SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 52
PD379/20
PD380/20

Lord Justice Clerk
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Reclaiming Motions

by

(1) B and (2) W

Pursuers and Reclaimers

against

THE CONGREGATION OF THE SISTERS OF NAZARETH

Defender and Respondent

Pursuers and Reclaimers: Di Rollo KC, Cowan; Digby Brown LLP
Defender and Respondent: Dean of Faculty (R Dunlop KC), Rolfe; Clyde & Co (Scotland) LLP

24 November 2022

Introduction

[1] Formerly, all personal injury claims in Scotland were subject to a three year limitation period in terms of section 17 of the Prescription and Limitation (Scotland) Act 1973. Under section 19A the court could override the time limit where it was "equitable to do so". However the courts adopted a restrictive approach to the exercise of this power as illustrated in *B* v *Murray (No 2)* 2005 SLT 982 per Lord Drummond Young at paras 27-30,

subsequently upheld in the House of Lords, see *AS* v *Poor Sisters of Nazareth* 2008 SC (HL) 146. The burden of satisfying the court lay on claimants, including provision of an acceptable explanation for the delay. If the passage of time did or was likely to cause real difficulties for the defenders that would militate against allowing the action to proceed. Courts followed the underlying legislative policy that the pursuit of "stale claims" caused injustice.

[2] The 1973 Act has been amended by the Limitation (Childhood Abuse) (Scotland) Act 2017 to the effect that there is now no limitation period in respect of claims based on childhood abuse. The thinking behind the reform was set out in the policy memorandum accompanying the draft bill. The view was that such cases have unique characteristics deriving from "the abhorrent nature of the act, the vulnerability of the victim … and the effect of abuse on children" (para 25). It is now recognised that the effects of abuse can inhibit disclosure until many years after the event, but courts had failed to accept explanations for delay based on shame, fear and psychological difficulties (para 10). This, plus the importance afforded to the risk of prejudice to defenders, had the result that abusers (and their employers) were protected. The abused were deprived of access to justice (para 32).

The reforms

[3] The 1973 Act was amended by the introduction of sections 17A-D, the full terms of which are set out in the appendix to this opinion. In summary, section 17A provides that there is no limitation period in childhood abuse cases. Section 17B applies this to rights of action accruing before the commencement of the change; in other words there is

retrospective effect. That a claim has already been made and settled does not necessarily prevent it being raised again – see section 17C.

[4] Section 17D provides for two situations where the court can stop an action from proceeding. The first is when "the defender satisfies the court that it is not possible for a fair hearing to take place" (subsection 2). The second is where "the defender satisfies the court that, as a result of the operation of section 17B or (as the case may be 17C), the defender would be substantially prejudiced were the action to proceed" and "having had regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed …" (subsections (3)(a) and (b).

The reclaiming motions

[5] The present reclaiming motions (appeals) arise from the Lord Ordinary's decision that a fair hearing is not possible in actions brought by two siblings (the pursuers) who allege that they suffered physical and emotional abuse at a residential home operated by The Congregation of the Sisters of Nazareth (the defender) while they were living there between 8 July and 12 August 1974. As a result he dismissed the actions. He did not require to reach a decision on the alternative basis for stopping the actions, though he did observe that if they proceeded the defender would be substantially prejudiced. The full circumstances, including the documentary and affidavit evidence put before him (there was no oral testimony), are set out in the Lord Ordinary's judgment, see [2022] CSOH 8.

The decision under challenge

[6] The reasoning of the Lord Ordinary can be summarised as follows. His attention had not been drawn to any case where, as here, the claim included allegations against un-named individuals. Only Sisters X and MMM had been specified in the pleadings though it

was clear that the allegations are of abusive practices perpetrated by the Sisters generally. They are not restricted to the named persons. In W's action Sister X is said to be responsible for only three incidents. Of the twelve Sisters present in the Home in 1974, eight are now deceased. The defender cannot obtain responses from the unidentified persons. It cannot ask them about the allegations concerning the named Sisters. It cannot assert that the alleged abuse did not occur, nor fully develop a full defence to the claims (para 109). The difficulty in establishing vicarious liability for un-named individuals was a further complicating factor (para 110). The Lord Ordinary considered that:

> "the absence of evidence from persons said to have committed abuse but who have not been identified on record is fundamental to both cases and … precludes the possibility of a fair trial in either of them" (para 113).

