SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 2
A95/14

Lord Justice Clerk
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

(1) THOMAS CHALMERS and (2) GAIL CHALMERS

Pursuers and Respondents

against

DIAGEO SCOTLAND LIMITED

Defenders and Reclaimers

Pursuers and Respondents: Moynihan KC, Nicholson-White; Balfour and Manson LLP
Defenders and Reclaimers: Cormack KC, Solicitor Advocate, Turner; Pinsent Masons LLP

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19 January 2024

Introduction

[1] The respondents own and reside at a property within a housing development in Bonnybridge, which is situated adjacent to a whisky ageing facility, which includes nine bonded warehouses, owned and operated by the reclaimers. As the whisky matures, ethanol vapour leaves the casks, the so-called "Angels' share". The respondents raised the

present action in which they contend that the level of ethanol emitting from the facility, combined with the surrounding atmosphere, encourages the germination, growth and development of a fungus named *Baudoinia*. They say that this has resulted in black, sooty deposits and staining covering their property, amounting to a nuisance.

[2] There is a lengthy and lamentable procedural history to the action, which commenced in 2014. The Procedure Roll debate with which this reclaiming motion is concerned was the third debate in which the reclaimers unsuccessfully sought dismissal of the action on the basis that the respondents' pleadings are irrelevant and lacking in specification. The debate followed an amendment procedure at the instance of the respondents, intimated in June 2022. A proof scheduled for 13 September 2022 was discharged and the diet on the Procedure roll subsequently fixed. The Lord Ordinary concluded that the pleadings were relevant and contained adequate specification. She awarded the expenses of the amendment procedure against the respondents but held that the expenses of the discharged proof should be expenses in the cause.

[3] The reclaimers challenge the Lord Ordinary's decision in its entirety. Apart from the issue of expenses, they seek dismissal of the action, which failing, exclusion of certain averments in the respondents' pleadings from probation and awards of expenses in the reclaimers' favour.

The Pleadings

[4] The primary effect of the amendment was in relation to the terminology used in relation to the substance which the respondents contend caused the discolouration of their property, and to add information as to how it develops. Article 4 of Condescendence initially read:

> "Ethanol vapour is released from the bonded warehouses and is carried by the prevailing wind onto the respondents' property. This has caused the exterior of the respondents' house and some of their moveable property, including a car, to be discoloured by an unsightly black fungus. The black fungus is *Baudoinia compniacensis*."

[5] The minute sought to delete averments from and including the words "an unsightly black fungus". The passage as finally amended reads:

> "black, sooty deposits or staining more substantial than commonly encountered on damp surfaces of many kinds where *Baudoinia* moulds are absent. These deposits have also formed on trees, where they are particularly fluffy. They have also formed on structures (including lampposts) downwind from the bonded warehouses and on plant pots, a trampoline, a playhouse and structures in the respondents' garden. These deposits are caused by *Baudoinia*. *Baudoinia* moulds can serve as a 'pioneer organism'. Its germination and growth having been stimulated by ethanol it can become an early coloniser of surfaces. Once established its presence raises the water retention capacity of the surface enabling other fungi and fungus eating arthropods to become established. Over time, as the community of organisms develops, the other organisms can swallow up the founding population of *Baudoinia*."

[6] The minute also sought to explain the way in which the taxonomy has changed over time, explaining that *Baudoinia* was previously understood to consist of a single species, *Baudoinia compniacensis* and that these two terms were previously treated as synonymous. However, in 2016 it was recognised that there were five species within what was previously only *Baudoinia compniacensis* and that in the pleadings the term *Baudoinia* referred to all species recognised within that genus.

Submissions for the reclaimers

[7] The amendment caused a sea change in the pleadings in relation to causation, liability and specification of nuisance, all of which impacted on the averments in respect of loss. The deficiencies were such that the action should be dismissed or, at least, certain averments should be withheld from probation.

[8] Prior to the amendment the case had been based exclusively on the alleged presence of discolouration from the presence of a black fungus, understood to be the single genus fungus, *Baudoinia*. The effect of the amendment is that the respondents now rely on the discolouration in the form of black sooty deposits of unknown and unspecified composition, where *Baudoinia* may not even be present. The resulting pleadings raise questions as to what the deposits actually are; how they are caused by *Baudoinia* and in turn ethanol; and, if they would have been present anyway, whether the alleged loss has been specified relevantly and in a way capable of quantification.

[9] In the absence of a stated composition of the deposits it cannot be known what was their cause; and it is not averred how release of ethanol may have been the cause, given especially that the "pioneer organism" averments mean that *Baudionia* may not even be present. The respondents' failure to aver what the condition of the property would be, how often it would require cleaning, and so on, made it impossible to assess what difference the escape of ethanol is said to have made. It prevents assessment on the issues of materiality, tolerability and loss, given that the respondents require to show that the effect is substantial; more than tolerable; and caused by the fault of the reclaimer. Such specification is also necessary since the object of an award of damages is to return the individual to the condition in which he would have been, but for the alleged nuisance. The reclaimers are entitled to notice of the case which they have to meet. The absence of these averments made the case irrelevant.

