**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2011] CSIH 26**

XA44/10

OPINION OF THE COURT

delivered by THE LORD PRESIDENT

in APPEAL

from the Sheriffdom of Lothian and Borders at Edinburgh

in the cause

ROWAN TIMBER SUPPLIES (SCOTLAND) LIMITED

Pursuers and Respondents;

against

SCOTTISH WATER BUSINESS STREAM LIMITED

Defenders and Appellants:

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# Lord President

# Lord Hardie

# Lord Mackay of Drumadoon

## Act: Moynihan, Q.C.; Morisons LLP (for the Pursuers and Respondents)

**Alt: Johnston, Q.C.; Brodies LLP (for the Defenders and Appellants)**

23 March 2011

**Introduction**

[1] The defenders and appellants are licensed providers of retail water and sewerage services in terms of the Water Services etc. (Scotland) Act 2005. The pursuers and respondents are a timber supply company, operating from Main Street, Plains, Airdrie. Between 1993 and 2008, charge notices were issued by the appellants and their statutory predecessors (collectively "Scottish Water") for, among other services, surface water drainage services in respect of those premises. The charges were paid by the respondents. Following flooding in 2007 it was discovered that the premises did not make use of Scottish Water's infrastructure for the purpose of surface water drainage. On 14 January 2009 the appellants sent a cheque in the sum of £40,394.98 to the respondents reimbursing them for the charges paid between 1 April 2002 and 25 January 2008. The respondents thereafter raised the present action, seeking repetition of the *cumulo* sum of £53,524.01 and interest of £23,103.52 in respect of the earlier charges paid in error.

[2] On 10 July 2009, following a diet of debate, the sheriff upheld the appellants' plea-in-law that any obligation to repay the earlier charges had prescribed. On 26 February 2010 the sheriff principal sustained the

respondents' appeal and recalled the decree pronounced by the sheriff dismissing the action. Against that decision the appellants now appeal.

**The legislation**
[3] Section 6 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") provides:

"6(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years -

(a) without any relevant claim having been made in relation to the obligation, and

(b) without the subsistence of the obligation having been relevantly acknowledged,

then as from the expiration of that period the obligation shall be extinguished:

...

(2) Schedule 1 to this Act shall have effect for defining the obligations to which this section applies.

(3) In subsection (1) above the reference to the appropriate date ... [*in relation to certain obligations none of which is of present relevance, to certain specified dates*] ... and in relation to an obligation of any other kind is a reference to the date when the obligation became enforceable.

(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section -

(a) any period during which by reason of -

(i) fraud on the part of the debtor or any person acting on his behalf, or

(ii) error induced by words or conduct of the debtor or any person acting on his behalf,

the creditor was induced to refrain from making a relevant claim in relation to the obligation, and

(b) ...

shall not be reckoned as, or as part of, the prescriptive period: Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph.

...".

**Discussion**
[4] In opening his submissions Mr Moynihan for the respondents described the issue before the court as one of principle: of interpretation of section 6(4)(a) of the 1973 Act. While issues of interpretation of that statutory provision arise, the true issue before this court is one of relevancy, namely, whether the sheriff principal was correct in recalling the sheriff's interlocutor dismissing the action and in allowing to the respondents a proof of their averments. The critical averments are: (1) "The Pursuers paid the appropriate Notices when received by them in the belief created by the receipt of invoices from the Defenders that the Pursuers were using the Defenders' infrastructure to discharge the surface water from the Property" (Art. 3) and (2) "The Defenders' conduct in issuing repeated charge notices in respect of waste water and surface water drainage charges induced the Pursuers to refrain from making any relevant claim in relation to repayment of waste water and surface water drainage charges not due to the Defenders" (Art. 7). The latter averment is the more critical one for the purposes of section 6(4)(a). It is also open to more than one interpretation: it may be an offer to prove that each charge notice issued induced *seriatim* the respondents to refrain from making a relevant claim for repayment in relation to that charge; or an offer to prove that the

repeated issuing of invoices induced over time the refraining from such action; or both. These alternative interpretations may involve different incidents of proof.

[5] As we have come to the view that the sheriff principal's interlocutor was well-founded and that this case should accordingly proceed to proof before answer, it is inappropriate prior to the facts being established to enter upon a detailed analysis of the legal position. But in deference to the able arguments which were addressed to us, it is appropriate that we express certain views.

[6] Section 6(1) of the 1973 Act lays down a prescriptive period of five years for obligations to which that section applies. These obligations are specified in schedule 1 and include any obligation based on redress of unjustified enrichment (para 1(b)). Section 6(4) identifies certain periods which are not to be reckoned as, or as part of, the prescriptive period. These include:

"... any period during which by reason of -

(i) fraud on the part of the debtor or any person acting on his behalf, or

(ii) error induced by words or conduct of the debtor or any person acting on his behalf,

the creditor was induced to refrain from making a relevant claim in relation to the obligation ...".

