SHERIFF APPEAL COURT

[2019] SAC (Civ) 034
PIC-PN2817-17

Sheriff Principal I Abercrombie QC
Appeal Sheriff P Braid
Appeal Sheriff A M Cubie

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in an appeal in the cause

(FIRST) ROBERTA BUCHANAN GILLIES as executrix nominate of the late Donald Gillies
(SECOND) DUNCAN GILLIES (THIRD) CAROLINE ROBERTSON
(FOURTH) GRANT GILLIES (FIFTH) ADAM GILLIES (SIXTH) MAX GILLIES
(SEVENTH) EWAN ROBERTSON (EIGHTH) JASMYN GILLIES
(NINTH) HAMISH ROBERTSON

Pursuers and Respondents

against

(FIRST) ARJO WIGGINS LIMITED (SECOND) FAIRFIELD ROWAN LIMITED

Defenders and Appellants

Defender and Appellant: Mackenzie; Clyde and Co;
2nd to 9th Pursuers and Respondents: Marshall (sol adv); Thompsons

2 October 2019

Background

[1] This is a decision of the court to which all members have contributed. Full account was taken of the notes of argument lodged on behalf of each party. Given that there are both appeal and cross-appeal, we use the terms "pursuers" (although we recognise that in

the absence of the minute of amendment there is only one pursuer) and "defenders" throughout this opinion.

[2] Donald Gillies ("the deceased") died on 29 May 2015. In 2016 an action was raised in the All-Scotland Sheriff Personal Injury Court ("ASPIC") by his wife *qua* executrix ("Mrs Gillies"), which was proceeding in accordance with the court timetable. As a matter of law the limitation period within which any claim arising from his death should be brought expired on 29 May 2018. In April 2018 Mrs Gillies' agents proposed to extend the action by including connected relatives of the deceased as pursuers. A minute of amendment was prepared introducing the 2nd to 9th pursuers and substantially increasing the sums claimed. A motion was lodged in terms of the intimation by email procedure allowed by rule 15A. In due course, the case called before the sheriff on 10 December 2018, where he faced the following accepted factual position.

[3] Both motion and minute of amendment had been intimated by the pursuers to the defenders on 25 May. The defenders did not oppose the motion. In accordance with the timetable prescribed by Rule 15A the motion and minute of amendment were lodged with the court for the first time on 30 May 2018, that is, the day after the limitation period had expired. The pursuers moved that the record be amended in terms of the minute and answers and a proof assigned. The defenders moved that the minute be refused on the basis that it came too late, having been lodged in process outwith the limitation period

[4] The sheriff determined that the minute of amendment had been lodged outwith the limitation period, and that the new claim was therefore time barred. He then, having heard parties, determined that he could exercise his discretion in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973 (to allow a claim to be made outwith the limitation period) on the basis of submissions by the parties; he then heard submissions and

exercised that discretion by allowing the amendment to be received and the record to be amended in terms thereof.

[5] We observe that parts of the minute of amendment related only to the case by Mrs Gillies so are not caught by any limitation period.

The appeal/cross-appeal

[6] The defenders were represented by Mr Mackenzie and the pursuers by Mr Marshall.

[7] The defenders submit that the sheriff was correct to find that the minute fell outwith the limitation period, but had erred in hearing submissions in relation to the section 19A argument; and further that, even if he had been correct about that, he erred in exercising his discretion in favour of the pursuers.

[8] The pursuers submit that the sheriff did not err in that regard; but (in their cross-appeal) that the limitation period was not breached by the amendment procedure, and that the sheriff did err in holding otherwise.

[9] There are thus three elements to the appeal and cross-appeal:

Did the sheriff err in holding that limitation period had been breached?

Did the sheriff err in accepting that the court could be persuaded to exercise its discretion in terms of section 19A by way of submissions?

Did he exercise his discretion properly?

Submissions

Defenders

[10] Mr Mackenzie submitted that the sheriff was correct to hold that the claim was time-barred because it was not brought into the judicial process within the limitation period.

