OUTER HOUSE, COURT OF SESSION

[2018] CSOH 116

PD231/18

OPINION OF LORD DOHERTY

In the cause

A AND OTHERS

Pursuers

against

GLASGOW CITY COUNCIL

Defenders

Pursuers: Bain QC, Forbes; T C Young LLP
Defenders: Smith QC; BLM, Solicitors

9 November 2018

Introduction

[1] On the late afternoon of 22 December 2014 a bin lorry driven by one of the defenders' employees left the roadway and travelled along pavements in Queen Street and George Square. It collided with several pedestrians before it finally came to a halt off the road near Queen Street Station. Six people died as a result of injuries which they sustained during the incident and others suffered non-fatal injuries.

[2] In this chapter 43 action ("the present action") eight relatives of some of the deceased (or, in one case the relative's guardian, and in another, the executor of a relative who has died since the incident) seek reparation from the defenders.

[3] The pursuers raised an action for damages against the defenders on 8 December 2017 ("the first action"). The summons in that action had been signetted three days earlier. The summons was not called within three months and a day of its passing the signet, with the result that the instance fell at midnight on 6 March 2018 (rule of court 43.3(2)). That fact did not become apparent to the pursuers' solicitors until 11 June 2018. The summons in the present action was lodged for signetting on 19 June 2018, and it was served on the defenders the next day. The defenders plead that each of the pursuers' claims in the present action are timebarred in terms of sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973. The pursuers aver that in the whole circumstances the court should exercise its power under s 19A of that Act to allow the pursuers to bring the action notwithstanding the provisions of sections 17 and 18.

[4] By interlocutor dated 25 June 2018 the Lord Ordinary made an order in terms of section 11 of the Contempt of Court Act 1981 prohibiting the publication of the names, addresses and dates of birth of the pursuers, or any particulars or details calculated to lead to their identification. On 12 October 2018 the Lord Ordinary allowed a proof before answer on two issues - whether the court should exercise its s 19A power to allow the action to proceed, and if so, whether the defenders are liable to make reparation to the pursuers. On 9 November 2018 the case came before me to hear the proof before answer. At the outset of the diet the parties lodged an extensive joint minute (no 22 of process). There was affidavit evidence from Grant Knight (a partner of the pursuers' Edinburgh agents), Paul Kavanagh (a partner of the pursuers' local agents), and Ian Leach (a partner in the Edinburgh office of the firm representing the defenders). Certain productions (6/8 to 6/59 in the Second Inventory of Productions for the pursuers and 7/1 to 7/14 in the Inventory of Productions for the defenders) were agreed to be true and accurate. The parties were in agreement that it

was unnecessary for the court to hear any oral evidence. I was informed that if the action was allowed to proceed liability was not in dispute.

[5] In advance of the proof counsel prepared Notes of Argument. At the conclusion of the proof I adjourned to deliberate. About an hour later I reconvened the court and delivered my decision. I exercised the s 19A power to allow the pursuers' claims to proceed. I gave oral reasons. I have now been advised that a reclaiming motion has been marked by the defenders. Those are the circumstances in which I have prepared this Opinion.

The facts and other agreed matters

[6] Mr Kavanagh has been instructed by the pursuers since very shortly after the incident. In addition to acting for them in the first action and in the present action, he has represented some of them in a number of other legal proceedings linked to the incident.

[7] The material facts, and certain other relevant matters, are not in dispute. For present purposes it is only necessary to mention some of the matters agreed in the Joint Minute:

> "...
>
> 7. ... Mr Paul Kavanagh, Solicitor is the pursuers' principal agent. He has acted on behalf of the pursuers for around four years, representing them throughout the FAI and in [a subsequent] application [to the court]. Mr Kavanagh has undertaken the work he has with the pursuers on a speculative basis (but with no fee arrangement in the event of a successful outcome) and his firm have incurred substantial outlays in the necessary preparations in this case. This case has had a profound psychological impact on each of the pursuers...
>
> 8. …[D]elay in this case may have a significant effect on the pursuers' psychological conditions. This is particularly so in the case of the first pursuer. The first pursuer… has developed severe mental health problems... As a consequence of this, instructions to proceed with this action were very difficult to obtain…
>
> 9. …On 24 October 2017 solicitors acting for the defenders agreed to settle the pursuers' claims on a full liability basis…The defenders agreed that they would not defend the action on the merits and that, once raised, the action could be sisted for a

period until full details of the claims could be provided and there was an opportunity to discuss settlement.

