OUTER HOUSE, COURT OF SESSION

[2020] CSOH 21

PD483/18

OPINION OF LADY CARMICHAEL

In the cause

STEPHEN ANTHONY QUINN AND OTHERS

Pursuers

against

WRIGHT'S INSULATIONS LIMITED

Defender

Pursuers: Stuart QC and Shields Solicitor Advocate; Thompsons
Defender: Mackenzie QC; Clyde & Co (Scotland) LLP

27 February 2020

Introduction

[1] This case came before me as a preliminary proof under section 19A of the Prescription and Limitation (Scotland) Act 1973. Francis Joseph Quinn ("the deceased") received a diagnosis of pleural plaques in 1993 or, at latest 1994. He sought advice in relation to pleural plaques in 2012. He developed mesothelioma. The onset of his symptoms of mesothelioma was in about January or February 2016. He died of malignant mesothelioma on 11 May 2017. The present action is at the instance of his executors nominate and certain relatives. The summons was served on 13 December 2018.

[2] The pursuers accept that their claims are time-barred because of the operation of sections 17(2)(b) and 18(4) of the 1973 Act, having regard to the five judge decision of the Inner House in *Aitchison* v *Glasgow City Council* 2010 SC 411. They contend that in the circumstances of this case the court ought to exercise its discretion to allow the claim to proceed.

[3] The defenders do not contend that they are prejudiced in the investigation of the claim by reason of the lapse of time. They accept that they employed the deceased in tax years 1964/65 and 1965/66. It is a matter of agreement that if the court were to exercise its discretion under section 19A the defenders would not dispute that the deceased was negligently exposed to asbestos. They would not in that event dispute that that exposure materially increased the risk that he would develop mesothelioma.

Events between 1993 and 2012

[4] The evidence in relation to this derives from the agreement between the parties, and the content of agreed medical records. It was agreed that the medical records should be "taken as evidence of their contents". Parties confirmed in oral submissions that there was no issue as to the accuracy of the entries in those records. If there was a note that the deceased had said something, then I should proceed on the basis that he had said it.

[5] On 11 or 12 November 1993 (the date in the GP records is unclear), the deceased attended his general practitioner ("GP") complaining of tiredness. He had made earlier reports of tiredness in the same year. On 12 November 1993 the deceased underwent a chest X-ray. It demonstrated bilateral basal pleural calcification, consistent with previous asbestos exposure, but disclosed no evidence of active lung disease.

[6] The deceased was seen by Dr Connolly at the Victoria Infirmary, Glasgow, on 1 December 1993. He described to Dr Connolly that "thirty years ago he worked in pipe covering, mixing asbestos for lagging the pipes". Dr Connolly wished to see X-rays taken by the pursuer's GP to exclude an asbestos-related lung condition. Dr Connolly appointed the deceased for a review 2 months later to discuss the results. On 10 January 1994 the deceased was advised by his GP about asbestos and Clydeside Action on Asbestos ("CAA"). Dr Connolly reviewed the deceased at the Victoria Infirmary on 4 February 1994. Dr Connolly wrote to the pursuer's GP in these terms:

> "His chest x-ray had bilateral basal pleural calcification consistent with previous exposure to asbestos but no evidence of active lung disease. This calcification on its own would not explain his symptoms …"

[7] The deceased had a further X-ray on 28 February 2012, which confirmed that he had pleural plaques. He was again referred to the Victoria Infirmary. On 10 April 2012 the deceased advised Dr Spears, a special registrar in respiratory medicine at the Victoria Infirmary that he was an insulator working on boilers for around 18 months when he was 18 years of age, and that he was exposed to lots of asbestos.

[8] The deceased made contact with CAA on 12 April 2012. CAA's first contact sheet records that the deceased said that he "came to us when in the Saltmarket but only for a donation". It is agreed that CAA had premises at Saltmarket, Glasgow, between 1984 and 1995. There is no evidence that the deceased consulted CAA in relation to his own situation before 2012.

History of claims

[9] The evidence in relation to this derives from agreement between the parties, and from the evidence of Craig Smillie, solicitor, and Laura Blaine, solicitor, given in part by

reference to documentary productions which are the subject of agreement. No issue arises as to the credibility or reliability of either of these witnesses.

[10] The deceased completed a CAA legal advice and assistance form. CAA referred the matter to Thompsons, solicitors ("Thompsons"). Because the deceased had indicated that Newalls had employed him, staff at Thompsons initially thought that a claim would have to be submitted to the T&N Asbestos Trust. As is routine in cases involving alleged exposure to asbestos, medical records and HMRC records were recovered under mandate. Newalls did not feature on the HMRC schedule of employers. The present defenders did. Craig Smillie, a solicitor, took a statement from the deceased. The statement was typed up and the deceased was asked to review and sign it. The deceased's account included one of being employed by the defenders. Mr Smillie checked with the T&N Asbestos Trust, who confirmed that they had no records indicating that the deceased had been employed by the companies with which they are concerned.

[11] In the CAA form the deceased indicated that he had bilateral pleural thickening, but that turned out to be incorrect. The only condition from which he was suffering at the time was pleural plaques. He made an unsuccessful application for Industrial Injuries Disablement Benefit on 19 April 2012. His appeal against refusal of that claim was withdrawn because he did not have diffuse pleural thickening as defined in the Social Security (Industrial Illnesses) (Prescribed Diseases) Regulations 1985.

[12] The deceased's medical records disclosed entries from 1993 relating to asbestos disease. On 12 November 1993 the deceased had a chest X-ray. It demonstrated bilateral basal pleural calcification, consistent with previous asbestos exposure. It showed no evidence of active lung disease.

[13] Mr Smillie realised that there was a potential limitation issue that required investigation. He took the deceased's instructions. The deceased had very little recollection of the contacts with clinicians that had led to the entries from 1993. He was unable to shed any light on the matter. Mr Smillie arranged for the file to be sent to a colleague who dealt with civil claims, rather than claims to the T&N Asbestos Trust.

