SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNDEE

[2020] SC DUN 1

DUN-PD29-18

NOTE BY SHERIFF LORNA A DRUMMOND QC

in the cause

LM

Pursuer

against

THE EXECUTOR OF DG

Defender

Pursuer: Whelan, solicitor;
Defender: Kennedy, counsel;

Dundee, 7 January 2020

The Sheriff, having resumed consideration of the cause, finds that in order to determine whether it is possible for a fair hearing to take place (in terms of section 17D(2) of the Prescription and Limitation (Scotland) Act 1973), evidence should be heard; fixes a proof before answer and pre-proof hearing, awards expenses in favour of the pursuer and sanctions the employment of junior counsel.

Note

[1] In this action the pursuer seeks damages from the executor of the estate of the late DG ("the deceased"). The deceased was the pursuer's stepfather. The pursuer avers that her stepfather sexually abused her for a period of five years between 1981 and 1985, when the pursuer was between 11 and 15 years old. She avers that he would rape her at least twice a

week during that period. The pursuer complained to Police Scotland in 1989 and again in 2001 but no further action was taken by the police at the time. On 13 March 2017, after further evidence came to light, the deceased was charged and served with a petition. The deceased died eleven days later, on 24 March 2017.

[2] The pursuer avers she has been diagnosed with post-traumatic stress disorder. She suffers from anxiety and depressions, flashbacks and sleep deprivation. She has struggled to sustain employment as a result of the effects the abuse has had on her throughout her adult life. She has required psychological and psychiatric help throughout her life.

[3] The pursuer raised the action for damages in May 2017, some 36 years after the alleged child abuse began and within months of her stepfather's death. She was able to do so by virtue of section 17A(1) of the Prescription and Limitation (Scotland) Act 1973 (inserted into the 1973 Act by the Limitation (Childhood Abuse) (Scotland) Act 2017). That section provides that the triennium time limit in section 17 does not apply to an action of damages if (a) the damages claimed consist of damages in respect of personal injuries and (b) the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred, or where the act or omission was a continuing one, the date the act or omission began, (c) the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries, and (d) the action is brought by the person who sustained the injuries.

[4] The defender is the executor of the deceased's estate. He is the deceased's son and the pursuer's step brother. The defender avers that he has no knowledge of the events complained about. The defender, relying on section 17D(2), avers that the action should not be allowed to proceed as it is not possible for a fair hearing to take place. The events complained of are alleged to have occurred over 30 years ago when the defender was still a

child. The defender was living with his mother who had separated from the deceased. Because his father has died, it is no longer possible to undertake the necessary steps to have a fair hearing. These steps include (a) putting the allegations to the deceased for his comment and response; (b) ascertaining and presenting the deceased's version of events; (c) obtaining the deceased's comments on his relationship with the pursuer and the circumstances in which the allegations were made; (d) identifying the alternative explanations for the pursuer making the allegations; (e) identifying potential witnesses to the alleged incidents and the surrounding circumstances and (f) identifying any further evidence with which to refute the allegations. Nothing can be done at proof to offset the prejudice caused to the defender by the delay and associated loss of the evidence of the deceased.

The Defenders' Submissions

[5] The defender submitted that it is not possible for a fair hearing to take place in terms of section 17D(2) of the 1973 Act. The action relates to events which occurred between 34 and 39 years ago. That, in itself, has a devastating effect on the quality of evidence. In addition, there is no contradictor to the allegations made. The court could only ever hear the pursuer's version of events and one half of the case. There is no means of presenting the deceased's evidence and having his credibility assessed, of ascertaining his position in response to the allegations, nor of obtaining his assistance to gather evidence to refute, contradict or explain the pursuer's account. The deceased's evidence is important and crucial evidence. It has been lost. Although the deceased's interview with the police has been lodged as a production, other than some denials, he made "no comment" answers throughout, having been advised by a solicitor to do so. His interview is no substitute for

detailed instructions the accused would have been able to provide if he was alive.

