OUTER HOUSE, COURT OF SESSION

[2019] CSOH 5

CA102/18

OPINION OF LADY WOLFFE

in the cause

RAMESH DEWAN

Pursuer

against

THE FIFE COUNCIL

Defenders

Pursuer: A Sutherland; MacRoberts LLP
Defender: R Dunlop QC, MacGregor; Clyde & Co (Scotland) LLP

22 January 2019

Introduction

[1] The pursuer is the heritable proprietor of certain property in Dunfermline ("the Site)". The pursuer avers that in February 2010 he leased the Site to two individuals who were directors ("the Directors") of a waste management company, First Option Services Ltd ("the Company"), which operated on the Site. The Company's activities on the Site were subject to environmental statutory control in the form of an exemption (as after-mentioned) under the Environmental Protection Act 1990 ("the Act") and The Waste Management Licensing (Scotland) Regulations 2011 ("the 2011 Regulations").

[2] The pursuer avers that by "26 April 2012 at the latest" waste stored on the Site by the Company was in breach of the Exemption granted to the Company under the Act and the 2011 Regulations. The Directors subsequently pled guilty to a charge of keeping controlled waste (comprised of 3,500 tonnes each of waste carpets and waste plasterboard) in a manner likely to cause pollution of the environment and harm to human health between 28 September 2012 and 21 February 2013, contrary to section 33(1)(c) and (6) of the Act.

[3] The pursuer estimates that it will cost about £1,000,000 to remove and dispose of the waste and to restore the Site ("the restoration costs"). The pursuer does not seek to recover that sum from the Company or the Directors. In this action, the pursuer seeks the sum of £1,000,000 from the defenders as damages as a consequence of their alleged breach of section 33(1)(a) of the Act.

Background

The activities carried on by the Company on the Site

[4] The Company operated a waste management facility on the Site. This included storage of waste as well as the processing of it by shredding. In terms of the 2011 Regulations, the Company required to register an exemption with the Scottish Environmental Protection Agency ("SEPA") to store waste at the Site. The Company registered an exemption for that purpose on 7 March 2011 ("the Exemption"). In terms of the Exemption, the total quantity of waste the Company was permitted to store at the Site at any time could not exceed certain quantities ("the quantity restriction") and, further, no waste could be stored at the Site for longer than 12 months ("the time-limit restriction"). It was also a requirement of the 2011 Regulations that the waste was stored and managed

without endangering human health and without using processes or methods that could harm the environment.

Outline of basis on which the pursuer seeks to impute liability on the defenders

[5] The defenders were neither the occupiers nor the operators of waste reception or processing activities on the Site. However, the defenders were one of about 38 third-party users of the services of the Company. In particular, the pursuer avers that in about March 2011 the defenders entered into an arrangement with the Company for disposal of the defenders' waste, which subsisted until the defenders ceased to deliver waste to the Site in about June 2012. During that period, the defenders were said to have deposited approximately 1,267 tonnes of carpet and 685 tonnes of plasterboard (the defenders say they "delivered" (not "deposited") these quantities). The total amount of waste averred to remain on the Site is 7,000 tonnes. In submissions it was explained that this was mixed waste comprised of the shreddings of different kinds of waste that had been provided to the Company.

[6] The basis upon which the pursuer seeks to impose liability on the defenders (and to do so for the totality of the restoration costs) is that the defenders breached the prohibition in section 33(1)(a) of the Act of (reading short) "knowingly" permitting controlled waste to be deposited on the Site when those deposits were not in accordance with the Exemption.

The defenders' debate

[7] At debate the defenders challenged the relevancy of the pursuer's case on three principal grounds, as follows:

1) The pursuer's case based on section 33(1)(a) was fundamentally irrelevant, as there were no averments to support imposition of liability ("the statutory liability issue");

2) Separately, the pursuer's averments of loss were irrelevant in that he seeks to recover the totality of the restoration costs, which is a global figure, without differentiation between the defenders' deposits and those made by the other users of the Company's services at the Site during the relevant time ("the averments of loss issue"); and

3) In any event, the pursuer's case was (largely) extinguished by the operation of prescription ("the prescription issue").

[8] By reason of adjustments in the week before the debate, the pursuer's common law case of negligence was removed.

The statutory provisions

The Act

Section 33 of the Act

[9] As noted above, the principal basis of liability is predicated on section 33(1) of the Act. So far as material (and in its application to Scotland) section 33, which is headed "prohibition on unauthorised or harmful depositing, treatment or disposal etc. of waste", provides as follows:

> "(1) Subject to subsection…..(3) below … a person shall not-
>
> (a) deposit controlled waste …, or knowingly cause or **knowingly permit** controlled waste to be deposited in or on any land unless a waste management licence authorising the deposit is in force **and** the deposit is in accordance with the licence;
>
> […]

> (3) Subsection (1)(a), (b) or (c) above do not apply in cases prescribed in regulations made by the Secretary of State and the regulations may make different exceptions for different areas;
> […]
> (6) A person who contravenes subsection (1) above… commits an offence."