He submitted that the sheriff had erred in relation to the exercise of his discretion by allowing the section 19A application. There was an inadequate explanation for the late amendment as a result of which the possible remedies available could not be determined. The defenders were prejudiced in the continuing action; the sheriff had given inadequate weight to that point.

[11] He looked at the phrase "brought into the judicial process" which he submitted was critical. He referred to the timing of events as set out in paragraphs [2] and [3] above.

[12] He submitted that the 2nd – 9th pursuers had to both intimate and lodge the minute of amendment prior to the expiry of the limitation period and they had not done so. He submitted that intimation was not enough. He submitted that notwithstanding the cross-appeal the pursuers in their written submissions had made a concession which was wholly destructive of their case when they said "the second to ninth pursuers…had to make claims against the Defender within a judicial process before the expiry of three years after the date of death of the deceased."

[13] He submitted that there was a distinction between sisting a party and amending. The sisting of the party did not interrupt the triennium.

[14] The limitation period can only be interrupted by the minute of amendment; it is tantamount to raising proceedings; he referred to Macphail, *Sheriff Court Practice* (*3rd Edition*) and to *Marshall* v *Black*, 1981 SLT 228. Parties must be sisted to have amendment heard.

[15] He looked at rule 15A, which required intimation first and then required lodging of the minute of amendment; in this case at a precise date after the expiry of the triennium. If a new action had been raised it would have to have been lodged in court and warranted (or signetted) and then served. The lodging was a requirement. For the court's authority to be given it must be "brought into the judicial process"; otherwise the court is purporting to

grant authority for a document not yet seen. He submitted that the judicial notice was the lodging of the minute of amendment. If the court has not seen the document, then it cannot give authority to it. If the pursuers peril their case by commencing it by using the rule 15A procedure two days before the limitation period expires (rather than by raising a new action), then they could not complain that that deadline is missed.

[16] He referred to *Boyle* v *Glasgow Corporation*, 1975 SC 238 where a pursuer in an action sought to introduce a new ground of fault after the limitation period. There was an existing cause and no new parties. At pp 250 - 251 the Inner House talk about the document having to be lodged to be brought into the judicial process; unless and until it is lodged, an intimated minute of amendment is no different to a letter. Unless and until it is lodged, it is not part of the judicial process; both intimation and lodging are required.

[17] Mr Mackenzie then moved on to why the sheriff had erred in the exercise of his discretion; he heard only *ex parte* submissions for which there was no record. The pleadings as they stood at the time of closing the record and at the time of the minute of amendment gave no explanation as to why the limitation period was missed. There was no proper basis for the sheriff to find one way or another that there should be a right of relief. There was prejudice to the defender. The respondents have to bring themselves within section 19A. They cannot claim it of right. It is an equitable discretion which can only be exercised in possession of the full information. Pleadings are required; the defenders may require to investigate what is said; a preliminary proof may be required. He referred to Macphail para 10.4.

[18] On enquiry from this court, he submitted that the sheriff did not have enough material to determine why amendment had been left so late. Although the defenders had not sought a proof, the sheriff had no material available on which he was entitled to reach a

conclusion and had not given compelling reasons for exercising his discretion in the pursuers' favour.

[19] The pursuers were bound to provide details about what had happened; it was put to him by the court that the defenders had to deal with the pursuers' claim already; what is the element of prejudice which can arise if the case continues in any event?

[20] He submitted that before prejudice can be assessed there needs to be an explanation for breaching the limitation period. He referred to *AS* v *Poor Sisters of Nazareth,* 2008 SC (HL) 146. The sheriff was plainly wrong to have exercised his discretion in the way in which he did; see paragraphs 29-33 of AS. He invited the court to refuse the cross-appeal and grant the appeal.

Pursuers

[21] Mr Marshall invited the court to grant the cross-appeal and to adhere to the interlocutor, with the case remitted to the sheriff to proceed as accords. If the sheriff was correct in the exercise of his discretion it was immaterial to find that it was out of time; if the minute was timeous, then exercise of discretion was immaterial.

