OUTER HOUSE, COURT OF SESSION

[2023] CSOH 50

PD101/21

OPINION OF LORD STUART

In the cause

ELAINE CROZIER OR VEALE AND OTHERS

Pursuers

against

SCOTTISH POWER UK PLC

Defender

Pursuers: Milligan K.C. et Balfour; Thompsons
Defender: Mackenzie K.C.; Shepherd & Wedderburn LLP

27 July 2023

Introduction

[1] The pursuers in this action ("the Current Action") are the relatives of the late Robert Crozier, who died on 15 October 2018. The cause of the late Mr Crozier's death was mesothelioma. The pursuers aver that the late Mr Crozier's mesothelioma was caused by the negligent exposure of him, by the defender, to asbestos. The pursuers aver an entitlement to seek damages for the late Mr Crozier's death in accordance with section 5 of the Damages (Scotland) Act 2011.

[2] Previously, in 2014, the late Mr Crozier had raised an action for damages against the defender in relation to the development by him of pleural plaques and asbestosis caused by

the negligent exposure of him, by the defender, to asbestos ("the 2014 Action"). Importantly for the purposes of this opinion, the late Mr Crozier settled the 2014 Action on a full and final basis, with the defender being granted decree of absolvitor. The late Mr Crozier developed mesothelioma after settlement of the 2014 Action.

[3] The defender avers in the Current Action, that settlement of the 2014 Action by the late Mr Crozier on a full and final basis, with the defender being awarded decree of absolvitor, renders the Current Action incompetent. The case called before me on the procedure roll on the defender's motion to dismiss the Current Action as incompetent.

Relevant legislation

[4] Historically, section 1 of the Damages (Scotland) Act 1976 set out the rights of relatives to claim damages for loss sustained by them as a consequences of a person's death from personal injuries. Under sub-section 1(2), the general rule was that if, before their death, a person excluded or discharged a liability to pay damages, any relative's right was also excluded or discharged. The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 introduced an exception to that general rule through the amendment into the 1976 Act of sub-sections 1(2A) and 1(2B). The relevant provisions of the 1976 Act, as amended, were as follows:

> **"1 Rights of relatives of a deceased person.**
>
> (1) Where a person dies in consequence of personal injuries sustained by him as a result of an act or omission of another person, being an act or omission giving rise to liability to pay damages to the injured person or his executor, then, subject to the following provisions of this Act, the person liable to pay those damages (in this section referred to as 'the responsible person') shall also be liable to pay damages in accordance with this section to any relative of the deceased, being a relative within the meaning of Schedule 1 to this Act.
>
> (2) Except as set out in subsection (2A) below, no liability shall arise under this section if the liability to the deceased or his executor in respect of the act

or omission has been excluded or discharged (whether by antecedent agreement or otherwise) by the deceased before his death, or is excluded by virtue of any enactment.

(2A) Where subsection (2B) below applies—

(a) liability arises under this section even though the liability to the deceased or the deceased's executor mentioned in subsection (2) above has been discharged as mentioned in that subsection; but

(b) that liability is limited to the payment of such sum of damages as is awarded under subsection (4) below.

(2B) This subsection applies where—

(a) the personal injury in consequence of which the deceased died is mesothelioma; and

(b) the discharge of liability and the death each occurred on or after 20 December 2006 (and whether before, on or after the date on which section 1 of the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 (asp 18) came into force)."

The Damages (Scotland) Act 2011 repealed and replaced the 1976 Act and is the relevant statute in force. Sections 3 to 8 of the 2011 Act address to rights of relatives. For the purposes of the procedure roll debate before me, sections 3 to 5 of the 2011 Act are relevant and are as follows:

"**3 Application of sections 4 to 6**

Sections 4 to 6 apply where a person ('A') dies in consequence of suffering personal injuries as the result of the act or omission of another person ('B') and the act or omission—

(a) gives rise to liability to pay damages to A (or to A's executor), or

(b) would have given rise to such liability but for A's death.

4 Sums of damages payable to relatives

(1) B is liable under this subsection to pay—

[Not relevant]

(2) But, except as provided for in section 5, no such liability arises if the liability to pay damages to A (or to A's executor) in respect of the act or omission—

(a) is excluded or discharged, whether by antecedent agreement or otherwise, by A before A's death, or

(b) is excluded by virtue of an enactment.