(I have highlighted in bold the words the pursuer relied on.)

Section 73 of the Act

[10] Section 73 in Part II of the Act makes provision for appeals, legal proceedings and civil liability. Reference was made during the debate to section 73(6), which is in the following terms:

> "(6) Where any damage is caused by waste which has been deposited in or on land, any person who deposited it, or knowingly caused or **knowingly permitted it to be deposited**, in either case so as to commit an offence under section 33(1) or 63(2) above, is liable for the damage except where the damage-
>
> (a) was due wholly to the default of the person who suffered it; or
> (b) was suffered by a person who voluntarily accepted the risk of the damage being caused;
>
> but without prejudice to any liability arising otherwise than under this subsection."

(I have highlighted in bold the words the pursuer relied on.)

The Regulations

[11] It was common ground that regulation 17 of the Regulations dis-applies section 33(1)(a) of the Act in relation to the carrying on of any "exempt activity" set out in schedule 1 to the Regulations. Schedule 1 to the Regulations identified the kind of waste and the maximum total quantity in respect of which an exemption could be sought. It appeared to be common ground that the storage of up to a maximum of 1000 tonnes of waste textiles (ie carpets) and up to a maximum of 1000 tonnes of plasterboard fell within the activities exempted from waste management licensing for the purposes of paragraph 17

and table 9 of schedule 1 to the Regulations (ie the quantity restriction). The maximum duration for which these types of waste could be stored was no longer than 12 months (ie the time-limit restriction).

Comment on basis of liability under section 33(1) of the Act

[12] The offence in section 33(1) is committed by a person depositing controlled waste (which includes the kind of material the defenders delivered to the Company for the duration of their arrangements with it) or "knowingly" causing or "knowingly" permitting controlled waste to be deposited on any land unless the conditions are satisfied. These conditions are first that there is in force a waste management licence authorising the deposit and, secondly, that the deposit is "in accordance with the licence". (In relation to the first condition, parties proceeded on the basis that the Exemption qualified as the licence referred to.)

[13] Two matters should be noted. First, the act constituting the offence is that of *depositing* waste material. Parties were agreed that no civil liability arose in respect of the *storage* of waste materials: see para 216 in the opinion of Lord Jones in *McManus* v *City Link Development Company Limited* [2015] CSOH 178. Secondly, the pursuer's case was predicated only on the ground of the defenders knowingly permitting controlled waste to be deposited.

Dates to note for the purposes of the debate

[14] The parties referred to a number of dates for the purposes of their arguments. It is convenient to note those at this point.

Date of possible inception of liability

[15] As noted above, the pursuer avers that the Company's breach of the Exemption occurred by "26 April 2012 at the latest". It is not entirely clear from the pursuer's pleadings why this particular date was selected. There is reference to an enforcement letter from SEPA dated 20 June 2012.

Timeframe of the defenders' use of the Company's services

[16] In terms of their own activities, the defenders provided waste materials to the Company between March 2011 and June 2012. The defenders' last load of plasterboard was provided to the Company in April 2012 and the last load of carpet in June 2012. Accordingly, if the date of 26 April 2012 is significant in terms of the attribution of liability (or knowledge), then the focus is towards the end of the period during which the defenders provided the two types of waste to the Company (ie the provision of waste carpet between April and June 2012 and the provision of plasterboard in April 2012).

The time-frame to which the Directors pled guilty

[17] The period of time to which the Directors pled guilty post-dated entirely the period during which the defenders provided waste to the Company.

Prescription and the date of the service of this action

[18] The pursuer's action was served on 3 March 2017 and, accordingly, unless there were a continuing default or act for the purposes of section 11(2) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"), any obligation incumbent upon the defenders to make payment as a consequence of any fault of breach on their part in the

period to 2 March 2017 was extinguished by operation of prescription under section 6 of the 1973 Act.

The pleadings

[19] The defenders' challenge to the relevancy of the pursuer's pleadings was a fundamental one and not, generally, simply a challenge to a lack of specification. Accordingly, I do not require to quote extensively from the pursuer's pleading section. However, in order better to understand the parties' submissions I shall summarise features of the pleadings, as follows:-

1) There are no averments that the defenders had actual knowledge that the Company was operating the Site in breach of the Regulations or outwith its Exemption.
2) There are no clear averments that knowledge that the Company was operating the Site in breach of the Regulations or outwith its Exemption could be imputed to the defenders at the material time. The pursuer makes a number of calls in its pleadings:
    (i) he calls upon the defenders to provide information about their arrangements (ie contract) with the Company and their assessment of its suitability as a provider of waste management services (in Article 3);
    (ii) he calls upon the defenders to state when they became "concerned" about the Company's waste reprocessing at the Site (at the end of Article 3);

(iii) he calls upon the defenders to state when and by what means the defenders attempted to undertake an audit of the Company's operations (at the end of Article 4);

Otherwise, the pursuer does not know or admit the defenders' averments that prior to entering into arrangements with the Company the defenders sought and received confirmation from SEPA that the Company had the appropriate consents and exemptions in place, or that they made further enquiries of SEPA in about November 2011 and received SEPA's assurance that there was no reason why the defenders could not continue to provide waste to the Company, or that in about March 2012 the defenders tried to carry out an audit at the Site (in Article 3).

