of either the statements or this possible justification on this appeal. Whether correct or not, they have nothing to do with the situation where (C) could never have been sued successfully by (A); and where the reason for this could never be described as being the result of a "whim" on the part of (A), but was the result of deliberate contractual arrangements apportioning risk between (A) and (C).

53. Subsections (1) and (2) of section 3 were on their face designed to dovetail with each other. The first deals with the situation where (B) and (C) are sued to judgment in one action; the second with the situation where only (B) is sued to judgment, but (C) "if sued, might also have been held liable". They cover only limited situations, leaving uncovered, for example, that where (B) recognising his liability to (A) pays up without judgment ever being given against him (although a formal decree giving effect to an agreed settlement was held sufficient for the purposes of subsection (2) in *Comex Houlder Diving Ltd. v Colne Fishing Co. Ltd.* 1987 S.C. (H.L.) 85). If (B) and (C) are sued in one action, and (C) defeats the claim by reference to a contractual exceptions clause, there can be no question of (B) claiming contribution from (C) under subsection (1). There is neither logic nor plausibility in an analysis whereby (B) is in a better, and (C) in a worse position, as regards contribution, if (A) never sues (C), perhaps because (A) appreciates, realistically, that such a suit would inevitably fail. The word "might" is used in subsection (2) because (C) has not in fact been sued, and not because it is sufficient that, in some parallel universe, (C) might have been party to some different contractual arrangement under which he might have undertaken a contractual responsibility which it can be shown in fact that he never had.

54. Lord Carloway also considered that the view which he took of the scope of section 3(2) avoided an inequitable result (paragraph 55), in that it might lead, as the Lord Ordinary had said (paragraph 31), to a party who has only a minor responsibility for causing an accident having to bear the entire financial loss. But no wrongdoer has a right to assume that there will be other wrongdoers available to contribute to the liability which he incurs; and there are also many reasons, legal and factual, why any expectation which he may unwisely hold to that effect may be frustrated. In the present case, the consequence of giving effect to Lord Carloway's view would be to ignore the actual legal position between (A) and (C) and to introduce by the back door a liability which was barred at the front door.

55. Lady Paton's view that the result achieved by the majority decision was "broadly equitable" (paragraph 43) was based on the consideration (which is common ground) that ASCO would, under the charterparty, be able to call upon Farstad to indemnify it in respect of any liability which Asco might have to make by way of contribution to Enviroco, so that Farstad "would receive reduced damages". But the existence of such an indemnity is a special circumstance, which in many contexts would not be replicated – with the result that a person in (C's) position would indirectly bear a liability for which it never contracted.

56. I turn to the construction of the charterparty, and of clause 33.5 in particular. It is argued that clause 33.5 does no more than require Farstad to indemnify Asco in respect of third party liabilities, such as, here, any contribution claim that Enviroco may have against Asco. The majority in the Inner House accepted this (Lady Paton and Lord Carloway, paragraphs 40 and 58). However, clause 33 is headed "Exceptions/Indemnities" and clause 33.1 provides that various other charterparty clauses are "unaffected by the exceptions and indemnities set out in this Clause 33". No distinction appears between exceptions and indemnities in any part or sub-clause of clause 33. Under each of sub-clauses 33.2 to 33.6, 33.9 and 33.11, either Farstad, as the owner, or Asco, as the charterer, agrees to "defend, indemnify and hold harmless" the other, "from and against any and all claims, demands, liabilities, proceedings and causes of action" (sub-clauses 33.2, 33.5, 33.6, 33.8 and 33.9) or from and against the same risks except for liabilities (sub-clauses 33.3 and 33.4), though it is hard to think that this could make any difference. Clause 33.8 provides that, "in order that Owners are effectively indemnified pursuant to ... clauses 33.2, 33.4 and 33.6" Asco "as agent on behalf of Customers shall indemnify and hold Owners free and harmless".

57. In the case of sub-clause 33.11, Farstad's agreement is to "defend, indemnify and hold harmless Charterer from any consequential or indirect losses that Vessel Owner may suffer as a result of the performance of the Charter". Farstad was the vessel's owner and this sub-clause indicates that the phrase "defend, indemnify and hold harmless" is used in a sense wide enough to embrace agreement to exclude the other contracting party from responsibility. That to my mind is anyway the sense in which it is used in all these clauses. Both the words "hold harmless" and indeed "indemnify" alone can have that sense. On Enviroco's construction, the parties provided that Asco should be indemnified against third party "claims, demands" and "liabilities" it incurred "resulting from loss or damage in relation to the Vessel (including total loss) or property of the Owner [Farstad]", but made no provision at all for claims, demands, etc. by Farstad itself, so leaving Farstad free to make any claims and demands and to establish any liability it wished as against Asco for damage to Farstad's own vessel. That makes no sense as a contractual scheme. Lady Paton thought that, on the basis of Farstad's case, words such as "arising from a claim made by any party other than Farstad" would have to be implied after the word "liabilities" in clause 33.5 "for if they were not implied, 'liabilities' would *prima facie* include a liability to Farstad arising from negligence on the part of Asco causing loss or damage in relation to the vessel" (para 39). But this is precisely what the parties intended to exclude – with the obvious concomitant that Farstad should insure against all risk of loss to their property, and that of their personnel and others for whom they were responsible (while Asco would insure against all such risks to their own as well as their affiliates' and customers' property: clause 33.6).

58. The point can be tested by looking at the opposite side of the coin – claims from Asco's side against Farstad. Clauses 33.2, 33.6 and 33.8 relate to claims arising from loss or damage to cargo or other property, including that of Asco's customers. On Enviroco's case, the parties were careful to provide Farstad with an indemnity in relation to any exposure it might incur towards third parties on that score, but entirely content to leave Farstad open to claims or demands from or liabilities towards Asco itself. Again, that makes no sense of the language.

59. The language therefore operates as a series of indemnities against third party exposure combined with exclusions of direct exposure to the other contracting party. This is both what the heading of clause 33 and what common commercial sense would lead one to expect under a scheme clearly intended to divide risk between the contracting parties. It is unnecessary to consider the position on the unreal hypothesis that clause 33.5 operates as a pure indemnity, enabling Farstad to make any claims or demands and to assert any liability it liked as against Asco in respect of loss or damage suffered by Farstad, but requiring Farstad to indemnify Asco for the claims and demands so made and any liabilities so established. The consequence of this hypothesis would seem to me probably a matter for English law, as the law governing the charterparty, rather than Scottish law. But, under both English and Scottish law, the action would clearly fail, whether for circuity of action in English terminology or pursuant to the Scots maxim *frustra petis quod mox es restiturus*: see for example *Workington Harbour and Dock Board v Towerfield (Owners)* [1951] AC 112, 148, per Lord Normand and 152 per Lord Oaksey; *Post Office v Hampshire County Council* [1980] QB 124; and *Rover International Ltd. v Cannon Film Sales Ltd.* [1989] 1 WLR 912, especially at 936C-F per Dillon LJ. On that basis, too, it could not be said that Asco was a "person, who, if sued, might also have been held liable in respect of the loss or damage" to the *MV Far Service*.

60. I would allow the appeal, recall the Inner House's interlocutor dated 1 May 2009, restore the Lord Ordinary's interlocutor dated 23 April 2008 and remit the cause to the Lord Ordinary to proceed as accords.