SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 6
PD231/18

Lord Justice Clerk
Lord Menzies
Lord Malcolm

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

A & OTHERS

Pursuers and Respondents

against

GLASGOW CITY COUNCIL

Defenders and Reclaimers

Pursuers and Respondents: Miss Bain QC; Forbes; TC Young Solicitors
Defenders and Reclaimers: Mackay QC; Gardiner; BLM Solicitors

24 January 2019

[1] The action arises from an incident which occurred on 21 December 2014 in Glasgow, in which a bin lorry driven by one of the reclaimers' employees left the road, travelled along the pavement and struck a number of pedestrians. Six people died as a result of their injuries. This action is being pursued by relatives (some in their personal capacity and as guardians or executors of other relatives) of some of the deceased. Because of the psychological effect on the respondents of prior press reporting of the events and court proceedings arising therefrom, an order was made in terms of section 11 of the Contempt of

Court Act 1981 prohibiting the publication of the names, addresses and dates of birth of the respondents, or any particulars or details calculated to lead to their identification.

[2] The respondents first raised an action for damages against the defenders by a summons signetted on 5 December and served on 8 December 2017. The summons was not called within three months and a day of its passing the signet, with the result that the instance fell at midnight on 6 March 2018 (rule of court 43.3(2)). That fact did not become apparent to the pursuers' solicitors until 11 June 2018. At that stage a second summons was prepared, signetted on 19 June 2018, and served the next day. In response to the reclaimers' plea that this second action was time barred, the respondents submitted that in the whole circumstances the court should exercise its power under s 19A of the Prescription and Limitation (Scotland) Act 1973 (as amended) to allow the respondents nevertheless to proceed with the action. A proof before answer on that issue, and on liability, came before the Lord Ordinary on 9 November 2018. No oral evidence was led, the parties resting on a Joint Minute, the agreement of certain productions, and certain affidavits. The second issue was not argued at the proof, it having been agreed that if the court exercised its discretion in favour of the respondents liability would be admitted. Having heard submissions, the Lord Ordinary exercised his discretion in favour of the respondents.

Joint Minute

[3] The following narrative contains a summary of the matters which were the subject of agreement in the joint minute. The respondents' principal solicitor was Mr Paul Kavanagh of KM Law, Glasgow. He instructed Mr Grant Knight of T C Young, Edinburgh as his Edinburgh agent. Mr Kavanagh had represented the respondents for about four years, during an FAI in 2015 and a subsequent application to bring a private prosecution. His firm

has undertaken this work on a speculative basis and with no fee arrangement in the event of a successful outcome and has incurred substantial outlays in the necessary preparations in the case. This case has had a profound psychological impact on each of the respondents. Delay in this case may have a significant effect on the respondents' psychological conditions, particularly in the case of the first respondent, who has developed severe mental health problems as a consequence of which instructions to proceed with the action were very difficult to obtain. On 24 October 2017 the reclaimers' solicitors agreed to settle the claims on full liability, indicating that they would not defend an action on the merits and that, once raised, the action could be sisted until full details of the claims could be provided and there was an opportunity to discuss settlement. The first summons was signetted and served as noted above, and an *interim* order made restricting reporting. On 11 December 2017 an amended copy of the summons, altering the designation of the first respondent was lodged at the General Department. The General Department required the principal summons be returned to them in case there was a media challenge to the *interim* order. When the summons was lodged with the General Department the calling slip had not been presented. This was a procedural oversight and a genuine error. Since no steps were taken to arrange calling, the instance fell, a circumstance which cannot be rectified.

[4] This error had not been noticed by the Edinburgh agent. The normal practice in his firm is that the principal summons would sit in the file, with a pre-prepared calling slip. However, this summons remained with the General Department so its presence on file did not act as a reminder that it had not yet been lodged for calling. Between 9 March and 12 June 2018 correspondence had taken place in respect of making progress towards settlement. During that period neither party recognised that the time limit for lodging the summons for calling had expired. On 12 June Mr Knight instructed his clerk to attend at the

General Department to take steps to arrange calling of the summons, at which point the error was discovered.