3) The timeframe to which the Directors' conviction for breach of section 33 of the Act (in Article 4) applies post-dates the defenders' involvement with the Company. The period covered by the conviction commenced on 28 September 2012, some three or four months after the defenders ceased providing waste to the Company.

4) Fairly read, the principal focus of the pursuer's averments are about *storage* of waste on the Site. See, eg, Article 5 (second and third sentences), where the pursuer avers that the defenders "knew or ought to have known, as hereinafter averred, that its Waste was being *stored* by [the Company] at the [Site] in breach of statutory control. In doing so, the [defenders] committed an offence in terms of section 33 of the [Act]". (Emphasis added.) (I note that there are also references to "deposits" by the defenders but these were not accompanied by other averments to support the contention or inference that the defenders'

deliveries to the Company were to be treated in law as deposits for the purposes of attracting liability for breach of the statutory controls. In any event, the pursuer's case is not that the defenders themselves deposited waste; it is confined to that part of section 33(1)(a) of knowingly permitting *another* to do so.)

5) The critical averments on liability are set out in Article 6 which includes the following passage:

> "The actions of the [defenders] have caused damage to the [Site]. The [defenders] knew or ought to have known that [the Company's] operations at the [Site] breached the [Act] and the terms of the Exemption. The [defenders] knew or ought to have known that by continuing to deposit the Waste at the [Site] the [defenders were] causing further breaches of the [Act] and the terms of the Exemption. The [defenders] knew or ought to have known that by depositing their waste to the [Site] the [defenders were] causing damage to the [Site]. The [defenders] should have checked to see if [the Company] was treating its waste appropriately. The [defenders] had 'concerns' about the treatment of waste at the [Site]. The [defenders] could and should have exercised [their] statutory powers to enter and inspect the [Site]."

There then follows a number of averments of what is asserted to have been "obvious" to the defenders, namely that the Company was not treating the waste appropriately and that no waste was leaving the Site. In relation to the averment about the defenders' exercise of statutory powers (at the end of the passage just quoted), Mr Sutherland, who appeared on behalf of the pursuer, explained in the course of his submissions that this was inserted to rebut the defenders' own averments that they had tried to inspect the Site. He did not rely on this to make any positive case against the defenders in relation to their statutory powers.

6) In terms of averments of causation of damage, the pursuer avers in Article 6 the total tonnage of carpet and plasterboard waste provided by the defenders to the Company. The pursuer also avers the total tonnage of waste delivered by "all

entities in the period from October 2010 to May 2012" and which is stated to be approximately 12,370 tonnes of waste. These averments are followed by the sentence: "The damage was caused by the breach of statutory duty of the [defenders]". Reference is then made to section 73 of the Act. Article 6 concludes with averments that "registration does not and cannot make an activity which is carried out in breach of the exemption requirements exempt".

7) Finally, the averments of loss are set out in Article 7. The pursuer avers that he has sustained and will continue to sustain loss and damage as owner of the Site. He refers to approximately 7000 tonnes of waste carpet and plasterboard on the Site which requires to be disposed of and he avers that he reasonably estimates it will cost £1 million to remove and dispose of this waste and to restore the Site. He also avers that the defenders were "the most significant contributor" of the controlled waste on the Site. In response to the defenders' averments invoking prescription, the pursuer avers at the end of Article 7 that the defenders' breach of section 33(1) was "a continuing default" and that on the defenders' averments that breach "ended on termination of" the defenders' arrangements with the Company which, at the earliest, was in about June 2012. Reference was then made to section 11(2) of the 1973 Act.

Submissions on behalf of the defenders

The defenders' motion

[20] The defenders moved their second and third pleas (to the relevancy of the pursuer's averments and seeking their exclusion *et separatim* dismissal of the action), their fourth plea (challenging the pursuer's averments of loss) and their seventh plea (of prescription).

Mr Dunlop QC, who appeared on behalf of the defenders, invited dismissal of the action, which failing the exclusion of averments from probation.

The statutory liability issue

[21] Mr Dunlop QC submitted that the pursuer makes a series of vague and irrelevant averments in relation to the Act. The pursuer's case does not provide fair notice in relation to why it contends that the defenders are liable for the Company's breach of the Exemption or any conditions attaching thereto, or knew or ought to have been aware that the Company was committing environmental offences. He referred first to the pursuer's averment that: "As at 26th April 2012 at the latest [the Company] were in breach of the Exemption... Notwithstanding the same the defenders continued to deposit the waste at the [Site]" (Article 3). It was, he suggested, tolerably clear that the pursuer's case is that the Company enjoyed an exemption relating to the processing of waste carpet and plasterboard. That being so, in his submission section 33(1)(a) does not apply: see section 33(3). There could be no breach for so long as the Exemption remained in place. The Exemption covered the activity, not the person engaged in that activity.

