SOME THIRD MEN

This talk is not about Kim Philby or Harry Lime. Still less, is it my intention to give rise to one of those dinner-table arguments about whether the Orson Welles film about the illegal trade in Penicillin in immediately post-war Vienna is the best film of the last so many years. But for a few moments I should like to talk about a figure not infrequently encountered in building contract litigation, the third man. In the wreaking of evil, he is no match for Harry Lime, but he is capable of giving rise to some trouble, and for that reason, he may warrant quarter of an hour's attention.

His stamping grounds are not those of the building contract alone; he verges upon the ubiquitous, and is commonly to be found wherever chains of contractors and sub-contractors, or parallel chains of contractors and professional teams exist. He is not restricted to commercial law, and will be found stalking personal injury cases. He was once to be found in the divorce courts sporting rather regrettable shoes. But it is primarily about his appearance in the building contract field that I want today.

My introduction notwithstanding, he is not always been viewed with disfavour. The client who is unwilling to contemplate the possibility that he or his

company may in any degree be responsible for whatever misfortune it is which has caused him to appear in a solicitor's office fulminating about the impertinence of the summons which came in the post, will regard him as the person who should really be taking the blame and a splendid way of justifying the client's belief in his own complete innocence of the errors which the pursuer has wrongly attributed to him. For a few years after the shock of the Supreme Court decision in **David T. Morrison & Co. Ltd v ICL Plastics Ltd, 2014 S.C. (U.K.S.C.) 222**, it was thought that the third man in the picture offered the way round the inability of employers to sue contractors on what suddenly turned out to be claims which had been extinguished by prescription. The idea assumed a situation in which both the contractor and, let us say, the architect, had contributed to the employer's loss caused by the mishap in the building contract work which was to be the foundation of the pursuer's action – a not uncommon situation. But it further assumed a situation less commonly encountered, where the latter had said or done things which had for a sufficiently long period of time led the employer into the mistaken belief that all was well with his building project. The broad idea was that, in a question with the employer, the error into which the latter had fallen in consequence of the acts and omissions of the architect would serve to stop the prescription clock long enough to bring the action against the architect within the *quinquennium*, and thereby permit the action against the architect to proceed without hindrance from the prescription which had precluded an action against the contractor primarily to blame for the

misfortunes of the employer. The law on joint and several liability would make the architect liable to the employer for the whole of his losses, which would leave him in as good a position as he would have occupied had the mishaps not occurred. The architect, it would be expected, would not be content with this situation, and would seek to recover from the contractor by way of contribution his due share of the sum which the architect had had to pay to the employer. Since rights to payment of contribution do not prescribe until a date two years after the money to which contribution is to be made has been paid out, the architect would be able to recover on that basis by way of third-party procedure, and the contractor hiding behind his shiny new prescription defence would receive his just desserts.

Perhaps in the immediate fraught aftermath of the **ICL Plastics** case, in at least some instances, this may have seemed a happy solution to the immediate nasty problems which had resulted from that decision, but looked at from a greater distance it is evident that there were problems with it. Aside from the obvious point that one had to be satisfied that the contractor and the architect had both contributed through fault or breach of contract to the loss complained of by the employer, so making them jointly and severally liable therefor, it was necessary for the employer to be able to demonstrate that the acts and omissions of the architect (including within that phrase, his words or silence) had indeed resulted

in the mind of the employer being so far clouded by error as to cause him not to sue the architect for a material tract of time (**The "Chevron North America" 2002 S.C. (U.K.S.C.) 19**). More recent authority has highlighted potential obstacles to that demonstration in relation to attribution and the disregard in this connection of assertions to the effect that the work of the architect himself is entirely correct or causative of no part of the problem in the work which has been identified (**Tilbury Douglas Construction UK Ltd v Ove Arup Associates 2024 S.C. 383** at para 62; **Greater Glasgow Health Board v Multiplex Construction Europe Ltd 2025 S.L.T. 989** at paragraphs 138-141).

Let us imagine a fairly simple building contract scenario. The employer's building is defective, and it will cost a lot of money to repair. He blames the contractor as being contractually liable for his own bad work and that of his specialist sub-contractors, who have allegedly been negligent. But that claim does not seem to have been progressed. Happily, if that was because the claim was contractually limited or had prescribed, the supervision claim against the architect is not similarly blocked, having been saved by sub-section 6(4) of the Prescription and Limitation (Scotland) Act, 1973. The architect is sued successfully, and has to pay the damages in full. He now wants to recoup a contribution to his payment from the contractor.