[10] The Lord Ordinary appeared to accept the respondents submissions that that there were four essential questions, namely: whether *Baudoinia* was present; whether that presence was caused by ethanol; whether that ethanol came from the reclaimers' facility; and whether germination of *Baudoinia* caused by ethanol caused discolouration to the respondents'

property. In doing so she failed to recognise that other essential questions, for which there were no relevant averments, included whether the discolouration went beyond that which was tolerable (*Watt* v *Jamieson* 1954 SC 56 at 58 per Lord President (Cooper)); whether any additional deposits or staining were substantial; and the quantum of any loss attributable to the alleged nuisance.

[11] As to lack of specification generally, and the averments which should be excluded from probation, the submissions were that:

(i) the averments relative to "black, sooty deposits or staining" were irrelevant without specification of their composition.

(ii) the averments that *Baudoinia* moulds can serve as "pioneer organism" were irrelevant in the absence of specification that this process had occurred, and without averments connecting the process to the discolouration of the property by black, sooty deposits greater than might otherwise be expected. The effect of the averments was that the deposits may not even contain *Baudoinia*.

(iii) absent proper specification of composition the reclaimers were unable to determine the academic expertise to which the case should be addressed.

(iv) there had been insufficient specification of the "but for position" by which the respondents required to aver and prove the degree and excess of the interference and the loss said to be consequent thereon.

(v) the various terms used inconsistently in the pleadings rendered the respondents' case incomprehensible. The words used are not defined, they ("black fungus", "black staining", "the fungus", "the effects of the fungus", "discolouration attributable to the fungus" and "sooty deposits") are not synonyms, and the Lord Ordinary erred in treating them as such.

(vi) the basis of liability had changed materially following amendment, and the Lord Ordinary erred by referring to prior decisions on relevancy by other judges made prior to that change, leading to the erroneous conclusion that the respondents' substantive amendments on liability and causation made no difference to the sufficiency of the averments of loss previously considered.

(vii) the respondents' bare denial in answer to averments that whilst *Baudoinia* might be expected to be present in certain manufacturing processes, they might be entirely absent was inconsistent with the necessary implication of their positive averments.

(viii) the averment 4 that "These deposits are caused by *Baudoinia*" lacked specification as to how *Baudoinia* allegedly does so.

(ix) the respondents purport to insert a plan into their pleadings which provides sample numbers and readings, without any averments to explain the content of these numbers and their relevance to the respondents' case. The plan should be excluded.

[12] The effect of excluding the averments which are lacking in specification was to render the respondents' case irrelevant such that it should be dismissed.

Expenses

[13] The Lord Ordinary's decision to hold the expenses of the discharged proof as expenses in the cause was irrational. It ought to have followed from her decision on the expenses of the amendment procedure that the respondents were also liable for the expenses of the discharge, which was necessitated by the respondents having lodged the minute of amendment. The parties agreed on 14 September 2022 that several months were required for the amendment procedure. Lord Harrower discharged the proof upon this basis. The

reclaimers had to identify and consult with a new expert to understand the ramifications of the proposed amendments.

Submissions for the respondents

Relevancy and specification

[14] The respondents' case was a simple one: the emission of ethanol from the reclaimers' facility caused the germination and stimulation of *Baudoinia* which in turn led to the discolouration of the respondents' property. It was averred that the discolouration was more substantial than commonly encountered. On loss, the averments include that the respondents have required to undertake extensive, annual cleaning of the exterior of their house. But for the emission of ethanol from the reclaimers' facility, the discolouration would not have occurred and the extensive cleaning would not have been necessary.

[15] It was frankly stated that the respondents' case depended, as it has from the outset, upon it being proved that *Baudoinia* was present at the property, caused by the reclaimers' facility emitting ethanol. Any suggestion to the contrary, for example, under reference to averments relative to "pioneer organism theory", was without foundation. The averments about *Baudoinia* as a pioneer organism assist in explaining the process which may follow from initial stimulation of the germination, growth and development of *Baudoinia* by release of ethanol and how discolouration progresses.

[16] Senior counsel for the respondents drew attention to certain averments made on their behalf. These included averment that "these deposits are caused by *Baudoinia*"; and averments that in the sampling carried out on four occasions over twelve years, *Baudoinia* has always been present. The case was periled on *Baudoinia* being present in these locations, although the findings at each may not consist 100% of *Baudoinia* because of the pioneer

theory. The case is also periled on the proposition that *Baudoinia* would not be present or would not have germinated in the absence of ethanol which came from the bonded warehouses.

[17] The averments made clear that whilst it may not be the only matter in the samples, *Baudoinia* has caused discolouration which is beyond tolerable. It has been germinated and proliferated by the ethanol escaping from the bonded warehouses. If the ethanol were not escaping, the *Baudoinia* would not germinate and proliferate and the houses and the moveable property would not be discoloured to the extent averred.