[22] Further, in Article 5, the pursuer avers that: "The [defenders] knew or ought to have known...that its Waste was being stored by [the Company] at the [Site] in breach of statutory control. In doing so, the [defenders] committed an offence in terms of section 33 of [the Act]". However, these averments contain no indication as to why the defenders "knew" or "ought to have known" that waste was being stored in breach of the Act. There are insufficient factual averments to support this assertion. No relevant and specific averments are made in relation to any individual officer or employee of the defenders that had actual knowledge that an offence was being committed, or in relation to any circumstances that

should have alerted the defenders that an offence was being committed. Moreover, he submitted that the foregoing averment illustrates the confusion in the pursuer's case. Notwithstanding earlier averments about "depositing", he argued it was clear from this averment that the pursuer's true complaint is the storage of the waste (he referred to the terms of the convictions founded upon in Article 4 (which concerned keeping waste)). He suggested that this was doubtless because the defenders only provided waste, whereas it was the Company that undertook its depositing and storage as the entity in control of the Site. However, such storage is not such as to impose civil liability on the defenders: see the Act at section 73(6); *McManus* v *City Link Development Company Limited, cit. supra* at [216]. From this he argued that if the pursuer's complaint is that storage of the waste materials cause damage, storage did not itself give rise to civil liability. Putting it another way, unlawful storage is not actionable. Accordingly, the pursuer's key averment was wrong in law and irrelevant.

[23] Turning to Article 6, complaints are made of breaches of section 33 of the Act. Standing the pursuer's own averments regarding exemptions, he submitted that the pursuer's case is irrelevant. Moreover, the pursuer's case is that the defenders "knowingly caused" the waste to be deposited. For that to be so, he argued, one would need "some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case": *Houston* v *Buchanan* 1940 SC (HL) 17 at 39. There were no such averments. Here, there was no suggestion that the defenders told the Company what it would or could do with the waste. There were no averments of directions or an express mandate given by the defenders to the Company. The pursuer's case is irrelevant.

[24] In addition, he submitted that the pursuer's pleadings are entirely lacking in specification in relation to the volume of material that he contends was deposited by the

defenders. The pursuer avers that the defenders deposited material between March 2011 and June 2012 (Article 3). The pursuer then avers that: "As at 26th April 2012 at the latest [the Company] were in breach of the Exemption...Notwithstanding the same [the defenders] continued to deposit the Waste at the [Site]". A similar averment is made at the start of Article 4. However, there are no averments in relation to: (i) why the defenders can have any liability for deposits made before 26 April 2012 (and to the extent that any such case is averred by the pursuer, he argued that it must fail on the weaker alternative rule); and (ii) what volume of waste was deposited by the defenders after this date, when deposits were made, etc. In these circumstances, the averments are entirely lacking in specification to the point that they are irrelevant. In relation to the date of 26 April 2012, the pursuer was only offering to prove a breach from on or after that date. Anything prior to that date was not said to be unlawful. Accordingly, the averments relating to deliveries or the defenders' moment party that date were irrelevant.

[25] Moreover, he submitted that the pursuer's case seems to be that the Exemption was in place regarding the processing of waste carpet and plasterboard, but that it had certain limits which were exceeded. What is entirely absent is any explanation as to why exceeding those limits was causative of loss.

The averments of loss

[26] Turning to the pursuer's averment of alleged losses, Mr Dunlop QC submitted that these are entirely lacking in specification. The pursuer avers that a total of 7,000 tonnes of waste carpet and plasterboard are at the Site. The pursuer only had a bare averment that the Site was damaged, but a large part of the restoration costs were likely to relate to removal of the waste. Mr Dunlop QC queried whether this could amount to "damage". Section 73(6)

was concerned with physical damage; it was not a means to provide a statutory indemnity against removal costs. Furthermore, there are no averments regarding the alleged remedial works required or how the sum of £1,000,000 has been calculated. If Mr Dunlop QC was right that the pursuer could not rely on any conduct prior to 26 April 2012, then this omnibus approach posed further difficulties for the pursuer. The sum sued for represented the total or global restoration costs for all of the waste now on the Site. On the pursuer's figures the total possible contribution by the defenders was no more than about 38% of the waste carpet and less than 8% of the waste plasterboard. If one endeavoured further to allocate this to that period from 26 April 2012 onwards, eg by taking 2/15ths of those totals, then the defenders' total possible contribution which was arguably actionable (if the pursuer's case were otherwise relevant) was less than one percent of the plasterboard and only about 5% of the waste carpet brought onto the Site. Furthermore, the pursuer made no averments in relation to the volume of this material which was deposited by him. These averments are entirely lacking in specification to the point that the action is irrelevant. At the very least, the averments of loss should be excluded from probation.