The first question for the architect's lawyers is whether or not, *vis-à-vis* the contractor, the architect has a case in contribution at all. This obviously requires a careful analysis of the facts of the case and the making of a "cold light of dawn" judgement about two things: the relative blameworthiness of the failings of the architect and contractor respectively, and the relative causal potency of those failings in the bringing about of the loss the infliction of gave birth to the action against the architect. Less obviously, it may also involve a check to see if there *has been* earlier litigation about the building project in question in which the architect was not called. It has been said in the Inner House that where a party (in our case, the contractor) has already been absolved of liability to a pursuer employer, he cannot be sued for contribution by another defender in that action who was found liable (**Singer,** *infra*). To the extent that the absolvitor is *res iudicata*, that would be correct because the "if sued" and "held liable" requirements of sub-section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940 cannot be met. But since that sub-section is concerned with a hypothetical case in which the liable defender and his opponent in the putative action under sub-section 3(2) had been sued together, the defender can run any other case he likes against the absolved party and is not tied to cases actually made by the original pursuer (**Loretto Housing Association Ltd v Cruden Building and Renewals Ltd [2019] CSOH 7**8).

But the architect may have to go further and burrow – if he can – into the terms of the building contract between the employer and the contractor in order to ascertain what exclusions, indemnities waivers or limitations of liability there may be therein. The terms of the charterparty in **Farstad Supply A/S v Enviroco Ltd 2010 S.C. (U.K.S.C.) 87** may seem some distance removed from the world of building contracts, but standard forms of contract in the building industry also contain exclusions, indemnities and waivers along with clauses limiting liability, and they are not infrequently amended in individual contracts. It thus behoves an architect (or more accurately, his lawyers) contemplating bringing in the contractor as a third party or defender in a s. 3(2) action to try to consult in advance the terms of the building contract in order to find out whether, like the charter in **Farstad,** they serve to preclude the architect from seeking contribution from the contractor under section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940. He may find that the contractually stipulated collection of exclusions, warranties and waivers has brought about the result that, even if one ignores the issue of the prescription of the employer's claim against the contractor on the hypothesis of a contribution claim that the defender has been sued relevantly, competently and timeously (**Singer v Gray Tool Co. (Europe) Ltd 1984 S.L.T. 149**; **Comex Houlder Diving v Colne Fishing Co. 1987 S.C. (H.L.) 85**), the contractor could not have been found liable to the employer jointly and severally with the architect. That, for the architect, has the unfortunate consequence that he fails to meet the

demands of section 3 of the 1940 Act which therefore does not apply in the circumstances of his case. So, although he may have had no part in the negotiation of the terms of the building contract, they have resulted in his having, like Enviroco Ltd, to bear the whole of the liability for the misfortune which has befallen the building project, and that without any opportunity to recover a due share of that liability from the peccant contractor. If his case is one of a variety not unknown in practice, where the contractor has made some ghastly error and the architect is sued only on an allegation of failure adequately to supervise, so that an 80%/20% split of liability in the architect's favour might have been expected, that will be a particularly dismaying discovery.

It is now not uncommon to find that they have put into their contracts of appointment net contribution clauses which try to contract out of joint and several liability with contractors by limiting the recovery in damages which can be made from the architect to the sum which he would have borne had all other parties been sued and paid the share of the damages which would have been attributed to them by the court in a notional action against all the parties. The primary object of this is obviously to protect the architect from the risk of the insolvency of any other party, and in particular, the contractor. I have heard it said that, armed with this clause, the architect need not worry about having to bring a third party into the action or facing the **Farstad** problem because he will

not in any event have to pay more than he would have done had the notional action gone ahead and been fought to a finish. Such may be the theory, but for myself, I am not sure how that result is meant to be achieved. If the architect is sued alone, how does he establish his limitation of liability defence? Presumably, he has to lead evidence against the notional other defenders and invite the court to determine the fraction of the award for which he is not liable because of the limitation clause (**Radius [2018] P.N.L.R. 31**). To do that, he must call the contractor in order that he might have the opportunity to dispute the architect's case on quantum. That immediately opens the architect up to the possibility of the **Farstad** problem, and the preclusion of any case in contribution. The architect has no case in relief against the contractor. By the use of his money, the contractor will not be freed from anything. The whole object of the architect's procedural steps is to avoid his money being spent beyond his own share of the loss. But more than that, although the architect is not trying to sue for contribution, but only to establish the proportion of the overall damages which his limitation of liability clause requires him to bear, the exclusions and indemnities which raised the problem about contribution in **Farstad Supply A/S** apply in the same way to scupper the limitation defence. In the notional action, nothing would be apportioned to the contractor, for the notional pursuer has contracted on terms which cause the contractor to have no liability to the employer. Whilst it would appear that the clause can operate to

protect the architect from the solvency risk of the contractor, I would suggest that it does not really help with the **Farstad** problem.

It has also to be borne in mind that not all claims against sub-contractors are ones which a degree of liability is being accepted by the main contractor. Especially where the main contractor is merely contractually responsible for the work of a specialist sub-contractor on the work of which the main contractor is not really qualified to comment, there may well be no act or omission on the part of the main contractor which has had any effect on the loss of which some pursuing employer may complain; the mishap may have been caused by the sub-contractor alone, and the very word "contribution" suggests a payment of some, but not all, of something else.