[14] By letter dated 14 October 2013 Thompsons intimated a claim to Aviva on the deceased's behalf relating to his exposure to asbestos while in the defenders' employment, and his having asbestos related pleural plaques. Simpson and Marwick WS, the agents for the defenders, responded on 23 October 2013, indicating that employment with the defenders was admitted. They asked for information about the deceased's employment history. On 28 October 2013 Thompsons sent them a copy of the deceased's statement and a copy of an X-ray to confirm that he had pleural plaques. The defenders' agents confirmed that there was no issue over employment or negligent exposure. On 8 November 2013 they wrote in these terms: "However, so that I can make offers on both a full and final and provisional basis, please provide me with a copy of the full GP records for review."

[15] Laura Blaine, who is the senior partner in the lung disease department of Thompsons, became involved. She did so because of a rule in her team that any decision to decline to act in a case must involve a partner and/or a solicitor advocate in the team. There was an awareness of the difficulty posed by the entries in the deceased's medical records, and attempts were made to settle the claim on the best terms in the first instance. To that end Thompsons wrote to the defenders' agents in the following terms:

> "We have discussed matters with our client regarding his options on either a full and final offer or a provisional offer from your client's [sic] to settle his pleural plaques claim.

> He has advised us that he is minded to accept a full and final settlement from you to settle his pleural plaques claim."

[16] The defenders' agents repeated their request to see the deceased's medical records in December 2013 and again in August 2014. By an email of 26 August 2014 Thompsons confirmed to the defenders' agents that they were not proceeding with the claim, and that the file could be closed. That reflected a decision by Ms Blaine that the matter should not proceed. She took the view that the entries from 1993 were sufficiently clear that the deceased must have had the relevant constructive knowledge for the limitation "clock to start ticking" at that time. She initially took the view that it was worth trying to see if the claim could be resolved by producing some limited radiological evidence and the deceased's statement. As was apparent from the correspondence, Simpson and Marwick were not persuaded to settle on that basis. It was clear that there would be no pre-litigation settlement. Ms Blaine considered that a limitation defence would be successful. She thought there would be no room for reliance on section 19A of the 1973 Act, as it was quite clear that he had been told that he had pleural plaques. There had been no progression to a more serious condition.

[17] Where a client attends in a similar situation, with a claim for pleural plaques that has time-barred, but has developed a more serious condition, such as lung cancer or mesothelioma, Thompsons policy is to take a different view as to whether to litigate. Ms Blaine explained that "historically" the relevant jurisprudence - *Carnegie* v *Lord Advocate* 2001 SC 802 - indicated that the limitation period started anew with the development of a new condition in an individual. The decision in *Aitchison* had overturned *Carnegie*. The view taken in her firm was that *Aitchison* might be capable of challenge in due course, and also that there would be scope to ask the court to exercise its discretion under section 19A where a more serious condition had

developed. This evidence was given, as I understood it, with a view to explaining why Thompsons had declined to pursue a claim in 2014, but were prepared to act in the present case.

[18] In line with that view, Thompsons advised the deceased to return and seek further advice in the event that he were to develop another asbestos related condition. The deceased did approach Thompsons again in 2015, but at that stage it was ascertained that he still had pleural plaques only.

[19] The deceased received a payment of £4,964 in November 2016 and his family received a payment of £16,477 on 8 February 2018 under the Pneumoconiosis Etc (Workers Compensation) Act 1979. The latter was a payment that would have gone to the deceased had he been alive when it was made, and would have been paid to his estate after his death.

[20] After the deceased's death, his children approached Thompsons. When their claim was intimated, the defenders' agents raised the circumstance that a claim had been intimated but not pursued in relation to a diagnosis from 2012.

Evidence of Stephen Anthony Quinn

[21] There is again, no issue as to the credibility of this witness ("Mr Quinn"), who is the son of the deceased. He pursues the action as one of the deceased's executors nominate, as an individual, and as the legal representative of a number of children. I have no doubt that he sincerely believed everything that he said in evidence. The evidence was led with a view to persuade me to draw particular inferences as to the state of mind of the deceased. I deal with that matter below. The evidence was as follows.

[22] The deceased was brought up in care. He did not have much of an education. It was his wife, the second pursuer's mother, who had taught him how to read and write correctly.

He had a strong moral sense, and a strong work ethic. Although he was not educated, he knew that he could improve his circumstances. When he got money from work, he would buy land, obtain planning permission, and then sell the land on at a profit.

[23] He was very protective of his family, and wanted to look after them. He did not smoke or drink, and took his health seriously. He did not suffer from ill-health or miss work through minor ailments. In the early 1970s he spent some time working with Scottish Television. Thereafter he concentrated on development opportunities: buying land, obtaining planning permission for perhaps four to eight houses, building the houses and selling them. He did not socialise much, but enjoyed holidays with his wife. His wife was a home-maker, and helped with bookkeeping. The deceased took responsibility for providing income for the family. His wife died in 2009, and the deceased was grief-stricken.

[24] Counsel asked Mr Quinn whether, if the deceased had thought he was significantly unwell, and that he might die prematurely, he would have taken steps to protect his family financially. After his wife died, he told Mr Quinn that he had split his pension fund so that half would pay an annuity. The other half would form part of his estate for the benefit of his children if he died within 5 years. That had been 5 to 7 years ago. Mr Quinn had some experience of working in financial services. Mr Quinn had thought, on reflection, that the deceased had been protecting him and other family members by acting in that way.

Submissions

Pursuers

[25] The pursuers accepted that their claims were time-barred. They accepted that it would have been reasonably practicable for the deceased to have become aware of the relevant facts for the purposes of section 17(2)(b) of the 1973 Act in 1993 or 1994. The claims

of the pursuers were therefore barred by virtue of section 18(4), subject to the operation of section 19A and the power of the court to allow the action to proceed if it seemed equitable to it to do so. Counsel referred to the definition of "equitable" in the Oxford English Dictionary. That was: "characterised by equity or fairness".

