OUTER HOUSE, COURT OF SESSION

[2019] CSOH 33

PD236/18

OPINION OF LORD BURNS

In the cause

LORNA McGINLEY OR McLEAN AND OTHERS

Pursuers

against

FAIRFIELD SHIPBUILDING LTD. AND ANOTHER

Defenders

Pursuer: Marshall, sol adv; Thomsons
First Defender: Bennett; BLM
Second Defender: Ross; Clyde & Co

9 April 2019

[1] The first pursuers are the executors nominate of the late Maxwell McLean who died of mesothelioma on 29 July 2017 at the age of 71. They are the deceased's widow and his two sons. The second to seventh pursuers are the relatives of the deceased namely his widow, his two sons, his two sisters and a grandchild.

[2] The present action was raised in June 2018. The first pursuers, as executors of the deceased, advance a claim for the deceased's pain and suffering and loss of life expectancy. They also claim under section 8 of the Administration of Justice Act 1982 for the care provided by his family during his illness and other expenses. The second pursuer, the

deceased's widow, claims loss of support and personal services. The remaining pursuers advance claims under section 4(3)(b) of the Damages (Scotland) Act 2011.

[3] The pursuers aver that the deceased was employed by the defenders from about 1962 to 1972 and that he was exposed to asbestos dust in the course of that employment. As a result, he developed pleural plaques and plural mesothelioma. In 2015 he attended his general practitioner and, having undergone certain procedures, was informed of a diagnosis of mesothelioma on 27 March 2017. He died about four months later.

[4] The deceased raised no action in respect of his condition against either defender during his lifetime. Having regard to what was said in *Sienkiewicz* v *Greif (UK) Ltd.* [2011] 2 A.C. 229 at page 244, paragraph 19 the injury caused by the deceased's exposure to asbestos dust must have been sustained by March 2012. Mr Marshall, for the pursuers, did not take issue with the approach set out in this case on which Mr Ross, on behalf of the second defenders, relied and I proceed on the basis set out there.

[5] A motion on behalf of the pursuers inter alia to allow issues came before me. It was opposed by counsel for the first and second defenders. It was argued by Mr Ross on behalf of the second defenders, whose submissions were adopted by Ms Bennett for the first defenders, that the right to a jury trial was precluded by section 22(4) of the Prescription and Limitations (Scotland) Act 1973 (the 1973 Act). No averments relating to any time bar issues appear on record and Mr Ross accepted that the actions raised by the pursuers in their various capacities were not time barred by the provisions of the 1973 Act.

[6] Section 17 of the 1973 Act deals with the actions of damages for personal injuries brought by the injured person. The pursuer is required to bring the action within three years of the date on which the injury was sustained or the date on which he became, or on

which it would have been reasonably practicable for him to have become, aware of the three "statutory facts" set out in section 17(2)(b).

[7] Section 18 applies where damages are claimed following the death of the injured person. The action must be raised within three years either of the deceased's death or of the date on which the pursuer in the action became, or on which it would have been reasonably practicable for him to have become, aware that the deceased's injuries were attributable to an act or omission and the defender was a person to whose act or omission the injuries were attributable or the employer of such a person.

[8] Section 22(4) provides as follows: "An action which would not be entertained but for the said subsection (2)(b) shall not be tried by jury".

[9] Although Mr Ross accepted that the actions raised by the pursuers were not time barred he submitted that their right to a jury trial is excluded by section 22(4) of the 1973 Act because the action is one which would "not be entertained but for the said subsection (2)(b)". The pursuers derive their rights of action from the deceased. The three year period from the date that his injuries were sustained had expired. He therefore could not have relied on section 17(2)(a) and would have had to rely on section 17(2)(b). Accordingly, section 22(4) applied to exclude the pursuers' right to a jury trial. He referred to the opinion of Lord Tyre in *Mitchell* v *Advocate General for Scotland* [2015] Rep LR 51 in which these provisions had been examined. Lord Tyre accepted the argument advanced by the pursuers that, in the context of a section 18 claim, the words "said subsection 2(b)" in section 22(4) fell to be construed as a reference to section 18(2)(b). Since the action had been raised with the three year period, it was not one which "would not have been entertained but for the said subsection 2(b)". Mr Ross asked me not to follow the reasoning set out in paragraph 10 of Lord Tyre's opinion. In the present case, the executor sued and were "in the shoes of" the

deceased. Since the deceased would have had to rely on section 17(2)(b), it would be absurd if the executors were in any better position.