[22] He referred to chapter 18 which makes provision for amendment; that provides for lodging of the minute at the same time as the motion. But the rule which governed the procedure in this case was rule 15A which deals with email intimation (in passing, the interlocutor eventually pronounced did not fix a rule 18.3 hearing.)

[23] The pursuers complied with rule 15A; they intimated on 25 May (day 1); they lodged by (day 4) in accordance with the rule. In his submission the intimation was the making of the claim by the respondents in the judicial process. It is the first date prescribed by the rules. There was a difference between raising an action and lodging a minute of amendment

in an existing action. Until a writ or summons is lodged with the court, there is no judicial process, contrasting with the present situation. Intimation took place within the three year period, within the judicial process; so the limitation period was interrupted.

[24] The motion and minute of amendment were intimated. The sheriff had regarded the possibility of that being dropped as important; but that was of no consequence at all. If the minute was not lodged, then no claim is made. (See *Kinnaird* v *Donaldson,* 1992 SCLR 694 and *Link Housing Association Ltd* v *PBL Construction Ltd,* 2009 SC 653). The lodging is not critical.

[25] In *Boyle*, the regime of rules which operated was very different; intimation is the trigger. The pursuers expected that the defenders would consent to dispensing with notice in the ordinary way, but that did not happen. However the requisite judicial notice was taken. If the dicta in *Boyle* is considered fully it can be seen to emphasise fair notice. The cross-appeal should be allowed.

[26] In relation to the exercise of the sheriff's discretion the pursuers approached it in a slightly different way, arguing that no question of section 19A arose; it was the exercise of the sheriff's discretion in allowing a minute of amendment which provided the basis for his decision; he submitted that *Aitchison* v *Glasgow City Council,* 2010 SC 411 supported his position.

[27] Mr Marshall submitted that there was enough in the averments to justify consideration. Proof can only be required when there is some material outwith the knowledge of the pursuers. He submitted that the sheriff had ample material before him; he did not need pleadings, but in any event the minute of amendment said it all by reference to "in all the circumstances of the case".

[28] He submitted that we are only concerned with general discretion to allow amendment (*AS* v *Nazareth*). The sheriff had not erred in taking account of the material presented. The sheriff had sufficient material to allow him to reach a view. The sheriff's assessment at paragraphs 19 and 20 of his judgment are enough. He commended the reason. *AS* refers to significant prejudice. There was no such prejudice.

[29] He moved for the cross-appeal to be granted and the appeal to be refused.

Defenders' response

[30] In a brief response Mr Mackenzie said proceedings have to be commenced within the three year limitation period; they have to be brought into judicial process in that time. That did not happen. Essentially, intimation of an intention to lodge the motion is insufficient for it to bring the matter into the judicial process; it must be lodged. Rule 15A did not elide the requirements of rule 18.

[31] It was put to him during his submissions that if he were right, the effect of rule 15A was to shorten the triennium by three days. He accepted that initially but in his response he submitted that, on the contrary, the effect of the pursuers' position was to extend the triennium by three days.

Analysis and decision

[32] We deal first with the cross-appeal, which if granted will resolve the matter. The issue for this court is whether the limitation period is interrupted by intimation of the minute of amendment or only by the subsequent lodging.

[33] Amendment is customarily by way of motion in accordance with the provisions of rule 18 which is in the following terms, so far as relevant:

"Powers of sheriff to allow amendment

18.2. (1) The sheriff may, at any time before final judgment, allow an amendment mentioned in paragraph (2).

Applications to amend

18.3. (1) A party seeking to amend shall lodge a minute of amendment in process setting out his proposed amendment and, at the same time, lodge a motion-

(a) to allow the minute of amendment to be received; and

(b) to allow-

(i) amendment in terms of the minute of amendment and, where appropriate, to grant an order under rule 18.5(1)(a) (service of amendment for additional or substitute party); or

(ii) where the minute of amendment may require to be answered, any other person to lodge answers within a specified period."