[26] While acknowledging that many of the decided cases in relation to section 19A often turned on the particular facts in each case, counsel referred to a number of authorities which he submitted provided guidance of more general application. He referred, first to a passage in the opinion of Lord Cameron in *Donald* v *Rutherford* 1984 SLT 70 (IH), at 74-75:

> "In considering whether the Lord Ordinary's interlocutor is open to successful attack it is first necessary to consider the nature of the power which he was called upon to exercise. The wording of s. 19A is unqualified in its generality: 'Where a person would be entitled, but for any of the provisions of s. 17 (as read with sections 18 and 19) of this Act [the 1973 Act], to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision.' The test then is whether 'it seems equitable' to the court: this, in my opinion, means and can only mean that the discretion thereby conferred upon the court is unfettered. This interpretation of the language of the statute is in line with that adopted by the Court of Appeal in England in considering the proper construction of the language of s. 2D of the Limitation Act 1939 as amended, which provides '(1) if it appears equitable to the court to allow an action to proceed'. It is true that s. 2D of the English statute goes on to provide 'having regard to the degree to which (a) the provisions of section 2A or 2B of this Act prejudice the plaintiff or any person whom he represents and (b) any decision of the court under this section would prejudice the defendant and any person whom he represents, the court may direct that these provisions shall not apply to the action or shall not apply to any specified cause of action to which the action relates … in acting under this section the court shall have regard to all the circumstances of the case and in particular' (and here are set out a catalogue of particular circumstances to be taken into account). The section was considered in the Court of Appeal in the case of *Firman v. Ellis*. In this case Ormrod L.J. said at p. 17, that in the construction of the section:
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> > 'The appellants contend that the section should be construed or applied not only strictly but, in the interests of public policy, restrictively. So far as construction is concerned, the words of the section are clear and unambiguous. It is impossible to construe the word 'equitable' narrowly or liberally. It is either equitable or inequitable to disapply the fixed time limit in any given set of circumstances, although different people may have different views of what is equitable in particular cases.'

This interpretation of the section in the English statute was approved by the House of Lords in the case of *Thompson v. Brown* at p. 752. In that case Lord Diplock said: 'I agree with what was said about the unfettered nature of the discretion by the Court of Appeal in *Firman v. Ellis* although the actual decision in that case must be regarded as overruled by *Walkley v. Precision Forgings Ltd*. In the case of *Thompson v. Brown* - concerned with the same statutory provision as the earlier case of *Firman* - Lord Diplock said this: 'The onus of showing that in the particular circumstances of the case it would be equitable to make an exception lies upon the plaintiff; but, subject to that, the court's discretion to make or refuse an order if it considers it equitable to do so is in my view, unfettered.' The speech of Lord Diplock was concurred in by the other members of the Judicial Committee. This passage of his speech was repeated by Lord Diplock in giving the leading speech in the later case of *Deerness v. Keeble* in the House of Lords. While these observations were made in the context of the English legislation, they are in my opinion equally applicable to the proper construction of s. 19A of the Scottish statute, and I would respectfully adopt them. The cases of *Firman v. Ellis* and *Thompson v. Brown* were not drawn to the attention of Lord Ross in the case of *Carson v. Howard Doris* which was much relied on by the reclaimer. In the case of *Carson* Lord Ross expressed the opinion at p. 275 that the power conferred by s. 19A should be exercised 'sparingly and with restraint. If the court were to exercise the power liberally and freely, that would drive a proverbial coach and six through the elaborate provisions contained in ss. 17, 18 and 19 of the Act of 1973.' No doubt the exercise of the unfettered discretion conferred on the court by s. 19A (1) in favour of a pursuer does, in any particular case, in a sense drive a coach and six through the provisions of the earlier protective sections of the Act of 1973, but that is no more than expressing in a vivid and picturesque phrase what is the effect of a decision to permit a time-barred action to proceed. At the same time I must emphasise that the discretion of the court is unfettered, although in every case the relaxation of the statutory bar can and must depend solely upon equitable considerations relevant to the exercise of a discretionary jurisdiction in the particular case, having regard to the fact that it is for the party seeking relief to satisfy the court that it is, in the view of the court and in the circumstances of the case and of the legitimate rights and interests of the parties equitable to do so. I do not think that what was said by Lord Ross should or could properly be interpreted as implying that he was seeking to place fetters on or limit the ambit of the equitable jurisdiction conferred on the court by s. 19A, or in any way to run counter to what was said in *Firman v. Ellis* or *Thompson v. Brown*. … But while the discretion is, in my opinion, unfettered, it must necessarily be exercised within certain limits and those limits must be as set by the circumstances of the particular case. The relative weight to be given to any particular circumstance must be for the court required to exercise the discretion to determine. The language of s. 19A, in my opinion, plainly carries the implication that it is for the pursuer in such a time-barred action to satisfy the court of the equity of his claim to be allowed to proceed, and consequently for the court to proceed from that point of departure. At the same time equity requires that an equitable decision should be one which proceeds on a fair balancing of the interests and conduct of the parties and their advisers, as well as the nature and circumstances and prospects of success in pursuit of the time-barred claim itself. But the attention to be paid and the weight to be given to these various

> considerations are for the court vested in this jurisdiction, as well as the balancing of the degree of prejudice which either party may be expected to suffer according as the court decides."

[27] Counsel also referred to a further passage in Lord Cameron's opinion at page 77 regarding the nature of the exercise for the court:

> "The task is to decide whether it is equitable that the pursuer should be allowed to escape from the operation of the time-bar imposed by s. 17 of the Act of 1973. The exercise of this jurisdiction necessarily involves a balancing not only of all relevant circumstances of the particular case but also the interests of both or all parties concerned. In the present case it would appear clear enough that no personal blame can properly be laid on the shoulders of the respondent himself, but he is answerable for the acts of his agents."