It is important to notice that each of reasons (i) and (ii) relate to actings on the part of the debtor or his agent. Thus, under (ii) the error must be one induced by words or conduct of the debtor or any person acting on his behalf; unilateral error on the part of the creditor is not a qualifying reason. (See also *Kleinwort Benson Ltd* v *Lincoln City Council* [1999] 2 AC 349, per Lord Hope of Craighead at page 418).

[7] The 1973 Act followed upon the Report on Reform of the Law relating to Prescription and Limitation of Actions issued by the Scottish Law Commission (Scot. Law Com. No.15, 1970). In Part IV the Commission addressed the existing law on prescription applicable to certain rights and obligations based upon agreement or promise. That law was to be found in a number of sixteenth and seventeenth century statutes of the Scottish Parliament and section 37 of the Bills of Exchange (Scotland) Act 1772. Among the Scottish statutes was the Prescription Act 1579. The effect of that statute, which set a prescriptive period of three years for the obligations to which it applied, was not to extinguish the obligation on the expiry of that period but to limit the mode of proof by which it might be established. The general principle of the reform proposed in 1970 was to set a new five year prescriptive period for the obligations to which it applied but on the expiry of which the obligation would be extinguished; and to provide for extension or interruption of that period in certain circumstances. At para 93, under the heading "Fraud, Concealment and Error" the Commission said:

"It is a defence to the existing triennial prescription that the creditor has been induced by the action of the debtor to refrain from pursuing the claim within the prescriptive period. We consider that on equitable grounds a defence against the suggested new short negative prescription should similarly be available to the creditor if he has been deterred from taking action within the prescriptive period by fraud or concealment by the debtor or by error on the part of the creditor, but only where the error has been induced by the words or conduct of the debtor. ... The effect of such fraud, concealment or error should be to defer the commencement of the prescription until the date when the fraud, concealment or error was discovered by the creditor or could, with reasonable diligence on his part, have been discovered."

[8] Although the Commission does not in that context expressly refer to *Caledonian Railway Co* v *Chisholm* (1886) 13 R 773, the reference to "equitable grounds" and the identification of fraud and of creditor-induced error are resonant of that case, decided under the 1579 Act. There again the issue before the court was one of relevancy. The pursuers averred that in the circumstances (amounting to fraud on the part of the defender) the limitation of mode of proof did not apply. The court held that, on the basis of the pursuers' case as averred, the statute was not engaged. Lord President Inglis said at page 776:

"The statute is intended to prevent creditors from delaying bringing forward a certain class of actions enumerated in the statute. It contains, in the first place, an order or direction that all such actions be pursued within three years, and if the creditor fail to comply with that enactment, then he is to be subjected in this penalty, that he shall have no action unless he prove it by the writ or oath of the defender. Now, that undoubtedly implies that there is negligence upon the part of the creditor, that he ought to have pursued his action sooner, and that he ought not to have allowed the three years to elapse. But how is that possible in the case of these pursuers if their statements be true? By the false pretences of the defender they were prevented from discovering that they were carrying sacks free for which they were entitled to charge. And the defender was in the full knowledge of that and failed to disclose it. To apply the statute to a case of that kind, it appears to me, would not only be entirely unjust, but would be entirely against the meaning of the statute. The statute assumes that the creditor is in a condition to sue, and it is because of his failure to sue - because of his negligence in putting off the making of his claim - that the statute imposes the penalty upon him. It is clear to my mind, therefore, that wherever a case of this kind can be made, that the failure to sue is due to the conduct of the defender (whether it amount to fraud or not), to concealment on the part of the defender, or to the bringing forth of pretences which are false in fact, whether fraudulent or not, the pursuer cannot be visited by the penalty of the statute, because there is no negligence upon his part, but the sole cause of the delay in bringing forward his claim and raising the action is the conduct of the defender."

Although the case in hand was one of fraud, it is plain that the Lord President would have applied the same principle where the conduct of the debtor was non-fraudulent, that is, where he had innocently induced the error on the part of the creditor.

[9] Lord Shand was of the same opinion. At page 777 he said:

"... it appears to me that whether the representation was made from an improper motive or not, if it was a statement which was false in itself, it deceived the company to whom it was made, and deprived them for the time of the power of making a charge, because they relied on that representation, and that being so, it appears to me that this is not a case of the class of house maills, men's ordinaries, &c which are struck at by the statute. It is not a case in which the pursuers could have pursued for the debt, for according to the defender's representation there was no debt. It was not a case in which there could be periodical settlements, for there was nothing due. If it was a case in which there was money due, and in which there ought to have been periodical settlements, the only reason for the absence of that was, that the company were deceived by the statements made by the defender. If that be proved, I do not think the defender can in these circumstances take the benefit of the triennial prescription so as to exclude inquiry, and finally to exclude liability for a debt which, according to the pursuers' statement, ought to have been paid."

Lord Adam concurred.