[6] The defender relied on *SF* v *Quarriers* 2016 SCLR 111 and *CW* v *Archdioces of St Andrews & Edinburgh* [2013] CSOH 185. Both cases were decided prior to section 17D being enacted. In both cases, the court considered whether it should exercise its equitable discretion to allow an action to proceed outwith the triennium in terms of section 19A of the 1973 Act. In *SF* Lord Bannatyne refused to exercise that discretion on the ground that if the case were to proceed the defenders could not be given a fair trial (paragraph 146). In that case the allegations of abuse were directed against a single person who died at a date within the triennium. Lord Bannatyne took the view that it is difficult to envisage a more highly material loss of evidence to the defenders than the denial to them of that evidence. The defenders have been denied the evidence of their most important witness. They are not properly able to defend themselves. They cannot, without that evidence, properly cross-examine the pursuer or any of the pursuer's witnesses as to the merits of the claim (paragraph 149). It was also clear in that case that it would be very difficult to find other witnesses from that time. In addition to the loss of evidence, Lord Bannatyne noted that the length of delay itself was an important factor which prejudiced the defender. The events which were the subject of the action took place more than 40 years before. That raised the issue not only of the loss of evidence but the decline in the quality of evidence. Details of daily life will have been long ago forgotten and incapable of retrieval.

[7] In *CW* temporary Judge Arthurson QC also refused to allow the case to proceed under section 19A where the alleged abuser had died and the summons was served 20 years after the alleged abuse ceased. Concern was expressed about the breach of fair trial protections which the court must accord to both parties in making a decision under section 19A (paragraph 29).

[8] The defender submitted that the policy of section 17A to D was to ensure that the absence of an explanation for the delay in raising proceedings did not count against a pursuer. Section 17D had taken the decision making away from the conduct of the pursuer and the prejudice to the pursuer if the action is not allowed to proceed. Section 17D(2) turns solely on whether it is possible to have a fair hearing. It is no longer relevant to ask why the pursuer delayed in raising the action or what prejudice would be suffered by either the pursuer or the defender. The Justice Committee Stage 1 Report on the Limitation (Childhood Abuse) (Scotland) Bill explains the two strands justifying the policy. First that it is the abuse itself which is the very reason why it is not reported until many years later (paragraph 39). The second strand is that the way the courts previously applied section 19A of the 1973 Act had operated to create an insurmountable barrier for survivors of abuse, particularly where the courts have refused to allow the case to proceed because there is prejudice to the defender in defending the action (paragraph 42).

[9] The defender submitted it was not necessary or appropriate to fix a proof before answer in order to determine whether it is possible to have a fair hearing. Similar questions had been answered in other cases at debate or after preliminary proof. It would be wholly irrational to proceed to a hearing in order to determine the issue. Reference was made to page 45 of the Justice Committee Stage 1 Report. The issue of whether a fair hearing is possible ought to be determined now.

[10] The defender submitted that expenses should follow success and if the action was allowed to proceed, the pursuer should be entitled to the expenses of this hearing. If dismissed, the defender should be awarded the expenses of the cause. The defender also sought sanction for the instruction of counsel. It was a novel case, against an executor on an allegation of historic sex abuse. It is the first case argued under section 17D. The evidential

complexities are enormous. The amount claimed by the pursuer would exhaust the estate.

The Pursuer's Submissions:

[11] The pursuer submitted that she proposed to lead evidence at the hearing from the pursuer and her sister. The pursuer, her sister, her mother and the deceased resided together when the abuse occurred. The pursuer's sister alleges she was sexually abused by the deceased too. Evidence would also be led from a clinical psychologist, Professor Craig White, (report at 5/2 of process) regarding the effects of sexual abuse suffered by the pursuer on her mental health. The defender would have the opportunity to cross examine these witnesses if the matter is allowed to proceed.

[12] The defender had been cautioned and interviewed by police on 15 February 2017 and a transcript of that interview has been lodged (5/5 of process). During the course of the interview the defender answered "no comment" to many questions. However, he also made specific denials that various incidents occurred. For example, he stated that the pursuer and her sister were liars and that the abuse did not happen.

[13] The pursuer submitted that Parliament recognised, by removing the time bar for historic sex abuse cases, that safeguards required to be built into the legislation for defenders (see paragraph 195 of the Stage 1 Report). Section 17D was included to ensure the legislation was ECHR compliant in relation to Article 6(1) and A1P1.

[14] The pursuer submitted that the court required to hear all the evidence in the case before the preliminary issue raised by the defender could be determined. The pursuer submitted that the authorities referred to by the defender were of limited significance because they related to section 19A and not section 17D and the test was different under each provision. The pursuer submitted that the defender had not satisfied the court that a

fair hearing is not possible. The pursuer sought expenses against the defender following success and did not oppose sanction for the employment of junior counsel.