He drew attention also to passages in the opinion of Lord Dunpark at page 78:

> "The starting point for the consideration of the exercise of the s. 19A power is s. 17, which prohibits the raising of an action such as this on the expiry of three years from the date of this road accident. Until the introduction of s. 19A by s. 23 (a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 this pursuer was precluded from enforcing his claim for damages against this defender, who had the statutory protection of s. 17 even if the pursuer's action had been raised on the day after the expiry of the three-year period. Accordingly, in balancing equity under s. 19A, the first weighty factor in the defender's favour is that he will be relieved of any legal liability that he may have to the pursuer unless the court sees fit to deprive him of his statutory protection on the ground of equity.
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> …
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> While the second of the two factors which apparently induced the Lord Ordinary to allow this action to proceed, namely, that the defender's insurance company had completed their investigation of the facts of the accident before the expiry of the triennium, is a weighty one, it is not conclusive."

[28] *Donald* had been cited with approval and applied in *Clark* v *McLean* 1994 SC 410, at 414F. *B* v *Murray (No 2)* 2005 SLT 982, although an Outer House decision, merited particular attention for its discussion of the policy issues underlying limitation of actions. Lord Drummond Young, at paragraph 21, had described the discussion of limitation statutes by McHugh J in *Brisbane South Regional Health Authority* v *Taylor* [1996] 186 CLR 541

at 551-554 as illuminating and, at paragraph 22, as manifestly relevant to the interpretation of the limitation provisions in the 1973 Act. He had quoted the following passages from it:

> "[S] 31 should not be read as giving an applicant a presumptive right to an order once he or she satisfies the two conditions laid down in s 31(2) of the Act. An applicant for any extension of time who satisfies those conditions is entitled to ask the court to exercise its discretion in his or her favour. But the applicant still bears the onus of showing that the justice of the case requires the exercise of the discretion in his or her favour.
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> The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law has been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that '[w]here there is delay the whole quality of justice deteriorates': *R v Lawrence*, [1982] AC 510, at 517, per Lord Hailsham of St Marylebone LC. Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realize, the deterioration in quality is not recognizable even by the parties. Prejudice may exist without the parties or anybody else realizing that it exists. As the United States Supreme Court pointed out in *Barker v Wingo*, 407 US 514 at 532 (1972), 'what has been forgotten can rarely be shown'. So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody 'knowing' that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose. …
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> The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even 'cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilize their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period. As the New South Wales Law Reform Commission has pointed out (Limitation of Actions for Personal Injury Claims (1986) LRC 50, page 3):

> The potential defendant is thus able to make the most productive use of his or her resources and the disruptive effect of unsettled claims on commercial intercourse is thereby avoided. To that extent the public interest is also served.'
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> Even where the cause of action relates to personal injuries, it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for wrongs of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong. The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.
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> In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated. Against this background, I do not see any warrant for treating provisions that provide for an extension of time for commencing an action as having a standing equal to or greater than those provisions that enact limitation periods. A limitation provision is the general rule; an extension provision is the exception to it. The extension provision is a legislative recognition that general conceptions of what justice requires in particular categories of case may sometimes be overridden by the facts of an individual case. The purpose of a provision such as s 31 is 'to eliminate the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time limit within which an action has to be commenced.' (*Sola Optical Australia Pty Ltd v Mills*, (1987) 163 CLR 628 at 635). But whether injustice has occurred must be evaluated by reference to the rationales of the limitation period that has barred the action. The discretion to extend should therefore be seen as requiring the applicant to show that his or her case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question. Accordingly, when an applicant seeks an extension of time to commence an action after a limitation period has expired, he or she has a positive burden of demonstrating that the justice of the case requires that extension".

[29] Counsel referred to passages at paragraphs 29 and 30 of Lord Drummond Young's opinion deriving five propositions relevant to the application of section 19A and considering in some detail the significance of a pursuer's ignorance of the right to damages.

> "[29] Section 19A has been the subject of considerable judicial discussion. The same is true of its English equivalent, s 33 of the Limitation Act 1980; s 33 is framed differently from s 19A, but it fulfils the same essential function and the authorities on its interpretation are accordingly of assistance in Scotland: *Donald v Rutherford*. A number of matters have been clearly established. First, the court has a general discretion under s 19A; the crucial question that must be considered has been stated to be 'where do the equities lie?': *Forsyth v A F Stoddard & Co Ltd*, at 1985 SLT, p 55 ,

per Lord Justice Clerk Wheatley; *Elliott v J & C Finney*, at 1989 SLT, p 608F, per Lord Justice Clerk Ross. Secondly, the onus is on the pursuer to satisfy the court that it would be equitable to allow his claim to proceed: *Thompson v Brown*, at [1981] 1 WLR, p 753, per Lord Diplock. Thirdly, the conduct of a pursuer's solicitor may be relevant to the exercise of the court's discretion, and the pursuer must take the consequences of his solicitor's actings: *Forsyth*, supra, at p 54. Fourthly, relevant factors that the court may take into account include, but are not restricted to, three matters identified by Lord Ross in *Carson v Howard Doris Ltd*, at 1981 SC, p 282; 1981 SLT, p 275, these are '(1) the conduct of the pursuer since the accident and up to the time of his seeking the Court's authority to bring the action out of time, including any explanation for his not having brought the action timeously; (2) any likely prejudice to the pursuer if authority to bring the action out of time were not granted; and (3) any likely prejudice to the other party from granting authority to bring the action out of time'. Fifthly, each case ultimately turns on its own facts, a principle which applies even if a number of claimants present similar claims against the same person: ibid; *KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation)*, at para 45, per Auld LJ.