The issue of prescription

[27] Mr Dunlop QC noted that the action was served on the defenders on 3 March 2017. If there was any obligation incumbent upon the defenders to make payment to the pursuer as a result of fault or breach of duty on the part of the defenders in the period to 2 March 2017, which the defenders denied, any such obligation had prescribed in terms of section 6 of the 1973 Act. There is here no question of a continuing act or default: *Johnston* v *Scottish Ministers* 2006 SCLR 5; *John G Sibbald & Son Limited* v *Douglas Johnston* [2014] CSOH 94. At best for the pursuer, there were individual but repeated acts of deliveries by the defenders.

Any liability in respect of deliveries prior to 3 March 2012 had been extinguished by prescription. All averments in respect of matters before that date should be excluded from probation.

Submissions on behalf of pursuer

[28] Mr Sutherland, who appeared for the pursuer, invited me to repel the defenders' pleas in law.

The statutory issue

[29] He noted that the defenders contend that section 33(1)(a) of the Act does not apply because the Company "enjoyed an exemption relating to the processing of waste carpet and plasterboard". He submitted that this argument misunderstands the effect of regulations 17 and 19 of the 2011 Regulations. In terms of regulation 17, section 33(1) is disapplied in relation to the exempt activities set out in Schedule 1 "Subject to … any conditions or limitations in Schedule 1". Paragraph 17 of Schedule 1 provides that a maximum total quantity of 1,000 tonnes of waste textiles may be stored at any one time and for no longer than 12 months. Accordingly, if those conditions are not adhered to (as he submitted was the case), section 33(1) is not disapplied.

[30] In terms of regulation 19, it is an offence to carry on an exempt activity without first being registered with the appropriate authority. Registration has no effect other than to prevent prosecution of carrying on an exempt activity without being registered to do so. It does not make exempt an activity which is being carried out in breach of the requirements for exemption.

[31] The defenders question the relevancy of the pursuer's averments in article 4 regarding the prosecution of the former directors of the Company. The prosecution stemmed from SEPA's earlier letters and is relevant to the Company having operated in breach of the terms of its exemption during the period at issue in this case, and the fact of the waste having not been removed from the Site.

The approach to questions of specification

[32] Mr Sutherland then made a general submission about the proper approach to be taken to challenges to the specification of a party's pleadings. He submitted that the defenders' pleas that the pursuer's averments lack specification should only be sustained if they do not know the case to be made against them, there is a real risk of prejudice and they will genuinely be taken by surprise at proof. The plea should not be taken where it is directed at factual matters within the defenders' knowledge. (*Hayward* v *The Board of Management for the Royal Infirmary of Edinburgh* 1954 SC 453, LP (Cooper) at 465). The matter must be looked at broadly to ascertain whether fair notice has been given (*McMenemy* v *James Dougal & Sons Ltd* 1960 SLT (Notes) 84). The pursuer has given the defenders fair notice of his case. (As Mr Sutherland subsequently retracted his contention that the defenders' pleadings were lacking in candour, I need not record his submissions to this effect.)

Reply to the defenders' criticisms

[33] Mr Sutherland submitted that, in broad terms, the pursuer's case against the defenders is perfectly clear: in terms of section 33(1) the defenders knowingly permitted controlled waste to be deposited at the pursuer's Site; section 73(6) imposes strict liability for

any damage caused by a breach of section 33(1); there is approximately 12,370 tonnes of waste at the Site; it has caused damage to the Site, offensive odours in the surrounding area and the generation of leachate; it poses a risk to the Site and the environment and requires to be removed; the cost of removing and disposing of that volume of waste and restoring the Site is estimated at £1,000,000.

[34] The requisite knowledge of the defenders may be constructive knowledge; the court may infer that it knowingly permitted waste to be deposited where such deposit was obvious (Burnett-Hall, *Environmental Law* (3rd ed) at paras. 14-176 to 14-177).

[35] He submitted that the pursuer avers circumstances from which it can readily be inferred that the defenders ought to have known that their waste was being deposited in breach of section 33(1). Those circumstances include: the defenders deposited approximately 2,000 tonnes of waste at the Site from March 2011 until June 2012 and it did so notwithstanding that it had "concerns" about the Company (Article 3); only 5 kilograms of Waste left the Site since the Company's operations began (Article 4); the time-limit restriction of the Exemption only allowed the Company to store 1,000 tonnes at any one time and for no longer than 12 months (Article 3); and it would have been obvious to the defenders from any inspection of the Site that the Company was not treating its waste appropriately (Article 6).

