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ROYAL COURT

74.

16th June, 1993

Before: The Bailiff (Single Judge)

BETWEEN	**CHARLES CHURCH (SPITFIRES) LIMITED**	**FIRST PLAINTIFF**
	CHARLES CHURCH (DISPLAYS) LIMITED	**SECOND PLAINTIFF**
AND	**AVIATION JERSEY LIMITED**	**FIRST DEFENDANT**
	HEDLEY GRIFFITHS	**SECOND DEFENDANT**

Advocate A. D. Robinson for the Plaintiffs.
Advocate R. A. Falle for the Defendants.

JUDGMENT

THE BAILIFF: The plaintiffs in this action were, at the relevant times, the owner and operator, respectively, of a super marine Spitfire Mark VC aeroplane registration G/MKVC and of a Rolls Royce Merlin Mark 35-2 aero engine serial number 222533. The defendants were and are, respectively, a company carrying on the business of overhauling, repairing and rebuilding of aero engines and the technical director of the company. It will be sufficient if I refer in future to the parties as the plaintiffs and the defendants.

In or about May, 1987, the defendants began work on rebuilding the engine. The work was completed on or about the 30th June, 1988. The engine was installed in the Spitfire and on the 4th April, 1989, and the Civil Aviation Authority issued a permit to fly. On the 1st July, 1989, after some thirty hours (the defendants suggest that there were more) the Spitfire crashed. The plaintiffs allege that the crash was due to a fractured crank shaft which had been negligently re-ground by the company.

By agreement of the parties, and following an order of the Judicial Greffier (by consent) of the 27th January, 1993, the issues were limited (assuming the facts to be as pleaded by the plaintiffs) to the question whether the plaintiffs were time-barred and I sat to determine the preliminary issue of whether, assuming the facts to be as pleaded by the plaintiffs, the plaintiffs were time-barred.

The Jersey statute on prescription is the Law Reform (Miscellaneous Provisions)(Jersey) Law, 1960, Article 2(1) of which provides as follows:-

> *"(1) **The period within which actions founded on tort may be brought is hereby extended to three years from the date on which the cause of action accrued.**"*

The Law is based on Section 2 of the Statute of Limitations 1939, which has remained substantially the same notwithstanding its repeal by the Limitation Act 1980. No Jersey cases were cited in argument and it may, therefore, be reasonable to look at the English cases to decide when the cause of action arose. If it arose when the company was negligent - and for the purposes of the argument I have to assume that it was - in re-grinding the crank shaft, the action would be time-barred. On the other hand, if the cause of action arose when the crank shaft broke causing the Spitfire to crash, it is not time-barred because the Order of Justice was served within three years of the 1st July, 1989, (Rule 6/5, Royal Court Rules 1992). It is interesting to note that if the claim of the plaintiffs had been brought in contract, the negligent re-grinding of the crank shaft would have been a classic example of a *vice cachée* and since it could not have been found out, apart from dismantling the whole engine, time would not have begun to run until the crash. If authority is required for this statement it is to be found in the Court of Appeal judgment in Kwanza Hotels Limited v. Sogeo Company Limited (1983) JJ 105 at page 119, which was cited and applied to a chattel (a motor car) in Dempster v. City Garage Limited and Another (24th March, 1992) Jersey Unreported.

Although in Watson v. Priddy (1977) JJ 145 the Court equated the definition of a tort in English Law with a tort in Jersey. Article 1 of the 1960 Law defines a tort as a *"tort personnel"* or a *"tort materiel"*. These two sorts of tort remain in Jersey Law but the distinction, which was so important before 1960 in cases of prescription, has, to a large extent, been removed by Article 2(1) of the 1960 Law.

The question from what date time begins to run in cases of tort was very fully considered in the leading case of Pirelli General Cable Works Ltd v. Oscar Faber and Partners (1983) 1 All ER 65. Before that case there had been a noticeable trend in the English Courts as regards latent damage in buildings, (and there

can be no doubt that the equivalent of *a vice cachée* is latent damage, and that is not limited, in my opinion, to real property), towards the principle that time began to run from the date when the defect was, or could have been, discovered.

The Pirelli case stopped that trend in its tracks and reaffirmed what had been the traditional approach. In Pirelli the plaintiffs engaged the defendants, a firm of consulting engineers to advise and design an addition to their factory premises, including the provision of a chimney. The latter was built in June and July, 1969, but the material used in its construction was unsuitable so that by April, 1970, cracking must have begun to develop at its top, albeit unobserved by the plaintiffs. The decision in Pirelli has been criticised heavily and certainly led to some of the recommendations of the Law Reform Committee in 1984 and, eventually, to the Latent Damage Act 1986. That Act increased the then three years limitation period to six years, but did not alter the date of accrual of a cause of action in cases involving latent damage to property and things, but only extended the limitation period. Thus, an action may not be brought after the expiration of either six years from the date on which the cause of action accrued, or three years from the earliest date on which the plaintiff, or any person in whom the cause of action was vested before him, first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such action. Negligence does not become actionable without proof of damage and it is only after damage has been suffered that the cause of action becomes complete and time begins to run. Pirelli did not affect the main principle of law that, in cases of latent damage to property (and things), the right of action accrues from the date when the damage occurred. In the instant case, the weakness to the crank shaft could have manifested itself at the time of the re-grinding, or secondly, at some time between the re-grinding and the aeroplane's first flight, or thirdly, very shortly, if not instantaneously, before the crash. Pirelli was very carefully considered by Hodgson J. in Dove v. Banhams Patent Locks Limited (1983) WLR 1436 where Hodgson J. cited passages from Lord Frazer of Tullybelton's judgment in Pirelli in which he examined the case of Sparham-Souter v. Town and Country Developments (Essex) Limited (1976) QB 858, where it had been held that a plaintiff only suffers damage when he discovers, or it was reasonable for him to have discovered, damage to the building. That case was overruled in the Pirelli case. Decisions of the House of Lords are of the highest persuasive effect, but there is, I think, a distinction to be drawn between cracks appearing in a chimney and a weakness in a crank shaft. I would have to assume that it, too, developed cracks well before the crash if not at the time of the re-grinding. I have to say that I incline more to the arguments advanced in the earlier cases, and particularly Sparham-Souter. In the latter case Lord Denning cited, with approval, a passage from Lord Reid in