[34] However, in relation to cases in the ASPIC, parties have the option to proceed by way of email intimation of motions. The procedure is governed by rule 15A; the relevant parts are as follows:

"Rule 15A; **Interpretation of this Chapter**

15A.1A. (1) In this Chapter—

"court day" means a day on which the sheriff clerk's office is open for civil court business;

"court day 1" means the court day on which a motion is treated as being intimated under rule 15A.4;

"court day 3" means the second court day after court day 1; "court day 4" means the third court day after court day 1; "lodging party" means the party lodging the motion;

"receiving party" means a party receiving the intimation of the motion from the lodging party; and

"transacting motion business" means—

(a) intimating and lodging motions;

(b) receiving intimation of motions;

(c) intimating consent or opposition to motions;

(d) receiving intimation of or opposition to motions.

Intimation of motions by email

15A.4. (1) Where—

(a) a defender has lodged a notice of intention to defend under rule 9.1;

(b) a party has lodged a minute or answers; or

(c) provision is made in these Rules for the intimation of a motion to a party in accordance with this Part,

the lodging party must give intimation of his or her intention to lodge the motion, and of the terms of the motion, to every such party by sending an

email in Form G6A (form of motion by email) to the addresses of every party.

…

(3) A motion intimated under this rule must be intimated not later than 5 p.m. on a court day.

Opposition to motions by email

15A.5. (1) A receiving party must intimate any opposition to a motion by sending an email in Form G9A (form of opposition to motion by email) to the address of the lodging party.

(2) Any opposition to a motion must be intimated to the lodging party not later than 5 p.m. on court day 3.

(3) Late opposition to a motion must be sent to the address of the court and may only be allowed with the leave of the court, on cause shown.

Consent to motions by email

15A.6. Where a receiving party seeks to consent to a motion, that party may do so by sending an email confirming the consent to the address of the lodging party.

Lodging unopposed motions by email

15A.7. (1) This rule applies where no opposition to a motion has been intimated.

(2) The motion must be lodged by the lodging party not later than 12.30 p.m. on court day 4 by sending an email in Form G6A headed "Unopposed motion" to the address of the court.

(3) A motion lodged under paragraph (2) is to be determined by the court by 5 p.m. on court day 4.

(4) Where for any reason it is not possible for a motion lodged under paragraph (2) to be determined by 5 p.m. on court day 4, the sheriff clerk must advise the parties or their solicitors of that fact and give reasons."

[35] For completeness, Rule 15A.3 provides that a motion may be made—

(a) orally with leave of the court during any hearing; or

(b) by lodging it in accordance with this Chapter.

Although the matter was not subject to submission before us, we proceed on the basis that the effect of "signing up" for email motion procedure under chapter 15A is to preclude the use of Rule 18 for amendment procedure in any action in the ASPIC.

[36] We take the following matters as uncontroversial:

- Amendment can take place at any time (*Thomson* v *Glasgow Corporation,* 1962 SC (HL) 36).

- The fact that the additional pursuers are sisted as parties is of no consequence in relation to the timing of the amendment any more than the fact an action has been raised invests in the pursuer right to proceed: (*Marshall* v *Black*).
- A minute of amendment introducing a new claim which has not been brought into the judicial process until after the limitation period means that the claim is timebarred.

If a claim is timebarred the onus is on the pursuer to demonstrate why it is nonetheless equitable that the action be allowed to proceed.