[36] The defenders contend that the pursuer's averments regarding the loss he has suffered lacks specification. The defenders rely again on the pursuer having failed to aver the volume of material which it deposited at the Site. However, the pursuer's position is clear: there is approximately 12,000 tonnes of waste at the Site; the defenders were the most significant contributors; the waste is causing damage to the Site and requires to be removed; and the pursuer estimates it will cost £1,000,000 to remove and dispose of the waste. The

pursuer has produced a report by Malcolm Hollis (dated 8 August 2017) which describes the condition of the waste at the Site, the damage it has caused, and the risk it poses to the Site and the environment. The defenders have fair notice of the pursuer's case in this regard.

[37] Mr Sutherland submitted that it was important to note the effect of the Exemption and the effect of registration of the Exemption. Under reference to regulation 17 of the Regulations, he submitted that any disapplication of section 33(1)(a) of the Act was subject to the conditions in Schedule 1 of the Regulations. These conditions include the quantity restriction and the time-limit restriction. Accordingly, if the activity was carried out otherwise than in accordance with these conditions, then regulation 17 was not effective to disapply section 33(1) such as to preclude liability. This meant that section 33(1) was capable of being applied even against the holder of an exemption if the terms of section 33(1) were met. In other words, if the activity complained of was carried out in breach of the statutory controls, then the exemption flies off and the depositor becomes liable. His second point was that the effect of registration was to avoid prosecution but it did not operate as a shield protecting against civil liability.

[38] Mr Sutherland also submitted that SEPA's decision to prosecute the Directors was relevant. The pursuer must show that there was an offence committed under section 33(1) and prove the same component parts that were contained in section 73 of the Act. The starting point was that the quantities of waste on the Site exceeded the quantity restriction for the two kinds of waste referred to (ie carpets and plasterboard). That was a given. The pursuer set this up as a primary fact and civil liability bit after that point in time such that any further deposits onto the Site would constitute an offence . The pursuer then needs to show that the defenders deposited or knowingly caused these waste materials to be deposited after that point in time. That sufficed to impose liability on the defenders. There

were equivalent defences in section 73(6) as were available to a charge under section 33(1). The pursuer's case of knowingly causing or permitting was based on the fact that there was an arrangement in place between the defenders and the Company. It was part of these arrangements that the defenders caused the Company to deposit waste on the Site. When pressed on this point, Mr Sutherland maintained that it was sufficient simply that there were "arrangements" and that he did not require to show anything more or that there was a positive mandate. This was consistent with the principle in environmental law that "the polluter pays". The defenders admitted there were arrangements for delivery of waste to the Site and that was sufficient in the context of waste legislation. In the circumstances, the defenders had knowingly caused or permitted waste to be deposited at the Site in breach of the statutory controls. (Mr Sutherland did not make a submission in reply on the case of *Houston* v *Buchanan* or Lord Jones's observations in *McManus*.)

The averments of loss issue

[39] The sum sued for was based on the pursuer's understanding that approximately 7,000 tonnes of waste required to be removed. The pursuer had taken further advice from Malcolm Hollis following the defenders' production of the schedule of waste quantities having regard to the current costs of disposing of the waste. The current costs assume a disposal cost of £140 per tonne and a transport cost of £85 per hour. On the basis that there is approximately 12,000 tonnes of waste at the Site, the pursuer now reasonably estimates the cost of disposing of the Waste at £2,000,000 (12,369 tonnes * £140/tonne = £1,731,600; plus transport costs). It should be noted that in the afternoon of the debate Mr Sutherland modified his position on the quantum of the pursuer's claim. He explained that the pursuer's case had been based on the fact that the defenders were the most significant

contributor and that, because the waste was all shredded and heaped together, it was no longer possible to identify the defenders' particular contribution but all of the waste had to be removed. He acknowledged that he was unaware of the identity of the other third party users until SEPA had produced the list shortly before the debate. As I understood his position, he ultimately accepted that the extent of the pursuer's loss and their case against the defenders fell to be calculated on a pro rata basis. However, it still depended on the amount of the defenders' deliveries on or after 26 April 2012, and so these matters should be left for proof. However, he did offer to amend to restrict the case against the defenders to a fraction of the restoration costs.

[40] In relation to the defenders' criticisms about whether restoration costs constituted "damage" to the Site, in his submission the Site had been rendered unusable and this sufficed.

The prescription issue

[41] Mr Sutherland noted that the defenders assert that any obligation it might have owed the pursuer prior to 2 March 2012 has prescribed. In doing so, the defenders' argument invites the court to treat each deposit by the defenders as an individual and discrete breach. However, Mr Sutherland submitted that this is an artificial approach, which does not reflect the reality of the defenders' dealings with the Company. The defenders admit that it entered into an arrangement with the Company for the disposal of waste carpet and plasterboard and that it provided waste to the Company for that purpose from March 2011 until it terminated the arrangement in June 2012. It was an ongoing arrangement. While the defenders focused on individual deliveries, in his submission it was important to distinguish between the act of delivery and the cause of that act. He accepted that an

individual act of delivery did not continue but, in this case, the pursuer relied on the cause of each delivery and these were the arrangements which, on the defenders' own averments, continued until June 2012.