[5] Mr Knight initiated a discussion with the reclaimers' agent who indicated that he could not agree not to insist upon a plea of prescription for fear of prejudicing his client's claim for reimbursement from a third party. He confirmed, however, that if the time-bar plea was unsuccessful, the reclaimers would continue to agree to settle the respondents' claims on a full liability basis. The reclaimers do not maintain that they have any defence to the original action on the merits; but for their time bar plea in this case, they have no defence; and there is no prejudice to them as far as the availability of evidence is concerned.

Productions

[6] The content of numerous productions was a matter of agreement. Of the reports available to the Lord Ordinary the most recent report (6/59) dated 29 October 2018 by a chartered clinical psychologist, Dr Alison Harper, who had assessed the first, second and third respondents in which she wrote:

> "2. I understand that a procedural situation has arisen whereby an omission was made by the lawyers acting for the pursuers, resulting in summonses not being lodged in the Court of Session within the three-year period allowed. I understand that as a result of this, the pursuers can apply to the Court to exercise its discretion to dis-apply the limitation period point or, alternatively, can claim against the legal firm who failed to lodge the summons timeously. I understand that the latter option would cause significant delay in concluding the cases.
>
> 3. You have asked me to give my opinion on the impact that having to bring a claim against the law firms could have on the pursuers. In my opinion, this would be two- fold:
>
> i) It has now been almost four years since the incident occurred. There is a wealth of literature on the detrimental impact of uncertainty on anxiety (e.g. Grupe & Nitschke, 2013). The … family are struggling with the impact not only of the deaths …, but with the stress caused by the ongoing legal case. Further delays in settlement of the case is likely to prolong uncertainty, thereby significantly

> exacerbating levels of anxiety and low mood and impacting negatively on their mental health.
>
> ii) In my opinion, failure of the defenders to accept responsibility for compensating the pursuers on the basis of a technicality would exacerbate feelings of anger and injustice felt by the … family, and thereby impact negatively on their mental health. Acknowledgement of responsibility is fundamental to pursuers in terms of their ability to process their emotions and come to terms with their experiences (e.g. Iqbal & Bilali, 2017)."

The Lord Ordinary's decision

[7] The Lord Ordinary concluded that the balance of the equities favoured the respondents and granted the application. The sole prejudice to the reclaimers would be the loss of the time bar defence. The case had been fully investigated by them - there was no question of evidential difficulties or a "stale case" argument. Should the case proceed there would be no defence on the merits. Several other claims arising from the incident had already been settled, and the reclaimers had agreed to settle these claims on a full liability basis.

[8] The respondents had to bear the responsibility for their agents' conduct (*Forsyth* v *A F Stoddard & Co Ltd* , 1985 SLT 51, *per* Lord Justice-Clerk Wheatley at p 54; *B* v *Murray (No 2)*, 2005 SLT 982, *per* Lord Drummond Young at para 29), and while the failure was an oversight there was no escaping that it was a serious and culpable failure. On the spectrum of culpability it was a less egregious breach than cases where, for example, a solicitor has failed to serve a summons within the triennium. Apart from this failure, the respondents' agents appeared to have acted in an exemplary way. In very difficult circumstances they had developed a strong relationship of trust with their clients.

[9] The Lord Ordinary recognised that the respondents had an alternative remedy against the solicitors, which was likely to succeed, but he considered that the respondents

would be very materially prejudiced by a refusal to exercise the court's power under s19A. To pursue the alternative remedy they would have to find and instruct new solicitors in whom they have trust and confidence, and who would be prepared to accept instructions on a funding basis which was satisfactory to both solicitors and clients. That process was likely to be difficult and challenging for each of them, particularly the first respondent given her current mental health, her experience of what would be two abortive actions, and the history of difficulty in obtaining instructions from her. The probable consequences would be very significant upset for the respondents and material delay in obtaining reparation, which would be likely to have significant detrimental effects on their mental health, particularly the first respondent.