Cartledge v. E. Jopling & Sons Limited (1963) 1 All ER 341. Lord Reid said:-

"It appears to me unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and therefore before it is possible to raise any action. If this were a matter governed by the common law I would hold that the cause of action ought not to be held to accrue until either the injured person had discovered the injury or it would be possible for him to discover it if he took such steps that are reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided."

In Cartledge v. Jopling the question, as Lord Reid pointed out, depended not on the common law but on Section 26 of the Statute of Limitations 1939. I find it impossible to say when damage in the form of weakness to the crank shaft came into existence, unlike their Lordships in the Pirelli case, who were certain that cracks near the top of the chimney must have come into existence in the Spring of 1970, outside the limitation period, nor using the analogy of a building case, do I find that the crank shaft was "so defective as to be doomed from the start".

Pirelli was considered also in 1991 in the case of Nitrigin Eireann Teoranta and Another v. Inco Alloys Ltd. and Another [1992] 1 WLR 498, the headnote to which reads as follows:-

"The first defendants, specialist pipe makers, supplied the plaintiffs, chemical manufacturers, with steel alloy tubing for a chemical factory in summer 1981. In July, 1983, the plaintiffs found that the pipe had cracked. The plaintiffs were unable to discover the cause of the cracking but repaired the pipe by grinding out the crack. On 27 June, 1984, the pipe again cracked and burst causing an explosion which damaged the structure of the plant around the pipe causing it to shut down. The plaintiffs issued a writ against the defendants on 21 June, 1990, claiming damages for, inter alia, negligence including the cost of repairs to the plant, the cost of replacing the burst pipe and loss of profit resulting from the shut-down of the plant.

On the preliminary question whether the cause of action arose in July 1983 so that it was statute-barred or whether it did not arise until the explosion of 27 June 1984:-

Held, that, since the cracking to the pipe in 1983 had been a defect in the quality of the pipe itself which had not caused personal injury or damage to other property and since the relationship between the first defendants and the plaintiffs

was not such as to give rise to a special duty of care, no cause of action had then arisen and the loss resulting from that cracking had been economic loss and irrecoverable in negligence; that, on the assumed facts, the first defendant's negligence had in 1984 caused physical damage to other property and a cause of action in negligence had first accrued when that physical damage occurred; and that, accordingly, the plaintiffs' claim was not statute-barred (post, pp. 503H-504A, 505B-C, H-506B, C).

D & F. Estates Ltd. v. Church Commissioners for England [1989] A.C. 177, H.L.(E.) considered.

Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 A.C. 520, H.L.(sc.) and Pirelli General Cable Works Ltd. v. Oscar Faber & Partners [1983] 2 A.C. 1, H.L.(E.) distinguished."

At letter E on page 503 May J. says this:-

"The relevant damage was, however, damage to the chimney itself and the Pirelli case cannot in my judgement now be read as a wide general authority that cracking damage to a chimney itself affords a cause of action against anyone concerned with its supply, manufacture or construction."

It seems to me that the question I have to decide is whether the weakness attributable to the defendants' negligence was damage to the crank shaft itself, and was a defect in quality which did not cause personal injury or damage to other property at the time of the re-grinding, and whether there was any special relationship between the plaintiffs and the defendants such as to give rise to a special duty of care. In my opinion it is impossible to say, unlike the negligent act in the Pirelli case, that the weakness must have manifested itself before the stress on it caused it to break. I find, therefore, that the weakness to the crank shaft was a defect in the quality of the crank shaft itself which did not cause personal injury or damage to other property until the time of the crash. The latent defect in the quality of the crank shaft did not, I repeat, cause personal injury or damage to another's property until the crank shaft broke and caused the aircraft to crash. There was no special relationship between the parties.

I find, therefore, that no cause of action accrued until the physical damage occurred at the time of the crash, and the plaintiffs are not prescribed by statute from bringing their action.

Authorities

Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960: Article 2(1).

Statute of Limitations 1939.

Royal Court Rules 1992: Rule 6/5.

Latent Damage Act 1986.

Kwanza Hotels, Ltd. -v- Sogeo Company, Ltd. (1983) JJ 105 C.of.A.

Dempster -v- City Garage, Ltd. (24th March, 1992) Jersey Unreported.

Watson -v- Priddy (1977) JJ 145.

Pirelli General Cable Works, Ltd. -v- Oscar Faber and Partners (1983) 1 All ER 65.

Dove -v- Banhams Patent Locks Ltd. (1983) WLR 1436.

Sparham-Souter -v- Town and Country Developments (Essex) Ltd. (1976) QB 858.

Cartledge -v- E. Jopling and Sons, Ltd. (1963) 1 All ER 341.

Nitrigin Eireann Teoranta & Anor. -v- Inco Alloys & Anor. [1992] 1 WLR 498.

Mathew -v- Maughold Life Insurance Company, Ltd. (23rd January, 1985) "The Times".

D.W. Moore and Company -v- Ferrier (1988) 1 All ER.

Archer -v- Cotton and Company (1954) 1 All ER.

4 Halsbury 28: p.272.

Halsbury Cumulative Supplement (1988): p.621.