[30] One issue relevant to the present case that has been discussed in earlier decisions is the significance of a pursuer's ignorance of the legal right to claim damages. This must obviously be distinguished from the pursuer's ignorance of facts that are material to his or her claim; ignorance of facts is dealt with by s 17 of the 1973 Act. It is clear that ignorance of a legal right is a material circumstance in the exercise that a court must perform under s 19A. Indeed, *McIntyre v Armitage Shanks Ltd*, the decision of the House of Lords that prompted the enactment of s 19A, was a case where the pursuer was ignorant of the existence of a right of action, albeit one induced by statements made by a trade union official. Nevertheless, there appears to be only one case where ignorance of the existence of a legal right was treated as decisive in allowing an action to proceed. That case is *Comber v Greater Glasgow Health Board*. The pursuer in that case had been disfigured in an operation, and partly as a result of her disfigurement she tended to withdraw from the world. Lord Morton of Shuna appeared to accept that she was ill informed about modern society to a degree described as 'strange'; he also accepted that neither the pursuer nor her parents had any appreciation of what lawyers do and what remedies the law provides. He held, accordingly, that until a relatively late stage the pursuer did not know that there was any possible right to claim compensation for her condition. The case is accordingly a fairly extreme one. It is also significant that in that case there was no suggestion that the defenders had suffered any prejudice other than losing the right to claim limitation; there was no suggestion that any witness had been lost or that any witness could not remember any crucial matter or that the relevant medical records were in any sense incomplete. The case must therefore be seen as somewhat exceptional. It was distinguished in *Kane v Argyll and Clyde Health Board*, a case where the pursuer claimed that she had had no knowledge of lawyers, legal remedies or the availability of legal aid, but her evidence on the matter was not accepted. The Lord Ordinary, Lady Cosgrove, described the pursuer as having a degree of worldliness and self confidence, and she held that no reasonable explanation had been provided for the failure to seek legal advice. Her decision was

> upheld in the Inner House. *Kane* is also significant because of certain of the observations made by Lord Prosser in delivering the opinion in the Inner House. He stated (at 1999 SLT, p 828): 'In the absence of any reasonable explanation for the delay, a court might well decide not to allow the action to proceed, even if it appeared that there would be no internal unfairness in obliging the defenders to go to proof. On the other hand, if there is material prejudice to a defender in having to go to proof, it is difficult to see how, even if there was a reasonable explanation for the delay, the action could reasonably be allowed to proceed.'"

[30] *McLaren* v *Harland and Wolff* 1991 SLT 85 was illustrative of the approach of the court in a case similar to the present one. The pursuer was diagnosed with asbestosis in 1983. He claimed state benefit in respect of that diagnosis, but did not claim against his former employers. He died in 1988, and his widow and children brought claims on the basis that he died of asbestosis. The Lord Ordinary exercised his discretion under section 19A so as to allow the claims to proceed because he was satisfied that the deceased during his lifetime was unaware that he had a right of action against the defenders.

[31] In *J* v *C* [2017] CSIH 8, at paragraph 16 the Lord President had given further guidance, consistent with earlier authorities such as *Donald*:

> "The Lord Ordinary did not ignore or 'discount' the fact that the pursuer would not be able to pursue her claim, but said that that factor could not suffice on its own. This is particularly so given that the right to pursue a claim has already been lost at the point of the court's determination of a section 19A application. There require to be additional circumstances justifying a revival of the right. It is not possible to circumscribe what these circumstances might be, but they do have to be sufficiently cogent to merit depriving a defender of what will have become a complete defence to the cause. The interests of both parties and all the relevant circumstances must be considered."

[32] Counsel also referred to Chapter 13 of Johnston, Prescription and Limitation in Scotland, 2nd Edition ("Johnston"), and in particular paragraphs 13.04, 13.07-13.08, 13.18, and 13.24-13.25. He referred to the list of factors that the Scottish Law Commission had recommended should be included in section 19A, and submitted that they were relevant

factors: Scottish Law Commission Report on Personal Injuries Actions: Limitation and Prescribed Claims, No 207 (2007), paragraphs 3.36-3.37.

[33] Counsel pointed out that in *Aitchison* the court had considered that the potentially harsh consequences of an analysis whereby limitation started to run from a single date only, even where there were later emerging conditions, might be mitigated by the availability of the court's discretion under section 19A. He referred in particular to passages in paragraphs 40 and 41:

> "[40] … It was submitted that there was an increasing awareness over the decades in question of the problems occasioned by late-emerging injuries. But these problems were not new. Pneumoconiosis and other respiratory diseases which emerge well after the relevant delictual exposure were a feature of personal injury litigation long before (see, eg *Brown's Exrx v North British Steel Foundry Ltd*, referred to by Lord Rodger of Earlsferry in *Rothwell v Chemical and Insulating Co Ltd*, para 86). It is acknowledged by the pursuers that a late-emerging condition which is a sequela of earlier injuries (for example, of arthritis consequent upon significant bony injury) would not be 'wholly distinct' and that accordingly the limitation provision applicable to the bony injury would also apply to it. Quite apart from the practical difficulty in many cases of deciding whether a later-emerging condition (which must ex hypothesi be causally related to the same wrong) was wholly distinct, there seems no reason in principle why damages in the one case should be irrecoverable as of right but in the other be recoverable.
>
> [41] There will, of course, be hard cases, however the line is drawn, but the discretionary remedy provided by sec 19A of the 1973 Act goes at least some distance to cater for these. When that jurisdiction is invoked it will, of course, be necessary to have regard to the interests of the defender as well as to those of the pursuer, regard being had to the principles enunciated by McHugh J in *Brisbane South Regional Health Authority v Taylor* (see *AS v Poor Sisters of Nazareth*). But in a situation where prejudice may be caused on either hand the administration of justice rightly demands a balanced approach."

[34] The circumstance that the claim was one for mesothelioma was a relevant factor in the pursuers' favour. Counsel referred to extracts from the Official Reports of the Justice 1 Committee in connection with the Rights of Relatives (Mesothelioma) (Scotland) Bill from 6 and 13 December 2006. The discussion in the passages produced, which included evidence from the late Frank Maguire, a solicitor who was extremely experienced in the relevant area

of law and practice, emphasised the reasons why mesothelioma was treated differently from other asbestos-related conditions. The committee had heard evidence to inform its consideration as to the lawfulness of creating a retrospective liability.