[42] In that respect, from the point in time at which the defenders were depositing the waste in breach of section 33(1) until the arrangement was terminated in June 2012 there was a continuing default. Mr Sutherland accepted that the terms of those arrangements will matter but this was all for proof. However, he also accepted that the pursuer did not know the terms of those arrangements. Those arrangements may have included a spectrum of controls. In his submission, the pursuer should be entitled to have those arrangements understood before any issue of prescription could be determined. Accordingly, the pursuer submits that in terms of subsection 11(2) of the 1973 Act, the loss, injury and damage he has suffered is deemed for the purposes of subsection 11(1) to have occurred at the time the default ceased in June 2012.

[43] If the defenders are right about prescription (which the pursuer did not accept), and the focus was on deliveries on or after 3 March 2012, the extent to which it might have a bearing on their liability to the pursuer will depend on when the defenders and the other entities deposited their waste at the Site and in what volumes. That is a matter for proof.

Discussion

The statutory liability issue

The existence of the Exemption is not conclusive

[44] I begin by noting that I do not accept Mr Dunlop QC's submission (at para [21] above) that there can be no breach so long as the Exemption is in place. This, it seems to me, would be to deprive the words "and the deposit is in accordance with the licence" at the end

of section 33(1)(a) of any content. Mr Sutherland's submission that the Exemption is not a shield is correct, to the extent that is does not preclude liability for breach of the statutory controls in circumstances where the conditions of the Exemption (here the quantity and time-limit restrictions) are said not to be complied with.

The basis of liability founded upon

[45] The sole basis of liability the pursuer invokes is that the defenders "knowingly permitted" waste to be deposited on the Site, contrary to section 33(1)(a) of the Act and which brought in train civil liability under section 73(6). In relation to Mr Sutherland's reference to *Burnett-Hall on Environmental Law*, while it is undoubtedly the case that the requisite knowledge for the offence (of knowingly permitting) could be constructive, a proposition Mr Dunlop QC did not contest, this is distinct from the other word in the relevant phrase (of "knowingly permit") and whether the defenders "permitted" the unlawful deposits in the requisite sense. The contravening act, for the purpose of section 33(1) (or, indeed, section 73(6)) of the Act, is that of *depositing* controlled waste on land without the two conditions (noted above, at para [11]) being satisfied. Has the pursuer pled a relevant case that the defenders are liable by reason of breach of the statutory controls? In my view he has failed to do so.

[46] Under reference to the case of *Houston v Buchanan*, Mr Dunlop QC submitted that the phrase "knowingly permitted" necessarily requires some degree of direction or control on the part of the defenders in respect of the activities of the Company on the Site. More recently, and in the same statutory context I am considering, Lord Jones observed in *McManus* v *City Link Development Company Limited* (at para 217) that "a person cannot 'knowingly permit' an act unless that person has power either to permit it or to prohibit it".

I agree with that observation. The necessary element of control or direction referred to in *Houston* was present in that case in the form of the defender providing to his brother a car insured only for specific uses but without restricting his brother's use of that car to those insured uses. In that case, the brother of the defender used the car in discharge of his operation of a farm on behalf of the defender. In other words, in that case the defender's authority or ability to direct his brother's activities was found in the pre-existing arrangements between the two brothers. By contrast, there is simply nothing of that character averred to be present or capable of being inferred from the bare averment of "arrangements" between the defenders and the Company.

[47] Applying Lord Jones' helpful formulation in *McManus*, there are in my view no averments from which it can be inferred that the defenders had power to prohibit what the Company did with the waste the defenders delivered to it.

[48] Whether there is such direction or control or power to prohibit (such that it can be said that the defenders are in a position of unlawfully permitting deposits by the Company to be made) will depend critically on the terms of those arrangements. It is possible to figure contractual arrangements in terms of which the defenders could have directed the Company's control over its operations or that they could have compelled the Company to receive all of the defenders' deliveries, or indeed, that they could have compelled the Company regularly to report to them in respect of its subsequent dealings with or disposal of the defenders' waste. Equally, the arrangements might have been quite different and such as to entitle the Company to decline to receive deliveries or to confer autonomy on the Company as to what it did with any waste. The arrangements might have relieved the defenders of any liability to third parties in respect of the Company's dealings with the defenders' waste. The particular terms of the arrangements critically inform the question of

whether the relationship between the Company and the defenders was such that the fact of the defenders' deliveries of waste to the Company from time to time could nonetheless amount to the defenders knowingly permitting the Company to deposit waste in a manner that contravenes section 33(1)(a). In my view, however, the bare averment of subsisting but unspecified "arrangements", without more, affords no basis to establish the requisite control or direction.