10. …On 4 December 2017 the Summons [in the first action] was presented for signetting along with a motion for the first pursuer to be anonymised in the proceedings and for reporting restrictions in terms of the Contempt of Court Act 1981. The Summons was signetted on 5 December 2017. The motion for anonymity and reporting restrictions was heard on 8 December 2017 and an interim order granted. The defenders' solicitors accepted service of the Summons on 8 December 2017. On 11 December 2017 an amended copy of the Summons was lodged at the General Department altering the designation of the first pursuer. The General Department required that the principal Summons be returned to them in case there was a challenge by the media to the interim order. The Court granted a final order on 13 December 2017.
…
12. …[T]he time period for the lodging of the Summons for calling under Rule 43.3(2) expired on 6 March 2018. Whilst the Summons had been lodged at the General Department of the Court of Session, the calling slip had not been presented. This was a procedural oversight and a genuine error. In terms of Rule of Court 43.3(2), if the Summons is not lodged for calling the instance [falls]. There is no scope for invoking the Court's dispensing power or any other equitable remedy to address the automatic falling of the instance.

13. …[C]orrespondence between the parties to the action took place in the period 9 March 2018 to 12 June 2018 in respect of further steps to progress the claims towards a possible settlement. During that period neither party recognised that the time limit for lodging the Summons for calling had expired.

14. …[O]n 11 June 2018 Mr Knight dictated a memo to his firm's Parliament House Clerk requesting that he borrow out the principal Summons so that it could then be lodged for calling and enrol [a] motion to sist. On 12 June 2018 the Parliament House Clerk took the memo to the General Department at the Court of Session. The Court then advised that as a period of three months and a day had expired, there was a requirement to lodge a fresh Summons…

15. …[T]he process in Mr Knight's firm was to the effect that ordinarily the principal Summons, duly served, would be sitting in the file. A calling slip would be prepared and the Summons lodged at court with that calling slip, so that it could call. In this case, the Summons never left the process after 11 December 2017. As it remained in process, its presence on file did not act as a reminder that it might require to be lodged for calling.
…
16. …[O]n 13 June 2018 … Mr Knight advised Mr Leach that the instance of the action had fallen. Mr Leach had not appreciated that that was the position… On 14 June [2018] Mr Leach advised that the defenders could not agree to not insisting upon a plea of prescription. Mr Leach advised that the defenders were, in due course, seeking to recover the sums to be settled in these claims from another party…

> Mr Leach advised that if they allowed this matter "in by the back door", the other party would refuse to entertain any possibility of a reimbursement.
>
> 17. …[O]n 18 June 2018 … Mr Leach … confirmed that if the time-bar plea was unsuccessful, the defenders would continue to agree to settle the pursuers' claims on a full liability basis.
> …
> 19. …[T]he defenders do not maintain that they have any defence to the original action on the merits; that but for their time bar plea in this case, they have no defence; that there is no prejudice to the defenders as far as the availability of evidence is concerned relating to the incident in George Square which is the subject of averment.
> …"

[8] Among the productions agreed to be true and accurate are medical reports (6/50 - 6/57) relating to the first pursuer and four of the other pursuers, and a further report (6/59) dated 29 October 2018 by Dr Alison Harper (a chartered clinical psychologist who has assessed the first, second and third pursuers). In that further report Dr Harper wrote:

> "…
> 3. You have asked me to give my opinion on the impact that having to bring a claim against the law firms could have on the pursuers. In my opinion, this would be two-fold:
>
> > i) It has now been almost four years since the incident occurred. There is a wealth of literature on the detrimental impact of uncertainty on anxiety (e.g. Grupe & Nitschke, 2013). The… family are struggling with the impact not only of the deaths …, but with the stress caused by the ongoing legal case. Further delays in settlement of the case is likely to prolong uncertainty, thereby significantly exacerbating levels of anxiety and low mood and impacting negatively on their mental health.
> >
> > ii) In my opinion, failure of the defenders to accept responsibility for compensating the pursuers on the basis of a technicality would exacerbate feelings of anger and injustice felt by the… family, and thereby impact negatively on their mental health. Acknowledgement of responsibility is fundamental to pursuers in terms of their ability to process their emotions and come to terms with their experiences (e.g. Iqbal & Bilali, 2017).
> > …"

Counsel for the pursuers' submissions

[9] Ms Bain submitted that, balancing the equities, the court should exercise its s 19A power to allow the action to proceed. It was common ground that there was no prejudice to the defenders other than the loss of the timebar defence. The first action had been raised within the *triennium* but the instance had fallen because, through an oversight, the summons had not been called within three months and a day as required by rule 43.3(2). Immediately the oversight had become apparent the pursuers' solicitors had promptly raised the present action. The claim was not a stale claim. It had been fully investigated by the defenders, and liability was not contested. There would be material prejudice to the pursuers if the action was not allowed to proceed. They would be compelled to sue their solicitors in order to obtain reparation. That might not be straightforward, as there could be issues of apportionment of liability between the principal agent and the local agent. In any case, it was highly likely that there would be delay in the pursuers receiving redress as compared with the position were the present action allowed to proceed. The pursuers would have to instruct new solicitors. They would have to agree a funding arrangement which was acceptable to both them and the new solicitors. Standing the pursuers' psychological difficulties, and the fact that they would be embarking on an action for a third time, it would not be easy for them to accept, and form a trusting relationship with, new solicitors. The delay and the upset involved would be likely to be detrimental to their mental health. Reference was made to *Carson* v *Howard Doris Ltd* 1981 SC 278, per Lord Ross at p 282; *McFarlane* v *Breen* 1994 SLT 1320; *McCluskey* v *Sir Robert McAlpine & Sons Ltd* 1994 SCLR 650; *B* v *Murray (No 2)* 2005 SLT 982, per Lord Drummond Young at paras 21-22, 29 (affirmed on appeal by the Inner House in *B* v *Murray (No 2)* 2007 SC 688, and by the House of Lords *sub nom AS* v *Poor Sisters of Nazareth* 2008 SC (HL) 146); *Johnston* v *Thomson* 1995 SCLR 554; *Peat's*

Executors v *Assembly Theatre Ltd* 2014 SLT 1017, per Lord Doherty at paras 19-23 and 27-28; *Brisbane South Regional Health Authority* v *Taylor* [1996] 186 CLR 541, per McHugh J at pp 551-554; Johnston, *Prescription and Limitation* (2nd ed.), Ch. 13; Russell, *The Law of Prescription and Limitation of Actions in Scotland,* (2nd ed.), pp 167-177; Scottish Law Commission, Discussion Paper no 132, *Personal Injury Actions: Limitation and Prescribed Claims*, paras 1.24 - 1.29; Scottish Law Commission, Report no 207, *Personal Injury Actions: Limitation and Prescribed Claims*, para 1.8.

Counsel for the defenders' submissions

[10] Mr Smith submitted that the balance of the equities did not favour the court exercising its s 19A discretion to allow the action to proceed. While it was accepted that the only prejudice to the defenders would be the loss of the timebar defence, that statutory protection was there for their benefit and they were entitled to take advantage of it. Here, as in *Peat's Exors* v *Assembly Theatre Ltd, supra,* and *Bell* v *Greenland* 1988 SC 54, the critical issue was whether the pursuers would have a good alternative remedy against their solicitors. Clearly, they would have. The solicitors' failure had been a mistake or oversight, but there was no doubt that they had been negligent. It followed that the pursuers would not suffer material prejudice because they would have a cast iron case against their solicitors. If there was delay in the pursuers receiving compensation that would be unfortunate, but it was possible that an action against the solicitors might be resolved just as quickly as the present action would be if it were allowed to proceed. The interests of justice were not well served by an approach which too readily excused failures to comply with the rules of court: *Brogan* v *O'Rourke* 2005 SLT 29, per the Opinion of the Court at para 33. The court should be

disinclined to exercise the s 19A power where, as here, the cause of the problem was a failure to comply with the rules of court.