[10] There can be little doubt, in our view, that in framing the proposal which was ultimately enacted as section 6(4) the Commission had in mind the observations made by the judges in *Caledonian Railway Co* v *Chisholm*. While the legislative solution was different, the principle that time should not run against a creditor who had been induced, fraudulently or innocently, by his debtor not to take proceedings timeously, was noted and adopted.

[11] Although in *Caledonian Railway Co* v *Chisholm* the (implicit) representation was that no obligation had arisen, while in the present case the (implicit) representation was that the sums sought were truly due, the representation in each case, on averment, induced the creditor not to pursue his right of action in the prescriptive period. It is not altogether clear from the report of *Caledonian Railway Co* v *Chisholm* as to whether the transportation of the sacks by the railway company without charge took place on a number of occasions or on a single occasion, but reference to Session Papers discloses that the amounts claimed were in respect of the period of the parties' contract (1 June 1874 to 1 December 1881) amounting in total to the sum sued for. Thus it appears that a series of obligations arose. If that is correct, the circumstances of that case share a feature with those of the present case where a series of invoices was sent.

[12] The leading authority on the interpretation of section 6(4) is *BP Exploration Co Ltd* v *Chevron* 2002 SC (HL) 19, where a central issue was the meaning of the word "refrain". It was held that that word did not import some self-conscious act of self restraint. Thus, it could include a situation where the creditor was wholly unaware of the obligation because its existence was being concealed from him by the debtor's fraud or by error induced by the debtor's words or conduct (per Lord Hope of Craighead at para [31]). Reference was made to *Caledonian Railway Co* v *Chisholm*. In para [32] Lord Hope endorsed the view expressed by Lord Murray in *Thorn EMI Ltd* v *Taylor Woodrow Industrial Estates*, 29 October 1982 (unreported), where he said that he could not see that it would make sense for Parliament to provide remedies for periods of time when a creditor's mind may be clouded by fraud or error and then to limit the availability of the remedies to the restricted circumstances where a creditor has been intent on pressing a claim and is then deflected from this course by a debtor's words or conduct.

[13] Lord Clyde agreed. At para [66] he adopted the "more generous approach" to the construction of the subsection expressing, at para [67], the view that it was supported by the policy which lay behind the exception. That policy was to be found in Lord President Inglis' opinion in *Caledonian Railway Co* v *Chisholm*; it also accorded with Lord Murray's view in *Thorn EMI Ltd* v *Taylor Woodrow Industrial Estates Ltd*.

[14] Lord Millett at para [97] adopted the same approach. Lord Slynn of Hadley at para [3] expressed his full agreement with the opinion of Lord Hope. Lord Hobhouse of Woodborough agreed with Lord Hope and Lord Clyde (para [74]).

[15] In the present case the respondents aver that between 28 November 1993 and 24 January 2003 they paid in aggregate £53,524.01 to Scottish Water in respect of charges, raised from time to time over that period, for water drainage. Some of the earlier charges are, in the absence of appropriate documentation, estimates. The respondents maintain that none of the charges so raised was in fact due because the water drainage infrastructure used did not belong to Scottish Water. Each of the charges, it is averred, was paid by the respondents in the erroneous belief that it was due. The error was discovered only following certain investigations carried out in 2007. The respondents now seek repetition of these payments (with interest). Their claim is based on unjustified enrichment. They answer the appellants' contention that each of these claims has prescribed by relying on section 6(4) and averring that they were induced to refrain from making each of them by conduct on the part of Scottish Water. The conduct of Scottish Water relied on is their "issuing repeated charge notices".

[16] As the respondents' claims are based on unjustified enrichment, no such claim could be enforceable until the relevant charge had been paid and received. Upon each receipt, on the respondents' averments, the relevant claim in unjustified enrichment would become enforceable and the prescriptive period would begin to run. Subject to section 6(4), the relative prescriptive period would expire five years thereafter.

[17] The only conduct of Scottish Water relied on by the respondents is their issuing of the charge notices. It was argued for the appellants that each obligation of repetition had to be viewed distinctly and that conduct inducing the creditor "to refrain from making a relevant claim in relation to the obligation" must, logically, be conduct which post-dates the coming into existence of that obligation. As each obligation came into existence only after the charge had been raised and paid, the raising of the charge could not constitute a relevant inducement.

[18] In our view this submission adopts an unduly restrictive approach to the statutory provision and to the respondents' averments. It will in the end be for the respondents to prove what in fact induced them to refrain from making their several claims earlier than they did. But it would be within the scope of their averments to seek to establish that the periodical and repeated issuing of charges (carrying the implication that the sums charged were due) induced them to refrain from pursuing a claim for repetition of a sum earlier charged and paid. It may also be that, looking at each transaction distinctly, the implicit representation contained in the notice was such that it not only induced payment but also subsequently induced the error which in turn

induced the respondents to refrain from making a relevant claim in repetition. These issues are properly for proof.

[19] In these circumstances we affirm the sheriff principal's interlocutor and refuse the appeal.