Matters were compounded by the inability to source archival material relating to the pursuers' residency beyond the admission and discharge records. It seemed reasonable to conclude that there would have been more detailed administrative records covering perhaps a list of the Sisters' names and their duties. Such might have contained material relevant to the plausibility of the claims (para 103).

Can there be a fair hearing (section 17D(2))?

[7] The Lord Ordinary equiparated the circumstances with the difficulties facing the defenders in *JXJ* v *Province of Great Britain of the Institute of the Christian Schools* [2020] EWHC 1914 and *B* v *Sailors Society* 2021 SLT 1070 (para 109). We doubt the value of reliance on decisions in other cases in such fact-sensitive matters. The present claims are materially different from those where the allegation concerns only a deceased abuser or abusers, and all the more so if they were operating in circumstances where others were likely to be ignorant as to what was happening. It is understandable that in such circumstances a

defender might be unable to prepare and could do no more than put the pursuer to proof of the claim. However, here the pursuers seek to prove abusive practices carried out by those charged with their care in 1974. In effect they allege generalised abuse which would be reflected in the culture and ethos of the administration of the Home as a whole. In her affidavit B states that all of the nuns treated her in the same way. W speaks of "a cruel regime", which included beatings from Sister X (who is still alive) and other nuns. As is noted by the Lord Ordinary (paras 18-43) there are several witnesses available who can speak to how the children were treated if, for example, they wet the bed or did not eat their food. We consider that the Lord Ordinary erred by not taking into account the nature of the attack on the overall standard of care, or lack of it, in the Home as a whole, as opposed to allegations of specific incidents.

[8] The defender asserts that the lack of specification of particular episodes of abuse by named people and the consequences of the passage of time presents it with a fundamental difficulty in investigating in a meaningful way the totality of the wrongdoing. However a fair hearing is not dependent on each party being able to investigate all that it would wish to pursue, nor on reassurance that all pertinent evidence remains extant and available to the court. In our view if appropriate regard is given to the systematic nature of the allegations and to the numerous sources of relevant evidence still available to the defender, it cannot be said that any hearing would be bound to be unfair. That is the high test presented by section 17D(2). If met it will usually be quite clear that the problems are insurmountable.

[9] We also consider that in the circumstances of these cases the Lord Ordinary need not have been troubled on the issue of vicarious liability. If any of the allegations of abuse is established, it is not easy to identify why the defender would escape legal responsibility simply because of an inability to specify a named individual. And in our view the concerns

expressed as to "missing documentation" are speculative. They would have carried more weight if there was a basis for assuming that there were likely to have been records which would have been of material assistance on the key issues and that their absence would hamper the fairness of the hearing.

Section 17D(3)

[10] It is necessary for this court to address the alternative ground for stopping the actions set out in section 17D(3). During oral submissions, and without prior notice, the pursuers presented a novel argument. They contended that, since it was the retrospective nature of the removal of a limitation defence which prompted these provisions, a defender would only be "substantially prejudiced were the actions to proceed" if, at a minimum, it could demonstrate that it had organised its affairs in reliance on the pre-existing law. However, nothing of that kind had been suggested.

[11] It was unsatisfactory that this was raised at the latest possible stage. Given the view we take on the overall circumstances here, our brief comments on this submission are not essential to our ultimate decision. The pre-legislative material does vouch the view that the safeguard was aimed at avoiding a potential breach of article 1 of the first protocol to ECHR which protects the peaceful enjoyment of possessions. It is unnecessary to dwell on whether this convention right was engaged; suffice to say that the intention seems to have been to avoid an excessive burden falling on someone deprived of an accrued limitation defence. That does provide some encouragement for the pursuers' approach, however the words used in the statute are open-textured and unqualified. They provide no support for a restrictive construction. It was suggested that the defender should not be able to rely on the same difficulties as were prayed in aid in respect of section 17D(2). However the two

provisions are aimed at different convention rights, one absolute and one qualified, and we see no reason why the same factors cannot be relevant to both. We therefore address the defender's reliance on the observations of the Lord Ordinary on this matter.