Decision and reasons

[11] I am grateful to counsel for their written and oral submissions. I commend parties' efforts to agree matters.

[12] It is accepted that the pursuers' claims are timebarred by virtue of sections 17 and 18 unless the court exercises the s 19A power.

[13] It is well established that s 19A confers a general and unfettered discretion on the court to do what is equitable in all the circumstances (*Donald v Rutherford* 1984 SLT 70, per Lord Cameron at p. 75, and per Lord Dunpark at p. 78; *Forsyth* v *A F Stoddart & Co Ltd* 1985 SLT 51, per Lord Justice-Clerk Wheatley at p 53; *McCabe v McLellan* 1994 SC 87, per Lord President Hope at p 97; *B* v *Murray (No 2)* 1985 SLT 982, per Lord Drummond Young at para 29). The court's jurisdiction is based upon equity, the crucial question being "where do the equities lie?" (*Forsyth* v *A F Stoddart & Co Ltd, supra,* per Lord Justice-Clerk Wheatley at p 55; *Elliot* v *J & C Finney* 1989 SLT 605, per Lord Justice-Clerk Wheatley at p 608F; *B* v *Murray (No 2)* 1985 SLT 982, per Lord Drummond Young at para 29).

[14] Here the defenders accept that if the application is granted the sole prejudice to them would be the loss of the timebar defence. This is not a case where there is any question of a stale claim being advanced. The case has been fully investigated by the defenders, and there is no question of them having evidential difficulties.

[15] If the action is allowed to proceed there will be no defence on the merits. The defenders had agreed to settle the claims on a full liability basis. They have already settled several other claims arising from the incident.

[16] The defenders advance no criticism of the pursuers' own conduct. However, it is clear that the pursuers must bear responsibility for their agents' conduct (*Forsyth* v *A F Stoddart & Co Ltd, supra,* per Lord Justice-Clerk Wheatley at p 54; *B* v *Murray (No 2)* 1985 SLT 982, per Lord Drummond Young at para 29).

[17] Apart from the failure to have the summons in the first action called timeously, the pursuers' agents appear to have acted in an exemplary way. In particular, the principal agents' solicitude towards the pursuers, their willingness to accept instructions on a conventional speculative basis, and their meeting of litigation outlays from their own funds, have been admirable. In very difficult circumstances they have developed a strong relationship of trust with their clients.

[18] The failure to have the summons called was an oversight (and an explanation as to how it came to pass has been provided). There is no escaping it was a serious and culpable failure: although on the spectrum of culpability it appears to me to be less egregious than many of the reported cases where a solicitor has failed to serve a summons within the triennium.

[19] If the application is not granted the pursuers' only redress will be against their solicitors. My assessment is that an action of professional negligence against the solicitors would be very likely to succeed. Accordingly, I approach matters on the basis that if the s 19A discretion is not exercised in their favour the pursuers will not be without a means of redress.

[20] However, notwithstanding the existence of the alternative remedy, in my opinion it is clear that the pursuers would be very materially prejudiced by a refusal to exercise the s 19A power. If the pursuers have to proceed against their solicitors they will have to find and instruct new representation in whom they have trust and confidence, and who would

be prepared to accept instructions on a funding basis which is satisfactory to both solicitors and clients. That process is likely to be difficult and challenging for each of the pursuers. It is likely to be especially fraught in the case of the first pursuer, having regard to her current mental health, her experience (on this hypothesis) of two abortive actions, and the history of difficulty in obtaining instructions from her. The probable consequences would be very significant upset for the pursuers and material delay in their obtaining reparation. That upset and delay would be likely to have significant detrimental effects on the pursuers' mental health (especially in the case of the first pursuer). In my opinion these are very weighty considerations.

[21] In the whole circumstances I am in no doubt that the balance of the equities comes down in the pursuers' favour. It follows that I am satisfied that the s 19A applications should be granted.