SHERIFF APPEAL COURT

[2023] SAC (Civ) 7
GLW-A198-20

Sheriff Principal N A Ross
Appeal Sheriff R D M Fife
Appeal Sheriff B Mohan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in appeal by

ROBERT McGARRIGLE

Pursuer and Appellant

against

UK INSURANCE LIMITED

Defender and Respondent

Pursuer and Appellant: McLean, solicitor advocate; Jones Whyte
Defender and Respondent: Mulhall, advocate; Harper Macleod LLP

2 February 2023

[1] The appellant is a self-employed private hire driver. On averment, the vehicle which he drove was leased by him from a third party leasing company. On 9 June 2019 the vehicle was parked and unattended. The respondent's insured negligently drove his vehicle into collision with the appellant's leased vehicle, causing sufficiently serious damage that the latter was rendered unroadworthy. The appellant thereby lost the use of the vehicle. He required a vehicle so he could continue to work as a private hire driver. The original leasing company had no other vehicles which they could supply. The appellant accordingly

approached a third party vehicle hirer, and contracted to lease a replacement vehicle. He entered into a credit hire agreement and hired that vehicle for 81 days at a cost of £8,495.28.

[2] The appellant raised this action against the respondent, as insurer of the negligent driver. The action has a single head of claim, seeking recovery of the hire charge for the replacement vehicle. The pleadings are short. Averments of foreseeability relate only to the occurrence of the accident itself. No analysis is attempted of knowledge or foreseeability of loss. The respondent challenged the appellant's title to recover damages. The respondent submitted that, as the appellant was not the owner of the damaged vehicle, he could not recover any loss flowing from the damage to the vehicle. Following debate, the sheriff dismissed the action on the basis that the appellant had no title to sue.

The sheriff's judgment

[3] The sheriff noted that parties agreed that the appellant had interest to sue. The dispute was about title. Both parties referred to Macphail, *Sheriff Court Practice* (4th ed) paragraph 4.36. The respondent submitted that the appellant required to demonstrate a legal relationship which allowed him to recover hire charges, and that there was no such relationship. Any failure to supply a replacement vehicle was between the appellant and the original hirer. Only the original hirer, as owner, could advance a claim based on damage to the vehicle.

[4] The appellant's position was to accept that a legal relationship was necessary, but that a legal relation with a third party (here, between appellant and original hirer) was enough to establish a legal relationship between appellant and respondent. The appellant was entitled to put himself in the position he would otherwise have been in had it not been for the negligent driving.

[5] The sheriff distinguished the limited English authority relied upon in argument (and not cited on appeal). He accepted that title to sue is difficult to define, but that there must be a relation between the parties to the action, not only between the appellant and another. The sheriff recognised that there would have been title to sue had the appellant sustained personal injury, or inconvenience, or other losses which arose directly from the accident. These did not arise in the present case. The claim was for loss arising from damage to a vehicle which the appellant did not own. The sheriff decided the appellant did not have title to sue, and dismissed the action.

Submissions

[6] The appellant submitted that to have title to sue a person must be party to a legal relation which give them rights that the person against whom they raise their action either infringes or denies (*D & J Nicol* v *Dundee Harbour Trustees* 1915 SC (HL) 7). There must be sufficient legal relationship between the opposing parties to create the necessary title to sue (*Air 2000 Ltd* v *Secretary of State (No 2)* 1990 SLT 335). In the present case, the contract of hire gave rise to a legal relationship, and the accident caused loss, which infringed the appellant's rights. The right infringed was the right to use the vehicle. The sheriff had not explained why title did not arise.

[7] The respondent submitted that the sheriff had correctly recognised that the legal relationship with a third party was irrelevant in any claim directed against the respondent. Any loss had been sustained by the leasing company. The appellant had departed from the original argument, and now placed some reliance on delictual aspects. The appeal was still, however, based on the contract between the appellant and the hire company, which could

not create any relationship between the parties. Parties agreed that the test is as stated in Macphail (above) at paragraph 4.36. The sheriff had applied the correct legal test.

Decision

[8] In our view, the appellant has title to sue. The parties agree that the appellant has interest to sue.

[9] There is a single head of claim. It is averred to arise as a result of a road traffic collision. The pleadings are exceedingly brief. The grounds of fault aver that the respondent's insured knew failure in his duty to drive with due care and attention meant that an accident would likely occur. There are no averments as to foreseeability of this head of claim, or knowledge of the appellant's hire contract with a third party. The sparseness of the appellant's pleading has, it appears, obscured analysis of his claim.