(3) The sums of damages are—

[Not relevant]

(4) [Not relevant]

(5) For the purpose of subsection (1)(a)—
[Not relevant]

5 **Discharge of liability to pay damages: exception for mesothelioma**
(1) This section applies where—
(a) the liability to pay damages to A (or to A's executor) is discharged, whether by antecedent agreement or otherwise, by A before A's death,
(b) the personal injury in consequence of which A died is mesothelioma, and
(c) the discharge and the death each occurred on or after 20th December 2006.

(2) Liability arises under section 4(1) but is limited to the payment of such sum of damages as is mentioned in paragraph (b) of section 4(3)."

The defender's submissions

[5] Mr Mackenzie had provided the court with a note of argument in advance of the debate, which he adopted. In support of the defender's motion to dismiss the Current Action as incompetent, Mr Mackenzie advanced two propositions. Firstly, Mr Mackenzie submitted that any right, whether in the late Mr Crozier or anyone else, including the pursuers, to claim damages arising from the late Mr Crozier's negligent exposure to asbestos by the defenders was destroyed by the late Mr Crozier settling the 2014 Action and, in accordance with that settlement, decree of absolvitor being granted in favour of the defender. Although Mr Mackenzie did not express it in such terms, that submission appears to be a statement of the effect of sub-section 4(2) of the 2011 Act, but which is, in turn, subject to the exception contained in section 5. The late Mr Crozier could, Mr Mackenzie submitted, have preserved any rights he may have had should he subsequently develop mesothelioma by accepting provisional damages in the 2014 Action but he elected not to do so.

[6] Secondly, and perhaps more importantly for the purposes of this procedure roll debate, Mr Mackenzie went on to submit that the pursuers were not, as pled by the pursuers, entitled to rely on the exception to sub-section 4(2) provided for by section 5 of the 2011 Act. Although Mr Mackenzie accepted the pursuers met the criteria under sub-sections 5(1)(b) and 5(1)(c), critically, Mr Mackenzie submitted that the pursuers did not meet the criteria in sub-section 5(1)(a). The "liability" referred to in section 5(1)(a), Mr Mackenzie submitted, must be for a personal injury existing *at the time* of the discharge of A's right (my emphasis). Given that the late Mr Crozier did not suffer from mesothelioma at the time of the settlement of the 2014 Action and consequent discharge of liability of the defender, there was not a "liability" within the meaning of section 5(1)(a) and, accordingly, the pursuers did not fall within the limited exception offered by section 5. The Current Action, which relied upon section 5, was therefore incompetent.

[7] In relation to the approach to the interpretation of section 5 of the 2011 Act, Mr Mackenzie accepted the principles of statutory interpretation advanced on behalf of the pursuers (to which I will return). In support of the interpretation of section 5 advanced on behalf of the defender, Mr Mackenzie referred to the case of *Dow* v *West of Scotland Shipbreaking Co Ltd* 2007 RepLR 59, excepts from paragraphs 3, 4 and 5 of the Explanatory Notes to the 2007 Act and excepts from paragraphs 35 and 36 of the Explanatory Notes to the 2011 Act.

[8] Mr Mackenzie relied on paras [1] to [3] in *Dow* where Lady Paton stated:

> "[1] The Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill seeks to resolve an invidious situation affecting those suffering from mesothelioma, and their families. That situation is having to choose whether the victim, while still surviving, should proceed to settle his or her claim for damages based on negligent exposure to asbestos, effectively preventing any further claims by relatives on the victim's death; or whether the victim should delay settling his or her claim, with the result that, on the victim's death, the relatives would be entitled to claim damages in terms of s 1(4)

> of the Damages (Scotland) Act 1976. It is widely acknowledged that having to face such a dilemma imposes an unacceptable and distressing burden on both the victim and the relatives.
>
> [2] The Bill amends s 1 of the 1976 Act, and in effect permits the victim to accept damages in settlement prior to death, without jeopardising the relatives' potential claims on death in terms of s 1(4).
>
> [3] The Bill is restricted to mesothelioma sufferers because of the particular characteristics of that asbestos-related disease. As was explained by a representative of the Scottish Executive Justice Department to the Justice 1 Committee of the Scottish Parliament on 29 November 2006: 'Under current medical science, there is no treatment that will cure anyone with [mesothelioma]. The average life expectancy of someone who has the disease is 14 months. 'For people diagnosed with mesothelioma, the issue of how to handle a compensation claim arises immediately. They know their likely life expectancy and that their disease was caused by exposure to asbestos, and—this is important—under the Fairchild exception they do not need to meet the normal test of causation in civil actions. The causal requirement is satisfied if an employer's wrongful conduct materially increased the risk of the person contracting mesothelioma. 'The Executive believes that no other class of personal injury shares those characteristics and, typically, puts the sufferer in a dilemma in relation to relatives' compensation claims. Most mesothelioma sufferers are not pursuing their own claims, in order not to disadvantage their relatives. No one involved in making personal injury claims has told us that any other groups of claimants face that dilemma and are forgoing their own claims in favour of their relatives' claims. We have introduced the bill to address that specific problem ... '[The bill] is intended to remove a problem that the law causes for a particular group of people; it is not intended to encroach into the law itself any more than is necessary to address the identified problem. In other words, the purpose of the bill is not to right any perceived wrong in the long-held principle that relatives' rights are extinguished if the deceased settles [his] claim in full prior to death ... 'The Executive has introduced this short bill to address urgently and specifically a problem encountered by mesothelioma sufferers who are choosing not to pursue their own claims so that their family can benefit from larger awards."