Further submissions

[15] Parties informed me that thus far there have been no decided cases in Scotland under section 17D. Having carried out some research, I directed parties to consider Australian authorities, particularly those referred to in a talk given by David Sheldon QC on section 17D[1]. In some Australian states, the limitation period for bringing this cause of action has been recently removed by statute. However, cases may still not proceed if proceedings constitute an abuse of process or where the defendant would not receive a fair trial. I further referred parties to a criminal case, *Transco plc* v *H.M. Advocate (No. 2)* 2004 S.C.C.R. 553, where the court considered the fairness of a criminal trial under Article 6 of the ECHR, in advance of the trial taking place. I fixed a continued debate on 27 November 2019 for parties to address me on these authorities.

[16] The defender produced a supplementary list of authorities containing five Australian cases. The defender submitted that the primary position was that when determining whether a fair hearing is possible, the focus should be on the well-established protections that already exist within Scottish civil court procedure. These include the ability to respond to the pursuer's assertions, to cross examine the pursuer's witnesses on the basis of investigations of the case against the defender, for the defender to be present throughout the hearing and respond to unexpected evidence that emerges and for the defender to give evidence and lead evidence from other witnesses. Because the only person that could

[1] https://www.compasschambers.com/seminar-pdf/Limitation%20(Childhood%20Abuse)(Scotland)%20Act%202017%20-%20David%20Sheldon%20QC.pdf

effectively fulfil the role of a defender in the case was the deceased, a fair hearing was not possible.

[17] Mr Kennedy referred me to the protections under Article 6 of the European Convention on Human Rights which include the right to participate in adversarial proceedings, to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision. The right is most effectively secured by a public hearing in the presence of all parties, with provision for each party to participate and contribute on an equal footing. (Reed and Murdoch paragraphs 5.106, 5.107 and 5.120). The defender submitted that if the case was to proceed he would be unable to defend the case in any meaningful way at the hearing.

[18] The defender relied on 5 Australian cases, particularly *Moubarak by his Tutor Cooney* v *Holt* [2019] NSWCA 102. The defender submitted that in that case the court decided to permanently stay the proceedings because a fair trial would not be possible (paragraphs 88, 158 – 161, 188, 196, 205). The grounds for the decision were that the alleged perpetrator (who was *incapax*) was unable to give instructions regarding the allegations for the purposes of the defence, that he would be unable to give evidence, that he would be unable to give instructions during the case, that there were no eye witnesses to the alleged assaults and that there was no meaningful record of the alleged perpetrator's response to the allegations (paragraphs 163, 166, 167, 168 and 169). The defender submitted this echoes the defender's submission in the present case.

[19] Mr Kennedy also emphasised that the court in *Moubarak* referred to the significance of delay: the impoverishment of evidence will be more acute when it depends exclusively on oral evidence. The court referred also to the fallibility of human recollection and the lack of opportunity for the defence to explore the surrounding circumstances. The deterioration in

quality of evidence may not be recognisable. These factors can result in the trial becoming no more than a formal enactment of the process of hearing and determining the claim which cannot be expected to be just (paragraph 86). At paragraph 109, under reference to another case, the court stated that it provides "a powerful insight into the matters going to the very essence of a fair trial, including the ability to give instructions, to decide what defence will be relied on, and to make the defendant's version of facts known to the court and his counsel".

[20] In the third and final submission the defender, addressing *Transco plc* v *HM Advocate (No 2),* submitted that whilst in that case and in *HMA* v *ARK and AR* 2013 SCCR 549, the High Court repelled the preliminary objection that a trial would inevitably be unfair, it is unnecessary to apply that test when deciding whether the case should proceed under section 17D. That is because section 17D has its own test namely "that it is not possible for a fair hearing to take place". In any event, unlike the situation before the High Court, the court in the present case does know the evidence to be led at proof. The court knows that the pursuer intends to give evidence and lead her sister in evidence also. The court knows that the defender in the absence of any contribution from the deceased will be unable to mount any meaningful challenge to the evidence or lead any evidence in contradiction. There is nothing to be gained from a procedural point of view in allowing the case to proceed which will inevitably be an unfair hearing.