[18] In addition he drew attention to the following three averments, namely that:

(a) The parties agreed jointly to take samples, which was done on 12th February 2013, half of each sample being provided to each party for testing. The respondents' report dated 11 December 2013 was disclosed to the reclaimers in July 2015. The results confirmed the presence of *Baudoinia*. Averments then follow as to the taxonomy used and how it should be interpreted.

(b) Further samples were taken on a shared basis in July 2021. The respondents' expert reported that the visible blackening in the samples was caused by ethanol-induced vegetative proliferation of *Baudoinia*. Specimens from the woods between the reclaimers' bonded warehouses and the Woodlea estate on 31 March 2022, showed *Baudoinia* present in all samples. No source of ethanol was found in the vicinity other than the reclaimers' bonded warehouses.

(c) Samples taken in the vicinity of the bonded warehouses in 2022 found the presence of *Baudoinia* in the typical distribution downwind of the bonded warehouses (the red markers on a plan incorporated into the pleadings). *Baudoinia* was absent in the other (green) sampled areas.

[19] As to loss counsel drew attention to averments as to the extent of the deposit; the frequency with which the property required to be cleaned externally; the length of time and amount of cleaning fluid required; that the respondents' cars are affected such that an ordinary power washer is ineffective; as well as averments about reduction in value of their property as a result; all of which may reasonably be read as indicating an effect which was both substantial and beyond what was reasonably tolerable.

Expenses

[20] The basis on which the reclaimers appeal against the Lord Ordinary's decision on expenses was devoid of any specification. It was not specified how the Lord Ordinary erred in her decision *(Shanley* v *Stewart* 2019 SLT 1090, para 21). A decision on expenses being discretionary, it may only be challenged where there has been a miscarriage of justice (*Grubb* v *Finlay* 2018 SLT 463, para 37) and no such ground was advanced. In any event, the Lord Ordinary's reasoning is within the bounds of a reasonable exercise of her discretion in the circumstances.

Analysis and decision

[21] The Lord Ordinary concluded that "the pursuers' case is that their property has been and continues to be damaged by black deposits or staining caused by *Baudoinia*, and that Baudoinia growth is promoted by ethanol vapour from the defenders' premises. The pursuers cannot succeed unless they prove that the black deposits or staining are caused by fungus of the genus *Baudoinia*. Without colonisation with *Baudoinia* as the cause of the deposits or staining, the pursuers do not have a case in nuisance." The respondents entirely accept this categorisation of their case; and in our view it accurately reflects the averments made. As the Lord Ordinary also stated: "It is clear, even without reference to the pleadings

about the testing of samples, that the growth of *Baudoinia*, causing deposits or staining, is central to the pursuers' case." Again, we agree with the Lord Ordinary on this matter and with her comment that "There is no lack of clarity as to the case that the defenders have to answer."

[22] The respondents aver that ethanol from the bond 350 metres from their property is carried by the prevailing wind onto the property; this has caused property to be covered with black sooty deposits more substantial than commonly encountered on damp surfaces of many kinds where *Baudoinia* moulds are absent; "these deposits are caused by *Baudoinia*"; the levels of ethanol at the property are elevated being to between 5-11 parts per million compared with expected levels of 2ppm; ethanol strongly stimulates the germination, growth and development of *Baudoinia*; widespread, visible *Baudoinia* colonisation on surfaces is found in the presence of industrial-scale emissions of ethanol by spirit ageing, commercial baking and petrochemical fuel manufacturing; the deposits in question have also formed on trees, structures and objects within the garden; "these deposits are caused by *Baudoinia*". The case which the reclaimer's have to meet is clear, and there is no deficiency in relevancy or specification of the averments either in respect of causation or liability. The arguments for the reclaimers repeatedly seek to isolate parts of the pleadings from other parts, rather than to consider the pleadings as a whole.

[23] The Lord Ordinary concluded that the arguments that the averments of loss were insufficient was without merit, and again we agree. The whole point of a proof before answer is that after evidence the case may not be established as a matter of both fact and law; the simple question at the moment is whether the averments are sufficient for inquiry. It cannot be said that if the respondents succeeded on liability and causation they must necessarily lose on establishing or quantifying loss.

[24] As to the argument on expenses, it is necessary to remember that an award of expenses is a discretionary order. The issue of whether the expenses of the discharge should be awarded is tied up with the nature of the amendment; whether it was something which absolutely necessitated the discharge of the proof; and the conduct of the litigation as a whole. The Lord Ordinary is not in our view required only to assess this at the time of the discharge, especially when the amendment procedure has not been completed. It may be necessary to examine the outcome of that procedure before reaching a concluded decision, and to reserve the question of expenses until that is done. Indeed that is what happened in the present case. The Lord Ordinary noted that the change in taxonomy had been known for a number of years; and that the reclaimers' response to the pioneer organisms averments is simply that this is not established science. In these circumstances she made the expenses of the discharge expenses in the cause and we are unable to say that this was not a decision within a reasonable exercise of her discretion. The reclaiming motion will be refused.