[9] From the Explanatory Notes to the 2007 Act Mr Mackenzie relied upon the words from para [3] "This meant that mesothelioma sufferers faced the dilemma", from para [4]:

> "The Act disapplies section 1(2) of the 1976 Act so as to allow the immediate family of a mesothelioma sufferer to claim damages for distress, grief and loss of society under section 1(4) of the 1976 Act after the sufferer's death irrespective of whether the deceased has already recovered damages or obtained a settlement."

and from para [5]:

> "The amendment at section 1(3) inserts new subsections (2A) and (2B) which set out the parameters of the exception. Paragraph (b) of new subsection (2B) provides that where a mesothelioma sufferer settles his or her claim".

[10] Finally, from the Explanatory Notes to the 2011 Act Mr Mackenzie relied upon the words from paragraphs 35 and 36:

> "35. Section 5 re-enacts subsections (2A) and (2B) of section 1 of the 1976 Act which were inserted by the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 ('the 2007 Act'). 36. It forms an exception, in cases where a victim dies of mesothelioma, to the general principle laid down in section 4(2)."

The 2011 Act was, Mr Mackenzie submitted, for practical purposes, identical to the 2007 Act.

The pursuers' submissions

[11] On behalf of the pursuers, Mr Milligan had also provided the court with a note of argument, which he adopted. Mr Milligan accepted that under section 4(2) of the 2011 Act, if a deceased person settled, during their lifetime, a claim for damages in respect of an act or omission suffered prior to their death, there was generally no liability to pay damages to their relatives. Section 5 of the 2011 Act, however, Mr Milligan submitted, provided an exception to that rule. Mr Milligan submitted that, on a proper reading of section 5, there was no basis for the limitation to sub-section 5(1)(a) argued for on behalf of the defender. Mr Milligan submitted that the pursuers' case on record met all of the conditions necessary to fall within the exception created by section 5 of the 2011 Act and, accordingly, the defender's plea to have the action dismissed should be repelled.

[12] To the extent it might be necessary to engage in an exercise of statutory interpretation in respect of section 5 of the 2011 Act, Mr Milligan cited relevant passages from the cases of *Comhairle Nan Eilean Siar* v *Scottish Ministers* [2013] CSIH 45 at

paragraphs 32, 47 and 62, *Coa Foundation* v *East Dunbartonshire Council* [2014] CSIH 46 at paragraph 32 and *R (on the application of Westminster City Council)* v *National Asylum Support Service* [2002] UKHL 38 at paragraph 6, from which he drew the following propositions (with which Mr Mackenzie agreed):

- It is for the courts in construing statute to give effect to the intention of Parliament but, ordinarily, the intention of Parliament is to be understood by reference to the words used by Parliament in the particular piece of legislation, interpreted by reference to their ordinary and natural meaning, read in the relevant context.
- The relevant context can include Explanatory Notes. In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are admissible aids to construction for what logical value they have.
- However, Explanatory Notes are not to be taken as being directive as to the meaning to be taken from the words used in the legislation.
- If the meaning of the words used by Parliament is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, the court should not search through external aids in support of a different interpretation.

[13] Mr Milligan submitted that, under reference to the above principles, the words used in sections 3 to 5 of the 2011 Act were clear and unambiguous. On a plain, objective reading they did not lead to a result that was manifestly absurd or unreasonable. The words used by Parliament could not reasonably be interpreted as containing the limitation in respect of section 5(1)(a) argued for on behalf of the defender. Indeed, Mr Milligan submitted, the interpretation argued for by Mr Mackenzie would require words to be read into section 5,

for which there was no basis. In relation to the defender's reliance on the case of *Dow* and the Explanatory Notes to the 2007 Act and 2011 Act, Mr Milligan submitted that, whilst these might have identified an "invidious situation" faced by those diagnosed with mesothelioma, they did not provide a proper basis to interpret section 5 as containing the limitation argued for on behalf of the defender.