[21] The pursuer in supplementary submissions referred to the case of *Dombo Beheer BV* v *The Netherlands* (1994) 18 EHRR 213 in support of a submission that the requirements under Article 6 of the ECHR for a fair hearing in the determination of civil rights and obligations are less demanding than in the determination of criminal charges. Under reference to *HMA* v *Bain* (2002) SLT 340, at paragraph 19, the pursuer submitted that the question of fairness

can only be resolved in light of the proceedings as a whole and after the conclusion of all the evidence in the case. The pursuer accepted that whilst reference can be made to the Commonwealth cases, each case must be determined on its own facts. The deceased gave an interview to the police which although was primarily a no comment interview, did make a number of denials. On the basis of that interview the defender could put forward a defence that no sexual assaults took place.

[22] In further submissions, under reference to *Transco plc* v *HMA (no 2),* the pursuer submitted that where the issue of a fair trial had been raised *ab ante* and the matters that purport to offend against Article 6 require to be assessed objectively, then it is necessary to consider whether the breach may be "a practical certainty or an inevitability" (per Lord Osborne at paragraph 24). The pursuer also referred to the opinion of Lord Hamilton who agreed, stating that: "But in many cases it will be impossible in advance to determine with confidence whether apprehended concerns as to the satisfaction of one or more of the requirements of Article 6 will, in the trial itself, turn out to be well founded.". The pursuer submitted that whilst it was accepted the absence of the deceased may cause problems for the defender, the issues raised by the deceased's absence in relation to a fair hearing are speculative and cannot be objectively determined at this stage of the proceedings. The defender would not lose the opportunity to raise section 17D once the evidence had concluded and the issue is premature at this stage. The pursuer sought expenses against the defender if successful.

Decision

[23] I am invited by the defender to dismiss the cause on the grounds that it is not possible to have a fair hearing under section 17D(2) of the 1973 Act. Section 17A(1) provides

that the time limit of three years in section 17 of the 1973 Act does not apply to an action of damages for sexual abuse where the conditions set out in that section are fulfilled. The section was enacted recognising that cases of childhood abuse have unique characteristics which justify a specific limitation regime. These characteristics derive from the abhorrent nature of the act, the vulnerability of the victim and the effect of abuse on children. The Policy Memorandum emphasises that it is now recognised that the effects of childhood abuse often themselves inhibit disclosure to third parties until many years after the event.

[24] However, section 17D provides the following specific restrictions:

> "(1) The Court may not allow an action which is brought by virtue of section 17A(1) to proceed if either of subsections (2) or (3) apply.
>
> (2) This subsection applies where the defender satisfies the court that it is not possible for a fair hearing to take place."

[25] The defender does not rely upon subsection (3) of section 17D in the circumstances of this case. Section 17D(2) provides that the case should not be allowed to proceed if it is not possible for a fair hearing to take place. Parties were agreed that the onus is on the defender to satisfy me that it is not possible for a fair hearing to take place. That is the statutory test and, I am told, this is the first case where the courts have applied that provision.

[26] The test is different from that which applies under section 19A of the 1973 Act where the court has a discretion to override the time limit and allow a case to proceed if it seems to it equitable to do so. Section 17D(2) turns solely on whether it is possible for a fair hearing to take place.

[27] Quite apart from section 17D(2), under section 6 of the Human Rights Act 1998, the court is required to act compatibly with the European Convention on Human Rights. This includes the right to a fair trial under Article 6. Thus, as is recognised in the Stage 1 Report, even without section 17D(2), the court could not proceed if it was not possible for a fair

hearing to take place (paragraph 208 of the Report).

[28] When considering Article 6, the European Court of Human Rights makes an overall assessment of the fairness of the proceedings as a whole. It has been recognised that the requirements inherent in a fair hearing in the determination of civil rights and obligations are perhaps less demanding than in the determination of criminal charges (Reed and Murdoch Human Rights Law in Scotland, 4th edition, paragraph 5.101; *Dombo Beheer BV* v *The Netherlands* (1994) 18 EHRR 213, paragraphs 31 and 32). Nonetheless, whether criminal or civil proceedings, the court is engaged in considering objectively whether the proceedings as a whole are fair.

[29] As has been pointed out in the Australian and Scottish authorities referred to, the question of whether it is possible for a fair hearing to take place is fact specific and will turn upon the particular circumstances, especially the overall context of the evidence, and the other opportunities for the defender to challenge it (*HMA* v *Bain* paragraph 19).