[35] The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 amended the Damages (Scotland) Act 1976 so as to make the special provision in relation to mesothelioma which is now replicated in section 5 of the Damages (Scotland) Act 2011. Section 4(2) of the 2011 Act excludes claims for damages under section 4(3) by relatives of a deceased person if liability in respect of the relevant act or omission was excluded or discharged, whether by antecedent agreement or otherwise, by the deceased before his death, or was excluded by virtue of an enactment. Section 5 makes a specific exception to that exclusion where a deceased person had died of mesothelioma, the death and a discharge of liability had occurred on or after 20 December 2006. That exception relates only to claims under section 4(3)(b). Counsel submitted that this special treatment in legislation was an indication of the way in which Parliament viewed mesothelioma. Parliament had determined to treat it in a way different from other injuries and diseases so far as actions for damages were concerned. In similar vein, section 3 of the Compensation Act 2006 made specific provision in relation to mesothelioma.

[36] Section 19A of the 1973 Act was a statutory provision which permitted the court to make an exception in respect of mesothelioma from the general rule in section 17 and as construed in *Aitchison* and read with section 18(4). Applying section 19A in the way for which he contended would not subvert or avoid giving effect to the intention of Parliament. Rather, to do so would be broadly in accordance with what was clearly a policy on the part of the legislature to treat mesothelioma differently from other injuries and industrial diseases. That policy, so far as claims by relatives was concerned, was apparent in section 5

of the 2011 Act. The court in *Aitchison* had expressly suggested that the application of section 19A was the means by which harshness resulting from the identification of a single date from which limitation must run, even where there is a later developing condition, should be mitigated. It formed part of the relevant statutory framework. The difficulties arising from late emerging asbestos-related disease had been the subject of discussion in *Aitchison*, particularly in relation to the obiter comments of Lord Prosser in *Shuttleton* v *Duncan Stewart & Co Ltd* 1996 SLT (Notes) 517, which were expressly disapproved: paragraphs 40, 42, 48.

[37] Turning to the evidence, counsel for the pursuers asked me to infer that the deceased must have been ignorant of his right to damages in 1993/4. His apparent inaction at that time fell to be contrasted with his seeking advice from CAA in 2012. The inference that fell to be drawn, particularly in the context of Mr Quinn's evidence, was that the deceased must in 1993/4 have been ignorant of his right of action. He must have been of the view that his medical condition at the time did not warrant seeking advice. I should consider how quickly he acted when he got a diagnosis that concerned him in 2012. The deceased must not have "joined the dots" in 1993/4 as he had in 2012. If the deceased had thought that he had a health problem or that there was a threat to the stability of his family he would have done something about it. For similar reasons, I should conclude that if he had settled a claim, he would have done so on a provisional basis in order to provide the greatest protection for his family.

[38] It fell to be inferred that the deceased, subjectively, was not aware of and/or not sufficiently concerned with any diagnosis or right of action following the investigations in 1993/4 to take any action about it. All of the evidence pointed towards such a lack, subjectively, of awareness.

[39] The pursuers' submission was, in summary, this. The loss of a defence to the action did not represent prejudice to the defenders. It was simply the inevitable consequence of the operation of section 19A. I should infer that the deceased did not pursue a claim in the 1990s because he was ignorant of his right to damages. There was therefore an explanation for the failure to pursue a claim timeously, which was a factor in favour of the pursuers. The circumstance that the deceased had developed mesothelioma having initially had a much less serious condition was itself a relevant factor in favour of the pursuers.

Defenders

[40] Counsel for the defenders accepted in the main the submissions of the pursuers regarding the law. He referred to the decision of the House of Lords in *B* v *Murray(No. 2)* (reported as *AS* v *Poor Sisters of Nazareth* 2008 SC (HL) 146), and the speech of Lord Hope of Craighead at paragraph 25:

> "… In *Carson v Howard Doris Ltd* (p 282) Lord Ross said, shortly after the provision was enacted, that the power conferred by the section should be exercised sparingly and with restraint. There is a risk that if that approach were to be adopted the court will fail to do what the section requires, which is to determine what would be equitable in all the circumstances. But the context in which that discretion is to be exercised is plain enough. Its effect will be to reimpose a liability on the defender which has been removed by the expiry of the limitation period. The issue on which the court must concentrate is whether the defender can show that, in defending the action, there will be the real possibility of significant prejudice. As McHugh J pointed out in *Brisbane South Regional Health Authority v Taylor* (p 255) it seems more in accord with the legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability reimposed on him. The burden rests on the party who seeks to obtain the benefit of the remedy. The court must, of course, give full weight to his explanation for the delay and the equitable considerations that it gives rise to. But proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour. This is a question of degree for the judge by whom the discretion under sec 19A is to be exercised. I do not think that Lord Drummond Young, who examined all the issues on either side of the argument, was in error in his assessment of the test or of the underlying policy of the statute."

[41] He placed some reliance on paragraphs 21 to 42 of the opinion of Lord Drummond Young in the Outer House in the same case. He submitted that limitation represented the legislature's judgment that the welfare of society was best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period might often result in an otherwise good cause of action being defeated. It was more in accordance with legislative policy that a pursuer's right should not be revived than that the defender should have a spent liability reimposed.

[42] Where a defender could demonstrate prejudice in investigating the claim, it was unlikely that the court would exercise its discretion under section 19A. It did not follow that the converse was true. It was still incumbent on the pursuers to explain why the time-bar had been missed and why it was fair to allow them to proceed. There was no explanation as to why the deceased had not raised an action timeously following the diagnosis in 1993/4. Counsel noted that there was nothing by way of averment in relation to that matter, and no averments relative to the inference that the pursuers now asked me to draw regarding the deceased's state of knowledge and mind in and after 1993/4. He said that he did not take any point in relation to the absence of averment. The evidence provided no explanation.

[43] There was prejudice to the defenders. If the deceased had taken action timeously, he might have compromised his claim either on a full and final basis, or on a provisional basis. If the latter, the pursuers would have been entitled to return to court. If the former, they would have had no right to do so. The prejudice was in having a spent liability reimposed on them. He suggested that I could infer that it was likely, given the correspondence in 2013, that the deceased would have settled his claim on the basis of full and final liability. In 1998 that would likely have been at around £13,500. The sums now concluded for by his

executors and relatives totalled £810,000. The defenders had on any view lost the opportunity to attempt to compromise the claim on a full and final basis.