Submissions for the reclaimers

[10] The reclaimers submit that the Lord Ordinary erred in law:

1. By making findings that: (a) to pursue the alternative remedy would require the instruction of new principal solicitors, which was a process likely to be difficult and challenging for the respondents; (b) this would result in a delay in obtaining damages; and (c) that this would have a significant effect on the respondents' mental health. There was no evidence to support such findings. The agents in whom the respondents had trust and confidence were the local agents, not the Edinburgh agents, a matter which the Lord Ordinary seems to have misunderstood. The fault being that of the Edinburgh agent there was no reason to anticipate that the local agent would have to withdraw from acting. The Lord Ordinary had not properly addressed the fact that the negligence was exclusively that of the Edinburgh agents. An action against the solicitors could proceed as a commercial action with the benefit of case management, suggesting that no material delay would be

encountered. As to the issue of mental health, the agreement in the joint minute was that "delay in this case may have a significant effect on the pursuer's psychological conditions". The report from Dr Alison Harper, Clinical Psychologist stated that "Further delays in settlement of the case is likely to prolong uncertainty, thereby significantly exacerbating levels of anxiety and low mood and impacting negatively on their mental health." The context of these references is Dr Harper's understanding that any delay was likely to be "significant", and do not justify the Lord Ordinary's conclusion of "material upset and delay which would have significant detrimental effects on the pursuer's mental health".
Dr Harper should be understood as indicating that only "significant" delay would have this effect. The evidence showed that the first respondent was suffering from severe PTSD and a very severe major depressive disorder, conditions likely to be permanent. Absent these various findings the equities would lie with the reclaimers.

2. By failing to take account of the relevant factor that the reclaimers would suffer material prejudice by sustaining a loss that is valued between £400,000 and c£2m – this was a material consideration (*Craw* v *Gallagher* 1987 SC 230); and

3. By placing too little weight on certain relevant considerations, namely (a) the existence of a strong alternative remedy; and (b) that the loss of the statutory protection would result in material prejudice to the reclaimers, in a sum up to £2m. He placed too much weight on (a) the possibility that the respondents would require to find new agents; and (b) any delay which might result from pursuing the alternative remedy. He thus erred in carrying out the balancing exercise between the parties, allowing this court to overturn his decision and consider the matter afresh (*G* v *G* [1985] 1 WLR 647 at 653, citing *In re F (A Minor) (Wardship Appeal)* [1976] Fam. 238).

Submissions for the respondents

[11] It was submitted that the Lord Ordinary had exercised his unfettered discretion correctly and the court should not interfere with his decision. He had not misdirected himself in law or otherwise transgressed the limits of discretion reposed in him. This was particularly the case when one gave consideration to his reasoning at paragraphs [11] to [21]. Senior counsel had taken instructions regarding the position of the solicitors and had been able to make representations thereanent to the Lord Ordinary. Mr Knight had consulted his insurance broker and others, and had reached the conclusion that in respect of any professional negligence action not only would he require to withdraw, so would Mr Kavanagh, as the principal agent with whom the respondents had a contractual relationship. Mr Kavanagh had also considered his position, and was of the view that as the principal agent responsible for instructing Mr Knight as his correspondent, he too would require to withdraw from acting.

[12] It could not be said that the Lord Ordinary had taken into account irrelevant factors and left important factors out which would warrant this court's interference (*Britton* v *Central Regional Council* 1986 SLT 207 referencing *A* v *A (Minors: Custody Appeal*) [1985] 1 WLR 647; and *McGhee* v *Diageo plc* 2007 SLT 1016, quoting *Thomson* v *Glasgow Corporation* 1962 SC (HL) 36).