[10] Mr Ross accepted that the deceased could not have known of his injuries until he was diagnosed in 2017 and thus his action would not have been time barred due to the provisions of section 17(2)(b). It followed that the claims of the pursuers were not time barred by virtue of section 18(4). However, it was only because of the terms of section 17(2)(b) that the pursuers were able to proceed. There was thus a link between the claims of the pursuers and that subsection. Section 22(4) should be read, in the context of the present case, as a reference to section 17(2)(b).

[11] Mr Mitchell for the pursuers pointed out that no issue of time bar is raised in the proceedings or in the course of argument. The defenders do not therefore advance any case raising potentially complex questions as to whether or not "the statutory facts" were or ought to have been known to the pursuers or indeed the deceased. In any event, Lord Tyre was correct in his interpretation of section 22(4). The reference to the "said subsection 2(b)" is to whichever subsection 2(b) is applicable. Support for this approach is found in the terms of section 22(3) where the reference is to the subsection 2(b) in the singular.

[12] I agree with Lord Tyre's conclusion for the reasons that he gives at paragraph 10 of *Mitchell*. In particular, I agree that section 22(4) falls to be read as a reference to whichever subsection 2(b) is applicable.

[13] It is necessary to examine in each case the nature of the pursuer's action and its basis. In the present case, the position of the pursuers as executors and those who sue as relatives of the deceased is different. The right of action of the first pursuers as executors only arose on the death of the deceased at which time his claims transmitted to them. Their right exists whether or not this deceased raised an action during his lifetime (see section 10(1)(a) of the

Damages (Scotland) Act 2011). They are therefore in a different position to the deceased himself. Their position is also different in that their right to claim does not expire at the same time as that of the deceased himself since the executors are given three years from the date of his death. The pursuers suing as relatives have separate claims to those advanced by the executors and their right also arose upon the death of the deceased.

[14] I do not accept Mr Ross' submission that the claims are derived from the deceased and that, because he would have had to rely on section 17(2)(b), the claims of the pursuers stem from that provision. In each case, the pursuers' rights of action are derived from section 18(2)(b) since they sue within three years of the date of the deceased. None of the pursuers require to rely on section 17(2)(b).

[15] Mr Ross referred me to the Report of the Committee on the Limitations of Actions in Cases of Personal Injury of 1962 (the Davies Report) and to the Law Commission's report on Prescription and Limitation of Actions of 1982 in order to explain the history of the sections under discussion and demonstrate what the problem was that those sections sought to address. In particular, he founded on what is said in the Davies Report at paragraph 30 to 33. It was recognised that a relaxation of the three year rule would impose additional burdens on defendants and a variety of safeguards were considered, including the imposition of a criminal standard of proof and a requirement of corroboration. Both of these were rejected. At paragraph 33B the Committee recognised that judges would take into consideration any lapse of time when "estimating the reliability of cogency (or the significance of the absence of) of evidence relating to incidents in the distant past". They were, however, conscious of the fact that those who had no training in the evaluation of evidence might not be so ready to discriminate between stale and fresh recollection. They therefore said that "where a pursuer is seeking to take advantage of a relaxation of the three

year rule, that fact should be regarded as special cause making the case appropriate for proof before a judge as opposed to trial before a jury". Accordingly, Mr Ross submitted that where, as here, the pursuers advanced a case which involved a relaxation of the three year period, a jury trial was precluded for the reasons advanced by the committee.

[16] The provisions under discussion here preclude a jury trial where a pursuer raises an action and requires to rely on section 17(2)(b) or 18(2)(b). They do not reflect the concerns of the Davies Committee about the more general issue of fading recollections of witnesses to "incidents in the distant past". Had this case involved questions as to when the pursuers knew or ought to have known about "the statutory facts", it can be readily understood that such matters would not have been appropriate for jury trial. However, as Mr Marshall argued, no such questions are raised in this case.

[17] I will therefore grant the motion to allow issues.