[10] We accept that the legal test for title to sue is as stated in Macphail (above) at paragraph 4.36, summarising *D & J Nicol* (above) at page 12 per Lord Dunedin:

> "'Title to sue' is difficult to define, but in order to have title to sue a person must be a party (in the widest sense) to some legal relation providing some right which the person against whom the action is to be raised either infringes or denies."

[11] The first question is whether the appellant is a party to any "legal relation providing some right". That relation need not be with the respondent. The appellant is entitled to pursue the respondent if the respondent "either infringes or denies" that legal relation. The origin of the appellant's legal relation, whether with the respondent or anyone else, is not of relevance to this test. The appellant must have some legal relationship, which provides a right which the respondent is accused of infringing or denying.

[12] The argument before the sheriff was conducted by reference to the appellant's contract with the hire company. The respondent is not a party to that contract. In our view,

this was a misdirected analysis. Title to sue requires a relationship between the parties. Clearly, the appellant's contract with the original hire company did not create any relationship between appellant and respondent. There is, nonetheless, a relationship between the parties. That relationship arises out of the occurrence of the accident, and from the respondent's insured's alleged negligence.

[13] There is no doubt that a victim has title to raise an action against their wrongdoer. A legal relation providing some right arises out of the relationship of wrongdoer and victim created by the negligent act. It arises in delict. The record contains averments relating to the delictual wrong. On the particular facts of this case, there is a further legal relation giving some right, namely the pursuer's rights under a third party contract with the original hirer.

[14] Once a legal relationship is established, the remaining question is whether the respondent has infringed or denied some right of the appellant. It must be recognised that the avowedly restricted definition in *D & J Nicol* does not directly encompass the present situation. It refers to legal relations which are infringed by a defender, rather than legal relations which arise because of a defender's actions, in other words from the delict itself. The delict is the source of both the legal relation and the infringement of the right of the victim. The negligent act or omission cannot in the ordinary course be described as infringement of any existing relation of the pursuer, whether with the defender or anyone else.

[15] Following Lord Dunedin's lead, we do not embark on any wider definition of title to sue. In our view the appellant is a party (in its widest sense) to a legal relation providing some right, which the respondent's insured has infringed or denied. The appellant's claim is that he was party to some legal relation (the original hire contract) which gave rise to some right (the right to use the vehicle for the purposes of trade) which the respondent's

insured has infringed (preventing use) by his negligence. As a result of the collision, the appellant was unable to earn a living, and took steps to remedy that, for which he seeks reimbursement. The definition in Macphail (above) is satisfied. He has title to sue.

[16] Even if this action had not sought to recover loss by reference to a third-party contract, but was based on another personal claim (for example physical injury), we would have found there to be a relationship between the parties arising out of the duty of care relied upon, and thereby a title to sue (see Stair Memorial Encyclopaedia, The Law of Scotland, Vol 15 paragraph 220).

[17] In our view, a plea of title to sue has a distinct function from a plea to the relevancy, of lack of specification, or other preliminary plea, although there is a degree of overlap. Title to sue focuses primarily on the existence of the legal relation. It follows that title to sue is not necessarily defeated by defects of fair notice or of specification of the right or infringement. Those issues remain arguable under other pleas-in-law.

[18] We are fortified in our view of title to sue by considering alternative facts. If the appellant had owned the damaged vehicle, there would be no dispute that relevant heads of loss arose, and the hire of a replacement vehicle would be a relevant ancillary claim. Similarly, had the appellant suffered personal injury, the present claim would also have been a relevant ancillary claim. In neither case would a claim for loss of use have been separately challenged on the basis of title to sue.

[19] We should not be understood to endorse the present claim as relevant or fully specified. There is, for example, no attempt to set-off the original hire charges from the replacement hire charges. There is no averment as to reasonableness, whether relating to the act of hiring a replacement, or to quantum measured by market rates. There may be questions about licensing, the terms of the replacement contract, remoteness or other

matters. These are not the subject of this plea of no title to sue, and we do not discuss them here.

Disposal

[20] We will allow the appeal and recall the sheriff's interlocutor of 29 June 2022. Parties agreed that expenses should follow success, and that sanction for junior counsel was appropriate. We agree. We will therefore find the respondent liable to the appellant in the expenses of the appeal procedure, sanction the appeal as suitable for the employment of junior counsel, and remit the cause to the sheriff to proceed as accords.