[13] The relevant consideration for this court was whether the Lord Ordinary misdirected himself in law or transgressed the limits of the discretions confided to him (*Forsyth* v *AF Stoddard & Co Ltd , per Lord Wheatley,* at p53).

Analysis and opinion

[14] We do not consider that there is any merit in the argument that the Lord Ordinary

did not have a sufficient evidential basis for the findings which he made. In our view the Lord Ordinary was entitled to conclude, on balance, that the pursuers would be likely to require the services of new solicitors, in whom they could repose trust and confidence, notwithstanding the fact that the failure to observe the time limit seemed clearly to be that of the Edinburgh agent. We do not accept the submission that the Lord Ordinary in any way conflated the roles of the respective solicitors, or that he failed to appreciate that it was Mr Kavanagh in whom the respondents had reposed their trust and confidence. The fact that a clear case of negligence might lie against the Edinburgh agent does not mean that the local agent would not consider it necessary to withdraw from acting. In any action against Mr Knight the role and responsibility of the local agent to check progress might be examined; the respondents might have a clear case of negligence against the Edinburgh agents, but they would also have a case in contract against their local agent, who would in turn be able to rely on a right of relief against the Edinburgh agents. In any event, it appears as a matter of fact that both agents would consider themselves bound to withdraw, and there is no basis for saying that in doing so the local agent would be acting with an over-abundance of caution. The nature of the funding arrangement with the present agents, and issues relating to finding an arrangement with other agents may not be the most important consideration, but it cannot be said to be irrelevant.

[15] Furthermore, the Lord Ordinary was entitled to take into account the history of the proceedings, and in particular the relationship which had developed between the local agents and the respondents. From the joint minute, the affidavit of Mr Kavanagh, and from a report from Dr Harper dated 27 November 2017, all of which provide detail about the extreme reluctance of the first pursuer to take proceedings at all, being distraught at the thought she might gain financially from death of a loved one, and exhibiting misplaced

feelings of guilt, the Lord Ordinary was entitled to conclude as he did about the likely effect of a forced change of agency. Tortured by this thought, she fluctuated between giving instructions to proceed and withdrawing them. The affidavit indicates that the concern of the other family members was to support the first pursuer in her decision making, although they eventually persuaded her of the merits of proceeding. It is clear that throughout this difficult process the pursuers have received considerable support from Mr Kavanagh and have placed a great deal of faith and trust in him. All of this material justifies the Lord Ordinary's conclusion that finding new agents would be difficult and challenging for the pursuers for these reasons, which was indeed his conclusion:

> "It is likely to be especially fraught in the case of the first pursuer, having regard to her current mental health, her experience (on this hypothesis) of two abortive actions, and the history of difficulty in obtaining instructions from her."

[16] We do not consider that the Lord Ordinary required to have evidence to enable him to reach the conclusion that the need to pursue an alternative remedy would be likely to lead to material delay in resolution of the respondents' claim, even if the negligence claim against the solicitors were to be litigated in the commercial court. The claim against the present reclaimers is one which is at the stage of having been fully investigated, has been quantified, where the reclaimers do not seek to advance any defence, where *interim* damages have been paid, and which the agents have agreed to settle on the basis of full liability. There have been many discussions relating to settlement of the claim. Should the alternative remedy against the agents be pursued, whilst there may be no difficulty in establishing primary liability, there may be issues relating to apportionment, and the likelihood is that the new agents, or the insurers, would require to carry out some investigation into the soundness of the original claim, and the value thereof, which might give rise to difficulties with quantification. Rather than proceed on the basis of the clear liability for the primary claim,