[37] What is controversial, and the question for us, is what the phrase "brought into the judicial process" means. The defenders relied heavily on *Boyle* in particular the following passage (emphasis added)

> "If this in fact was an entirely new case, then the action would be brought when the summons had passed the signet and had been served on the defenders (*Miller* v *National Coal Board, 1960 S.C. 376*; Maclaren, Court of Session Practice, 317; *Alston* v *Macdougall, 15 R. 78*; and *Stewart* v *North, 17 R. (H.L.) 60* at 63). It should be noted that at and up to this point the Court in the person of the Judge is in no way involved. It seems to me therefore that the provisions of section 6(1) *supra*, which is designed to give fair notice to a defender that an action is being brought against him within the prescriptive period, are satisfied, and the action is "brought" within our procedure, when first steps in the judicial process are taken, namely when the summons has passed the signet and has then been served on the defender. As far as researches have gone, there has been no decided case to determine what is the corresponding point when an existing summons is amended by a Minute of Amendment. Manifestly in that situation it must be initiated by something within the judicial process. The lodging of a Minute of Amendment brings it into the judicial process. Intimation to the defender of the motion to the Court asking for the Minute to be received and answered within a specified period brings to the attention of the defender that the Minute of Amendment has been lodged, and it is at that point available to the defender. That seems to me to constitute fair notice. It is true that at that stage the amendment has not yet been allowed, and eventually may not be allowed, by the Court; but at least the pre-requisite of fair notice has been satisfied within the judicial process in which the defender is already involved, and if this has been done within the triennium, then that is as near to equiparation to the service of a summons as the situation permits. In fact it goes even a step further, because the Court in the person of the Judge is brought into the procedure at the stage when it is asked to give authority for the Minute of Amendment to be received and to authorise

> answers to be lodged within a specified period, whereas in the case of a completely new action the Court in the person of the Judge is not involved in the corresponding part of the procedure."

[38] The defenders argue that the unequivocal language of the Lord Justice Clerk -"the lodging of the minute of amendment brings it in to the judicial process" - has the effect that the minute is not and cannot be part of the judicial process until it has been lodged.

[39] But that does not reflect the analysis which was made by the court in *Boyle*; the emphasis was on fair notice; that was the matter with which the court was concerned. The Lord Justice Clerk said at p 251 "When fair notice within the judicial process and within the prescriptive period has been given, I consider that the purposes and the provisions of section 6(1) have been effected."

[40] The provisions of rule 15A have innovated upon the means of taking judicial steps. That rule provides for the lodging of the principal document after the motion procedure has concluded, either by agreement or by opposition. The pursuers complied with the terms of the rule 15A procedure. We are satisfied that, such intimation having been made, the "pre-requisite of fair notice" has been satisfied. The lodging of the minute of amendment is, in this context, a red herring. The important part of the procedure is that which provides fair notice. Looking at the matter the other way round demonstrates the fallacy in the defender's argument. If the pursuers had simply lodged a minute of amendment, with no accompanying motion, that could hardly have operated to interrupt the limitation period; that would have offended against the prerequisite of fair notice. Indeed, such procedure would not have been competent.

[41] That analysis is consistent with the rubric in *Boyle* which as Mr Marshall pointed out emphasised that the trigger is the motion, which says:

> "Held… that that the *punctum temporis* when a minute of amendment is brought within the judicial process was when the motion to allow the minute of amendment to be received and answered was made and that since that had been done within the triennium, the averments were not time-barred."

[42] We accordingly find that the minute of amendment intimated under rule 15A was timeous, and that it was brought into the judicial process within the limitation period. It was not time barred. The cross-appeal succeeds and the issues arising in the appeal are rendered academic; it is unnecessary for us to deal with them in any detail although we make the following points, lest we are wrong in relation to time bar.

[43] There was force in the defenders' positon that, absent averments about how the minute came to be lodged when it did, the sheriff was not in a position to exercise his discretion in terms of section 19A. A catch-all averment such as "in all the circumstances of the case" is not necessarily apt to allow submissions to be made about the factual circumstances giving rise to any delay.

[44] We also consider that where there has been a failure to lodge a claim within the limitation period, the matter is not simply one of the sheriff exercising his discretion in the ordinary way in terms of the allowance of an amendment; the decision is based on a wider consideration of factors than those addressed in the case of a minute of amendment which does not give rise to consideration of limitation. We would, therefore, have been inclined to allow the appeal, had the cross-appeal not succeeded.