In such a case, I should have thought that neither relief nor contribution under sub-section 3(2) would be open because *ex hypothesi* the contractor's case, he and the sub-contractor are not "persons… found jointly and severally liable" to the employer. The sub-contractor has no contract with the employer and, at least where the mishap results from no delict other than his negligence, the rules on the recovery of pure economic loss preclude a direct liability in him to the pursuing employer. Accordingly, the sub-contractor is *not* one who "if sued" might "also have been held liable" in "any such action as aforesaid" *i.e.*, one in

which the two parties are held jointly and severally – and hence, both - liable to the pursuer. There is, however, a recent decision from the Outer House in a medical negligence case in which an award of 100% contribution was made against one defender in favour of another. When the facts of the case are examined one can understand the feeling that a fair result had been achieved through the making of that award, but it is not apparent that the co-defender against whom the award was made challenged the ability of the Health Board to obtain such a decree, and it might be wise to treat the decision with some caution. It could be a classic example of a hard case making bad law. (**CAR v NHS Tayside [2021] CSOH**.).

If it be the case, as I suggest, that sub-section 3(2) cannot be resorted to if he from whom contribution would have been sought could not have been held liable along with the now proposed pursuer, the consequence is that in order to recoup from the sub-contractor the loss taken by the main contractor through its having incurred liability to the employer, the main contractor has to sue for damages – usually for breach of the commonly stipulated provision of the sub-contract that the sub-contractor will not do his work in such a fashion as to embroil the main contractor in a breach of the main contract – for he has no right to either contribution or relief (**British Railways Board v Ross and Cromarty County Council 1974 S.C. 27** at page 37). In long-running building

contract disputes this can cause another problem, prescription. The damages case will prescribe under the *quinquennium* and that period will have started to run when the liability to the employer was incurred. Any suspension of time that might be available under section 11 may well be running out, too, and if the sub-contract has been written to make the remedy for this situation an indemnity, section 11 will not assist in any event. Nevertheless, despite the passage of time, the sum for which to sue the sub-contractor may still be guesswork. Happily, there is a solution to this problem, the declarator *ab ante*, but the action seeking that declarator has to be drafted with some care. If faced with this problem, the opinion of the Lord President in **Highland and Islands Airports Ltd v Shetland Islands Council 2015 S.C. 588** will repay study.

There are two other points about third parties. One relates to what, I admit, is something of a *bete-noire* of mine, **N.C.B. v Thomson 1959 S.C. 353**. This is the decision which holds that in order to claim contribution under section 3(2) of the 1940 Act, one has to have a decree pass against one. **Comex Houlder Diving Ltd**, *supra,* makes that true even if the case has really been settled instead of being decided by the court. There is a strong dissent in **N.C.B. v Thomson**, and the case has been repeatedly questioned, by the Scottish Law Commission amongst others. But short of parliamentary action the case would seem likely to stand. It has perhaps always been what Prof. McBryde called an

"unfortunate" decision, but if what I understand about public sector pre-tender questionnaires be true, it is now quite baleful. To protect rights to contribution, a settling contractor more sinned against than sinning must ensure that, notwithstanding settlement, decree pass against him. The semi-automatic reaction to obtain a joint minute granting absolvitor must be avoided. But a peccant contractor of doubtful capacity with no need to protect contribution rights, for the fault causing his employer's loss was entirely his, can settle with absolvitor. So, when the questionnaire asks whether decree has passed against the contractor trying to get on to the tender list, the bad contractor can honestly answer "no", but the one who was really let down by his sub-contractor and has the 90% contribution award to prove it, must answer "yes". Guess who will be struck off the tendering list because of **N.C.B. v Thomson**, even though he be the better contractor. *Qui bono*, one might ask.

The other is a trap lurking in the rules on expenses relating to third party cases in which the pursuer does not adopt the defender's case against the third party and thereafter loses his action against the defender. The courts take the view that, although the pursuer's case may have necessitated bringing in the third party in order to protect his own position (as in the case of the specialist sub-contractor on account of the acts and omissions of which the main contractor is sued in breach of contract), if the pursuer has not adopted the case of the

defender against the third party, it will not, as a rule, be required to pay any expenses in relation to the third party's involvement in the case. All of those expenses will have to be paid by the successful defender who brought the third party into the action (**Albert Bartlett (Airdrie) Ltd v Gilchrist & Lyn Ltd [2010] CSIH 33; Prospect Healthcare (Hairmyres) Ltd v Kier Build Ltd 2018 S.C. 155**). This will require to be explained to clients particularly English ones, who may expect something different (Prospect Healthcare at [9]), and the making of careful arrangements if the defender and third party find themselves making common cause against the pursuer with the third party as the expert on the subject taking the lead, so as to avoid the unhappy situation in which the defender ends up paying out in expenses for the privilege of winning. If those arrangements are not made (and in time), the defender's solicitor may encounter another third man – the one behind gully, who catches him out!