[12] Having reached his decision on the fair hearing issue, it is unsurprising that the Lord Ordinary also considered that the defender was substantially prejudiced in terms of section 17D(3). He had regard to the effect of the passage of time on the available witnesses and documentation. For similar reasons to those already expressed, we consider that he erred in this regard.

[13] The other factor mentioned as leading to substantial prejudice was the exposure to significant potential liabilities which would not otherwise have arisen and the cost of mounting a defence. This will be common to all childhood abuse cases which, but for the reforms, would have been dismissed as time barred; and often a large sum will be claimed by way of damages. No doubt all this is prejudicial for defenders, but in our view it does not amount to substantial prejudice of a kind which would justify stopping proceedings. Were it otherwise that exercise would be required in most cases thereby undermining the policy and purposes of the reforms. And it would be odd if the greater the harm done, the more likely that the action would be dismissed.

[14] It is hard to figure a case of alleged childhood abuse where the pursuer's interest in the action proceeding is not worthy of considerable weight. Mention was made of alternative methods of obtaining a measure of redress, however we agree with the Lord Ordinary (para 116) that access to justice through the courts is "a precious commodity". We well understand the Lord Ordinary's comments as to the potential problems for the pursuers, however at this preliminary stage, the primary focus cannot be on the merits.

[15] In short we are not persuaded that the prejudice suffered by the defender is such as would justify stopping the actions in terms of section 17D(3).

Decision

[16] We will allow the reclaiming motions, quash the interlocutors dismissing the actions, and remit both of them to the Outer House for further procedure.

Appendix

"17A Actions in respect of personal injuries resulting from childhood abuse

(1) The time limit in section 17 does not apply to an action of damages if—

(a) the damages claimed consist of damages in respect of personal injuries,

(b) the person who sustained the injuries was a child on the date the act or omission to which the injuries were attributable occurred or, where the act or omission was a continuing one, the date the act or omission began,

(c) the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries, and

(d) the action is brought by the person who sustained the injuries.

(2) In this section—

"abuse" includes sexual abuse, physical abuse, emotional abuse and abuse which takes the form of neglect,

"child" means an individual under the age of 18.

17B Childhood abuse actions: previously accrued rights of action

Section 17A has effect as regards a right of action accruing before the commencement of section 17A.

17C Childhood abuse actions: previously litigated rights of action

(1) This section applies where a right of action in respect of relevant personal injuries has been disposed of in the circumstances described in subsection (2).

(2) The circumstances are that—

(a) prior to the commencement of section 17A, an action of damages was brought in respect of the right of action ("the initial action"), and

(b) the initial action was disposed of by the court—

(i) by reason of section 17, or

(ii) in accordance with a relevant settlement.

(3) A person may bring an action of damages in respect of the right of action despite the initial action previously having been disposed of (including by way of decree of absolvitor).

(4) In this section—

(a) personal injuries are "relevant personal injuries" if they were sustained in the circumstances described in paragraphs (b) and (c) of section 17A(1),

(b) a settlement is a "relevant settlement" if—

(i) it was agreed by the parties to the initial action,

(ii) the pursuer entered into it under the reasonable belief that the initial action was likely to be disposed of by the court by reason of section 17, and

(iii) any sum of money which it required the defender to pay to the pursuer, or to a person nominated by the pursuer, did not exceed the pursuer's expenses in connection with bringing and settling the initial action.

(5) The condition in subsection (4)(b)(iii) is not met if the terms of the settlement indicate that the sum payable under it is or includes something other than reimbursement of the pursuer's expenses in connection with bringing and settling the initial action.

17D Childhood abuse actions: circumstances in which an action may not proceed

(1) The court may not allow an action which is brought by virtue of section 17A(1) to proceed if either of subsections (2) or (3) apply.

(2) This subsection applies where the defender satisfies the court that it is not possible for a fair hearing to take place.

(3) This subsection applies where—

(a) the defender satisfies the court that, as a result of the operation of section 17B or (as the case may be) 17C, the defender would be substantially prejudiced were the action to proceed, and

(b) having had regard to the pursuer's interest in the action proceeding, the court is satisfied that the prejudice is such that the action should not proceed.".