Decision

Statutory interpretation

[14] In addition to the passages cited on behalf of the pursuers, as accepted on behalf of the defender as containing correct statements of the law, the following passage from Lord Hodge, DPSC, in *Regina (O)* v *Secretary of State for the Home Department* [2022] UKSC 3, Lord Hodge, DPSC, at paragraphs 29 to 31 is relevant:

> "29 The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396.). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'
>
> 30 External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. … The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty:

> *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. …
>
> 31 Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:
>
> > 'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House . . . Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'"

The defender's argument on interpretation of section 5 of the 2011 Act

[15] Before considering the defender's submission on the interpretation of section 5 of the 2011 Act, two preliminary observations are relevant.

[16] Firstly, as the Lord President (Hamilton) stated in the case of *Aitchison* v *Glasgow City Council* [2010] SC 411 at para [26] under reference to liability for injury negligently caused and the "single action rule":

> "[26] As Lord Johnston recognised in *Carnegie*, a person claiming damages founded on a single wrong can bring only one action for reparation; all losses, past and prospective, must be addressed in that one action. This procedural rule goes back beyond *Stevenson v Pontifex* and *Wood* where Lord President Inglis observed (p 129) that the most familiar illustration of that rule of practice was to be found in actions for injury to the person, 'in which the practice is invariable'. Lord Mure and Lord Adam agreed, the latter again illustrating the rule by reference to the practice in actions of damages for personal injuries arising from fault. The rule was more recently applied (in an action not concerned with personal injuries) by the House of Lords in *Dunlop v McGowans* where Lord Keith observed (p 81):

> 'An obligation to make reparation [for loss, injury and damage caused by an act, neglect or default] is a single and indivisible obligation, and one action only may be prosecuted for enforcing it.'"

[17] Secondly, as was stated by Lady Hale, sitting in the Court of Appeal, in the case of *Shell Tankers UK Ltd* v *Jeromson* [2001] EWCA Civ 101 addressing the question of reasonable foreseeability in cases concerning injury caused by exposure to asbestos:

> "32. … It matters not that at the relevant time the diseases understood to be caused by exposure to asbestos did not include mesothelioma. … Russell LJ in *Margereson v Roberts* [1996] PIQR P358, at 361:
>
> > '… liability only attaches to these defendants if the evidence demonstrated that they should reasonably have foreseen a risk of some pulmonary injury, not necessarily mesothelioma.'
>
> Following the House of Lords' decision in *Page v Smith* [1996] AC 155 it is sufficient if any personal injury to a primary victim is foreseeable."

[18] Turing then to the defender's submission on the interpretation of section 5 of the 2011 Act, as discussed above. With regard to the words "liability to pay damages" in section 5(1)(a), Mr Mackenzie submitted that 'that liability must be for a personal injury existing at the time of the discharge of A's right'. I do not accept that submission. Having regard to the principles of statutory interpretation set out above, I do not accept that it is correct to define "liability" by reference to the personal injury.

[19] Looking first at the words used in sections 3 to 5, which constitute the primary source by which meaning is to be ascertained, in their collective context, it appears clear that the "liability to pay damages" that is discharged in sub-section 5(1)(a) must be the same liability referred to in section 3. The opening words of section 3 make clear "Section 4 to 6 apply where …". It is also clear from the words and structure of section 3 itself that whilst there is a requirement for *A to have died in consequence of* suffering personal injuries as a result of an act or omission, the "liability to pay damages" is derived from the act or

omission - "*and* the act or omission … gives rise to liability to pay damages" (my emphasis). The terms of section 4(2) are to the same effect. Thus, what is discharged under section 5(1)(a) is the liability arising from the relevant act or omission and not, as Mr Mackenzie submitted on behalf of the defender, the liability for any, and only any, personal injury existing *at the time* of the discharge of A's right (my emphasis).

[20] Considering the authorities above in relation to the single action rule and reasonable foreseeability of injury, it is clear that in settling the 2014 Action as he did, the late Mr Crozier discharged the defender from all liability arising from any negligent exposure to asbestos (the act or omission), including the reasonably foreseeable development, by the late Mr Crozier, of mesothelioma. It is also notable that in the case of *Harris* v *The Advocate General for Scotland* 2016 SLT 572, cited by the defender, that in settling a case on a full and final basis where a pursuer has developed pleural plaques, there is included within the damages an element to reflect the reasonably foreseeable risk of the development of further asbestos related injury, including mesothelioma.