[44] Counsel submitted that the payments made under statutory schemes were relevant considerations. The deceased and his estate had not gone entirely uncompensated.

[45] The law did not leave people such as the deceased and his family unprotected. Timeous commencement of an action and settlement by way of provisional damages catered for the situation. A claimant had the alternative of attempting to quantify his future risk and settling on a full and final basis. Section 19A provided a mechanism to regulate the interests of pursuers and defenders in an equitable manner. That operated only where a pursuer could satisfy the court that it was equitable for the action to continue. It did not operate by reason simply of the circumstance that the deceased had gone on to develop mesothelioma. There was no lacuna in the law necessitating such a construction or application of section 19A.

Decision

The law

[46] There was, in the main, no dispute as to the applicable law, and as to the factors that should inform a decision as to whether to exercise the discretion for which provision is made in section 19A. I accept and adopt, so far as is relevant to this case, the analysis set out by Lord Drummond Young in *B* at paragraph 29. The court has a general and unfettered discretion, and requires to consider where the equities lie. The onus is on the pursuer to satisfy the court that it is equitable that the action should proceed. Each case turns on its own facts. There is no question of an alternative remedy against advisers. There is nothing

in the conduct of the defenders, their insurers or agents of any relevance to the exercise of the discretion in this case.

[47] Where the right to pursue the claim has already been lost, it is not enough simply to say that the pursuer cannot succeed but for the operation of section 19A: *J*, Lord President, paragraph 16. The circumstances must be sufficiently cogent to merit depriving the defender of a complete defence.

[48] Subjective ignorance of a right of action may be a relevant factor weighing in favour of allowing an action to proceed: *McLaren*; *B*, paragraph 30.

[49] Absence of prejudice to the defenders in relation to investigation of the claim is a factor that favours the pursuers. It is not conclusive: *Donald*, Lord Dunpark, at 78; *Kane* v *Argyll and Clyde Health Board* 1999 SLT 823, Lord Prosser, at 828C-D.

[50] Proof that a defender will be exposed to the real possibility of significant prejudice will normally determine the issue in his favour: *AS*, Lord Hope, paragraph 25.

[51] There was some debate between the parties in submissions as to what is meant by prejudice in this context. The discussion at paragraphs 24 and 25 of *AS* includes both consideration of Lord Drummond Young's conclusion that, in the circumstances of that case, a serious decline in the quality of justice was inevitable by reason of delay and the more general policy considerations regarding the reimposition of a liability otherwise removed by the operation of a limitation period.

[52] The policy underlying the time-bar provisions is not just to avoid the prejudice involved in defending claims where the evidence is stale or may have diminished in quantity or quality. As McHugh J pointed in in *Brisbane South Regional Health Authority*, there is also the interest that insurers, public institutions and businesses have in knowing that they have no liabilities beyond a particular period. McHugh J was not dealing with a

provision in terms similar to those of section 19A: Johnston, paragraph 13.08. That does not undermine the analysis in *Brisbane South Regional Health Authority* regarding the rationale for limitation provisions. Parliament has also recognised, however, that there will be circumstances in which it will be equitable for the court to allow an action to proceed outwith that limitation period, and made provision for that in section 19A. Defenders and their insurers have notice of that provision, and have the opportunity to provide for such contingencies as they see fit in the light of their understanding of the law, informed by the developing jurisprudence.

[53] Counsel for the pursuers referred to the analysis in Johnston, at paragraphs 13.24 and 13.25 to the effect that the loss of immunity under the normal limitation rules ought to be regarded as irrelevant in balancing the equities, as should the fact that the pursuer would be prejudiced if the action were not allowed to proceed. The fact that the action is time-barred is not a material factor, but subject matter of the discretion. The author, however, notes, at paragraph 13.25 that there is a substantial body of authority, not least *Donald*, to the effect that a defender will be prejudiced by losing the protection of section 17. As a matter of analysis, it may not particularly matter whether one categorises this as prejudice to a defender, or simply recognises it as part of the rationale for placing the onus on the pursuers as to the circumstances justifying the exercise of the court's discretion under section 19A. The result of either analysis is consistent with Lord Hope's statement that it is more in accordance with legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability reimposed on him. In the light of the body of authority to the effect that a defender is prejudiced by the reimposition of liability, I proceed on the basis that the defender is so prejudiced.

Is the fact that the claim is one for mesothelioma a factor relevant to the exercise of the discretion in section 19A?

[54] There was a dispute between parties as to whether the circumstance that the claim was one for mesothelioma was itself a factor relevant to the exercise of the discretion in question.

[55] The pursuers submitted that the following was a relevant consideration. The illness of which the deceased died is one with a very long latency period. It is of a different degree of seriousness altogether from pleural plaques, the condition the deceased had at the time that the triennium expired. That is a symptomless condition. It was found not to sound in damages (*Rothwell* v *Chemical & Insulating Co Ltd and another* [2008] 1 AC 281), with the consequence that the Scottish Parliament enacted the Damages (Asbestos-related Conditions) (Scotland) Act 2009. It was equitable that the claim be allowed to proceed, bearing in mind the very different nature of the claim that the pursuer had at the time that the triennium expired. Mesothelioma was a condition which had been afforded special treatment in legislation.

[56] The claim is time-barred. The right to the claim has already been lost - and that is a claim for mesothelioma, made after a claim for pleural plaques has time-barred. That is precisely the liability of which the defenders have been relieved by virtue of sections 17(2)(b) and 18(4). To refer to the effect of the operation of law in the circumstances of the case is to do nothing more than to say that the pursuer cannot succeed but for the operation of section 19A.

[57] That there is a claim of high value for a serious condition which led to the death of the deceased is a relevant consideration so far as the pursuers are concerned. It is, however, also relevant that the defenders are being deprived of a complete defence to a substantial

claim for a serious and ultimately fatal condition. They have also lost the chance to settle once and for all at a lower level.