[30] The court stated in *HMA* v *ARK*, at paragraph 20, and in *Transco plc* v *HMA (no 2),* paragraph 44, that it is normally impracticable for the court in advance of the trial to become engaged in an exercise of predicting the fairness of a trial, since it cannot know the extent of the available evidential material, or its relevance and weight, in advance of the trial itself. It is only in rare and isolated cases that the question of fairness will be capable of being determined before the trial (paragraph 44). Whilst these are criminal authorities, it seems to me that the test that applied in those cases (whether the trial would inevitably be unfair) is not materially different from the test that applies under section 17D(2) (whether it is possible for a fair hearing to take place). The court is essentially engaged in the same exercise: assessing whether it is possible to have a fair hearing.

[31] I accept in this case that it is known that the court will hear the pursuer's version of

events. The pursuer proposes to give evidence and lead her sister and Professor White, Clinical Psychologist, as witnesses. It is also known that the deceased will not be able to give instructions or give evidence at the hearing. However, it seems to me that it is not accurate to say that there is no meaningful record of the deceased's response to the allegations. There is a transcript of a police interview with the deceased. At interview, the police put to the deceased the allegations of sexual offences committed between 1974 and 1985 by him against the pursuer and her sister. The deceased makes many "no comment" replies. But he does also specifically refute certain allegations, for example about playing games (page 8) (which I am told is the context in which the abuse occurred) and about specific incidents of abuse (page 11, 13, 16, 20). He calls the pursuer's sister's friends liars (who I am told will say something similar to her sister) (page 13). He also answers some questions about the pursuer's sister (page 9-10) as well as offering an explanation for the pursuer and her sister making the allegations up (page 16, 19, 24).

[32] The content of the police interview at the very least would allow the defender at a hearing to refute the allegations. Further, some of these replies may be evidentially significant and some may be capable of investigation by the defender. There are other people mentioned such as JB (page 15 of the interview), and the pursuer's mother, both of whom may have been nearby (but, I am told, not eye witnesses) at the time of some of the alleged abuse. However, without knowing further about the overall context of the allegations and the evidence overall, it is difficult to know how much the defender could investigate and refute further. It may also be, for example, that the defender can instruct an expert to challenge the findings of the pursuer's expert.

[33] In some of the Australian cases, notably *Judd* v *McKnight* [2018] NSWSC 1489, following the leading of evidence, the Court allowed proceedings to continue

notwithstanding the death of the alleged perpetrator and his inability to give evidence or instructions throughout the trial. Although in *Judd* the alleged perpetrator had accepted that there had been sexual contact between himself and the plaintiff, he essentially denied any sexual offence occurred as he claimed the sexual contact was consensual. In this case, the deceased denied the allegations put to him by police at interview. He put forward the position that the events did not happen and that the sisters had got together to make it up. The situation is similar to the facts before the Court in *Judd.* It contrasts with a scenario where the allegations have never been put to the alleged perpetrator with there being no possibility of them ever being put to him and his position ever being known, because he has died or become *incapax*. In the present case there is a basis on which to cross examine the pursuer and her sister. At the very least their accounts can be tested against their police statements and possibly against each other's accounts too. The situation is different in *Moubarak by his Tutor Cooney* v *Holt* relied on by the defender, where at no time prior to becoming *incapax*, due to the onset of dementia, was the defender ever confronted with the allegations, nor was any police statement ever taken from him.

[34] Mr Kennedy suggested it is illogical to require the hearing to take place before a decision on the fairness of the hearing is reached. However, in my view, to do otherwise runs the risk of making a decision in the abstract based on speculation and false prediction. In particular, I cannot properly and fully assess the significance of the police interview, nor the extent to which the evidence may be capable of being challenged by the defender, without assessing the evidence as a whole and the hearing overall. I accept, on the face of it, that the absence of the deceased may cause problems for the defender, but whether, as a consequence of that, the hearing becomes nothing more than a formal enactment of the process of hearing and determining the claim, cannot be objectively determined in the

abstract and before any evidence is led.

[35] I appreciate that will mean the pursuer and her sister giving evidence with the possibility nonetheless that the proceedings may be later dismissed, but that risk exists to some extent in all cases. It does, in my view, allow the court to properly assess the fairness of the proceedings as a whole. The defender does not lose the opportunity to raise section 17D(2) once the evidence had concluded, or at any stage to raise questions about the fairness of the hearing under section 6 of the Human Rights Act 1998. But the issue is, in my view, premature at this stage.

[36] I will therefore fix a proof before answer and pre-proof hearing. I award expenses in favour of the pursuer, who had previously offered a proof before answer rather than a debate. I am satisfied that the cause is suitable for the employment of junior counsel. It is a novel case under section 17D of the 1973 Act, previously untested by the courts.