[21] Turning to the case of *Dow* and the Explanatory Notes referred to on behalf of the defenders, in accordance with the principles of statutory interpretation referred to above, such external aids to interpretation must play a secondary role but may assist in understanding the objective setting or contextual scene and/or the mischief at which the particular provisions arise or are aimed.

[22] The case of *Dow* concerned the procedure that might, most appropriately, be followed where a mesothelioma sufferer raised a court action seeking damages on his own behalf and settled that action in the knowledge that relatives' claims would follow after his death. It does not appear from the case report that Mr Dow had developed an earlier asbestos related injury manifesting from his negligent exposure, for example pleural

plaques, and settled a claim in respect of that negligent exposure. Thus the factual situation in *Dow* is, insofar as relevant to the issue raised in the Current Action, materially different. The procedural solution anticipated by Lady Paton was for one action to act as a vehicle for both the pursuer's and the relatives' claim. In that situation the now section 5 is not brought into play and was, accordingly, not considered by the court. At para [24] however, Lady Paton acknowledged that there might be cases where the anticipated procedure could not be followed. Example 2 related to the situation where, as in the Current Action, a joint minute brought the initial action to an end and the defenders obtained decree of absolvitor. In that situation, Lady Paton recognised that the relatives would be required to raise another action after the deceased's death. Again, there was no discussion about the effect of the exception contained in, the now, section 5 of the 2011 Act and any limitation on its operation. In relation to the relatively extensive citation in *Dow* of the unidentified "representative of the Scottish Executive Department", one should be mindful of the warning of Lord Nicholls in the case of *Spath Holme* cited by Lord Hodge, DPSC, as set out above, concerning the "subjective intention" of those who promoted legislation. Accordingly, no material assistance can be properly derived on the operation of section 5 of the 2011 Act from *Dow*.

[23] In relation to the Explanatory Notes to both the 2007 and 2011 Acts, both contain the rider that they have "not been endorsed by the Parliament", which, on the face of it, appears to remove the principal justification for reliance on such materials per Lord Hodge, DPSC, at paragraph 30 of *R(O)*, as set out above. Whilst I acknowledge that the wording relied upon by Mr Mackenzie from the 2007 Explanatory Notes, and particularly those in paragraph 5 of the Notes, on their face, might appear consistent with the interpretation that the exception applied to a mesothelioma sufferer who settled their claim, it would be incorrect, as a matter

of logic, to conclude that the words necessarily implied that the exception applied to only such persons.

[24] Looking specifically at the Explanatory Notes to the 2011 Act, the Act relevant to the Current Action, paragraph 36 makes clear that the section 5 exception to 4(2) principle applies "where a victim dies of mesothelioma". No further limitation is stated. Further, paragraphs 37 to 40 are a clear articulation of the section 5 conditions to be met and paragraph 41 reiterates that there are no further conditions to those set out in sub-section 5(1)(a) to (c). None of these paragraphs contain any reference to the limitation argued for on behalf of the defenders.

[25] Accordingly, none of the external materials relied upon by Mr Mackenzie displace the clear meaning conveyed by the words used in the relevant sections of the 2011 Act, which, after consideration of their context, are clear and unambiguous and do not produce absurdity.

[26] Finally, as Mr Milligan submitted, it would have been entirely straight forward for Parliament to include within section 5 the limitation argued for on behalf of the defenders. An example might be by including a further sub-section in section 5 to the effect "at the time the liability to pay damages to A was discharged by A, A was suffering from mesothelioma".

Conclusion

[27] Returning then to the two propositions advanced on behalf of the defender, in light of the conclusions I have reached, it follows that settlement of the 2014 Action by the late Mr Crozier had, as a consequence of section 4(2) of the 2011 Act, subject to the exception contained in section 5, the effect of discharging the defender's liability arising from any

negligent exposure of the late Mr Crozier to asbestos. However, on the pleadings averred by the pursuers, the pursuers would meet the conditions set out in section 5 of the 2011 Act and would, accordingly, be entitled to seek damages for the late Mr Crozier's death as they do in the Current Action.

[28] Accordingly, I will (1) remit the case to proof under deletion of the averments in Answers 5 from "Explained and averred" to "pursuers' claims are incompetent." and (2) reserve all questions of expenses meantime.