[58] I do not take the passage in paragraph 41 of *Aitchison* as indicating that any case in which a more serious disease develops will be a "hard" case meriting the exercise of the court's discretion under section 19A. I consider that the court had in mind a case that was hard for some reason other than the inevitable harshness caused by the operation of the law under sections 17(2) and 18(4) so as to bar a claim. Examples might be cases, such as *McLaren*, in which an individual was unaware that he had a right of action. Proof that an individual had in good faith let the limitation period expire prior to 2010 in relation to a pleural plaques claim on the basis of advice received as to the effect at the time of *Shuttleton* and *Carnegie* might, perhaps, be relevant.

[59] I do not accept that the circumstance that the claim arises out of mesothelioma as opposed to any other later developing condition adds weight to the pursuers' case. It is pre-eminently for Parliament to determine how the interests of pursuers, defenders and insurers ought to be balanced in the public interest where particular conditions or categories of claim may come to merit special treatment making exceptions from the normal operation of the law. The Compensation Act 2006, the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 and the Damages (Asbestos-related Conditions) (Scotland) Act 2009 are all examples of legislation of that sort.

[60] In relation to claims for childhood abuse, Parliament has recognised that a number of special features justify a different approach to time-bar, notwithstanding the existing provision in section 19A: sections 17A-D of the 1973 Act, added by the Limitation (Childhood Abuse) (Scotland) Act 2017. The considerations relating to childhood abuse are obviously rather different from those relating to mesothelioma. It is, however, an example

of Parliament weighing the competing considerations in the public interest where there may be grounds for treating a particular type of claim in a special way in relation to the limitation of claims. Since the decision in *Aitchison*, Parliament has not made any special provision in relation to mesothelioma or any other late-emerging industrial disease, so far as time-bar is concerned.

Is there an explanation as to why there was no claim within the triennium?

[61] I turn to consider whether the pursuers have established that there is an explanation for the failure of the deceased to pursue a claim timeously.

[62] There is no direct evidence as to the state of mind of the deceased in 1993/94 or in the period after that. There was no evidence from Mr Quinn about that. When, in 2013, Mr Smillie specifically asked the deceased about these matters in 1993/4 he was unable to cast any light on the entries in his medical records. The deceased was not able to enlighten Mr Smillie in relation to either the diagnosis or his state of mind in 1993/4. No statement or other document recording this aspect of their discussion was produced. There is no evidence as to why the deceased sought advice in 2012 but did not do so in 1993/4. I have no difficulty in accepting, in general terms, that the deceased was someone who took his responsibilities to provide for his family seriously. I accept that he arranged his affairs in some respects so as to increase the amount of his estate available for distribution to his children. I am not, however, prepared to infer that he must have been ignorant of his right to sue in 1993/4 and that that was the cause of his not pursuing a claim at that time. I am unable to make any finding as to what he was thinking in 1993/4 or the period of the triennium and then the intervening years before 2012, or why he took the course that he did. I consider that I am being asked to speculate rather than to draw a legitimate inference from

proved fact. I am unable to make a finding that provides any explanation as to why the deceased did not make a timeous claim.

Other inferences from the evidence

[63] The pursuers asked me to infer that, had the deceased settled a timeous claim, he would have done so on a provisional basis, given that he was someone who was keen to protect his family. The defenders asked me to infer that the deceased would have compromised his claim, had he raised it timeously, on a full and final liability basis, on the basis of the correspondence and his instructions in 2013. I am not prepared to draw either inference. The correspondence in 2013 obviously took place in the context of a claim that was bound to fail had it been pursued by way of an action, and in respect of which efforts were being made to settle on the best terms. An offer to settle on that basis would have had more potential attraction to the defenders. One could speculate that he would have wished to preserve the position for the future on the basis of Mr Quinn's evidence, but, on the other hand, one might speculate equally that he would have regarded it as prudent to use the money from a full and final settlement and invest it in one of the development projects to which Mr Quinn referred. Each of these courses would be an exercise in speculation rather than inference. I am unable to make any finding as to what the deceased would have done in relation to a choice between provisional damages and damages on a full and final basis in the 1990s.

[64] Although I cannot make a finding as to what the deceased would have done in relation to a choice between provisional damages and damages on a full and final basis, I do accept that the defenders are prejudiced by having lost the chance to settle the claim, if made

timeously, on a full and final liability basis at a much lower sum than that presently concluded for.

Application of section 19A to the circumstances of this case

[65] As I do not draw the inferences that the pursuers ask me to, there is no explanation for the failure of the deceased to raise an action within 3 years of his acquiring the relevant knowledge in late 1993 or early 1994.

[66] There is no prejudice to the defenders so far as investigation of the claim is concerned. That is a matter that favours the pursuers.

[67] I do not afford any particular weight to the payments from statutory schemes in determining where the equities lie. These would be recoverable by the state in the event of a successful claim for damages by the deceased's executors. They are not payments relevant to the claims made by the deceased's relatives in the present case. Mr Stuart suggested that if I were minded to regard these payments as relevant, there might be grounds for distinguishing between the position of the relatives and that of the executors. The payments are at a lower level than damages in respect of the deceased's losses would be likely to be. I do not make a distinction of the sort that he proposed.

[68] The pursuers have lost a potentially high value claim in respect of a death from a serious condition, in circumstances where the limitation period expired when the deceased had a much less serious condition. That relevant circumstance is balanced by the circumstance that the defenders would lose a complete defence to a potentially high value claim. The defenders are prejudiced in that they lost the chance to try and settle a lower value claim on a once and for all basis because there was no timeous claim for the less serious condition.

[69] In determining whether there are sufficiently cogent reasons to justify overriding the time-bar in this case, it is necessary to bear in mind that barring claims where the evidence may be stale or lacking is not the only policy objective of the limitation provisions.

[70] Taking account of all of these circumstances, and in particular given the absence of any explanation as to why the limitation period expired in the first place, I am not satisfied that I should exercise my discretion in favour of the pursuers. I therefore dismiss the action.