the respondents would be relying on the loss of being able to pursue that claim, with the likely outcome being settlement. Senior counsel for the reclaimer submitted that this would be established simply on the basis of opinion evidence from senior counsel. However, it seems to us equally possible that evidence might require to be led as to the true value of the primary claim. Therefore, notwithstanding that liability might be clear, there remain what Lord Wheatley in *Forsyth* v *A F Stoddard & Co Limited* referred to (p55) as "imponderables" in relation to the progress of that claim. The Lord Ordinary was fully entitled to consider that, having regard to the stage of the present case, compared with the issues which would arise in the alternative remedy, the latter would be likely to involve material delay. It is well recognised that having to pursue an alternative remedy is a factor productive of delay. In *Craw* v *Gallacher* at p 233 Lord Jauncey concluded, without the need for evidence to establish the fact, that pursuit of the alternative remedy would result in prejudice to the pursuer, occasioned by the inconvenience and delay in instructing fresh solicitors and prosecuting a new claim. He had "no doubt that this is a factor prejudicial to the pursuer which must be taken into account".

[17] As to the potential effect on the respondents' mental health, we consider that there was evidence before the Lord Ordinary which entitled him to make the finding which he did. It was a matter of agreement in the joint minute that

> "[D]elay in this case may have a significant effect on the pursuers' psychological conditions. This is particularly so in the case of the first pursuer. The first pursuer … has developed severe mental health problems ... As a consequence of this, instructions to proceed with this action were very difficult to obtain…"

[18] A report from Dr Harper, dated 16 November 2016, stated that the ongoing legal proceedings were a factor increasing the severity of the first respondent's PTSD. In her October 2017 report she commented that the first respondent found it very difficult to move

on "given the inquiry and the possibility of another trial". There were reports indicating the psychological problems incurred by the other respondents, including the effect on them of the serious problems encountered by the first respondent. It is correct that in her report of October 2018 Dr Harper indicated that her understanding was that pursuing the alternative remedy would lead to "significant" delay. However, in giving her opinion on the potential effect of delay on the respondents, she did not restrict herself to commenting on the effect of "significant" delay. Rather she commented that "further delays" were "likely to prolong uncertainty, thereby significantly exacerbating levels of anxiety and low mood and impacting negatively on their mental health". There was therefore evidence from which the Lord Ordinary was entitled to reach the conclusion which he did.

[19] On the remaining issue of the balancing exercise, we again cannot accept the submission that the Lord Ordinary erred in the weight he attributed to the individual factors. He gave due attention to all the relevant factors. He recognised in terms that the respondents had a claim for professional negligence which "would be very likely to succeed." He recognised that the reclaimers would suffer prejudice from the loss of the statutory protection, but he was entitled to take into account that this was the only prejudice which would be encountered by the reclaimers. He was entitled to take account of the fact that this was only one of the factors which he required to consider, as was the availability of the alternative claim. What the Lord Ordinary required to do was make an assessment of all the relevant factors, and in our view this is what he did.

[20] In *Forsyth* v *Stoddard* at p53, the test which this court must apply in a case such as this was described by Lord Wheatley:

> "... when this matter is brought before the appeal court the test is not *primo loco* whether that court considers it equitable to permit the action to proceed but is whether the judge in the court below in the exercise of his unfettered discretion has

> misdirected himself in law or otherwise transgressed the limits of discretion reposed in him so as to permit an appellate court to intervene and set aside his decision. It is only in such circumstances that the appeal court is entitled to intervene and, on the material available to it, of new to consider the question which the statute poses (cf. Lord Cameron in *Donald* v *Rutherford* at p. 75)."

What Lord Cameron said in *Donald* v *Rutherford* 1984 SLT 70, at p75 was:

> "the primary issue is not whether this court considers it equitable to permit the action to proceed, but whether the Lord Ordinary in the exercise of a discretion unfettered by definition, had misdirected himself in law or otherwise transgressed the limits of the discretion reposed in him so as to permit an appellate court to intervene and set aside his decision. It is only in such circumstances that this court would be entitled to intervene and on the only material available to it, of new to consider the question which the statute poses."

[21] We are satisfied that the Lord Ordinary was entitled to exercise his discretion in the way he did, and that the reclaiming motion must fail.