[49] I am fortified in this view by observations in the well-known English authorities (not cited to me) concerning the phrase "knowingly permit" by the House of Lords in *Alphacell Ltd* v *Woodward* [1972] AC 824 at 834 (*per* Lord Wilberforce) and at 849 (*per* Lord Salmon), by the Court of Appeal in *Walker and Son (Hauliers) Limited* v *Environment Agency* [2014] EWCA Crim 100; [2014] Env L R 22 at paragraph 28 (*per* Simon J), and more recently by Nichol J in *Stone* v *Environment Agency* [2018] EWHC 994 (Admin); [2018] Env L R 32 at paragraphs 45 to 47. Although the House of Lords in *Alphacell Ltd* was commenting on an offence under section 2(1) of the Rivers (Prevention of Pollution) Act 1951 (the offence a person commits if he "… knowingly permits" pollutants to enter a stream), the observations that "knowingly permitting" involved "a failure to prevent" (at page 834) or that the offence created included "the type of case in which a man knows that contaminated effluent is escaping over his land into a river and *does nothing at all to prevent it*" (at page 849, *per* Lord Salmon, emphasis added) remain apposite. In *Walker and Son (Hauliers) Limited* the Court of Appeal approved the jury direction which included the question of whether the defendant "permitted" the waste operations, where the word "permit" was glossed as "allow or *fail to prevent*" (emphasis added): see paragraph 17.

[50] The facts in the more recent case of *Stone* share similarities with the instant case. The second defendant was the owner of heritable property leased to the third defendant, which

operated a waste business recycling mattresses. The tenant company ceased trading but did not clear the property of the waste mattresses. On appeal from its conviction for "knowingly permitting" a waste operation to continue at the property (ie once it was aware it's tenant had ceased trading without removing the waste mattresses), the second defendant (ie the owner) argued that a positive act was required in order to be guilty of this offence rather than simple knowledge. After reviewing the English authorities, Nichol J rejected the argument that the prosecution required to prove a positive act. He then commented on the terms of the question the Magistrates referred to him, as follows:

> "that, it seems to me is the essential issue posed in [the Magistrates'] second question. That question concludes 'but [the prosecution must prove that the defendant] simply knew such a waste operation (as defined) was taking place'. That way of phrasing it does not quite capture the 'knowingly permitting' alternative. As the House of Lords and Court of Appeal has said, if this alternative is charged it must be proved that at least the Defendant *failed to prevent the waste operation from occurring*." (Emphasis added.)

It respectfully seems to me that Lord Jones' statement in *McManus* that "a person cannot 'knowingly permit' an act unless that person has power either to permit it or to prohibit it" is wholly consistent with the English tract of authorities just referred to.

[51] The approach the pursuer advocated came close to suggesting that knowledge of the growing pile of waste at the Site was sufficient to impute liability. However, in the context of a case based on "knowingly permitting", on the authorities reviewed, the person fixed with such knowledge must nonetheless be in a position to be *permitting* the unlawful deposits. As already noted in *Houston*, the requisite degree of control arose from the prior relationship between the defender and the driver of the car. In *Stone*, the second defendant was the owner of the property and further, once its tenant ceased trading, the owner could also occupy and control what occurred on the property. In that circumstance, the owner would come within Lord Salmon's observations in *Alphacell Ltd* (quoted at para [49], above),

of the owner of land "doing nothing". By contrast, however, a neighbouring proprietor watching the effluent escaping from his neighbour's property, although fully cognizant of that unlawful and polluting escape, would not be in breach of the statutory controls if he stood by and did nothing. He is neither owner nor occupier and there is no other factor to put him in the position of "permitting" the escape of effluent of which (in this example) he is aware. This reinforces the need to identify some factor by which a person subject to the liability of "knowingly permitting" in section 33(1)(a) of the Act (ie the defenders) could be said to have been in a position to permit or prevent the unlawful deposits. As the cases show, this could arise from a prior relationship (*Houston*) or from the rights *qua* owner or occupier of the land concerned (*Stone*). It could also potentially arise from some contractual nexus but, in my view, one would require to aver a term instructing the requisite degree of control or power to prohibit arising from those arrangements. Returning to the pursuer's averments, a bare averment of "arrangements" between the defenders and the Company are in my view insufficient to set out a relevant case of "knowingly permitting" the complained of deposits. This is consistent with "the polluter pays" principle Mr Sutherland invoked. On the example just considered, the non-intervening neighbouring proprietor is not the polluter. Similarly, for the reasons I have given, the pursuer has no averments to instruct the defenders as polluters, ie that they knowingly caused or permitted the deposits made by the Company.

[52] Accordingly, the pursuer has failed to aver a relevant case that the defenders "knowingly permitted" unlawful deposits. Contrary to Mr Sutherland's submissions about specification, the deficiency in the pursuer's pleadings is not a want of specification but is a more fundamental failure to plead a relevant case.

[53] There is a further difficulty for the pursuer arising from the disjunction between the acts that create the statutory offence (knowingly permitting controlled waste to be *deposited*) and his averments, which essentially focus on the *storage* of the waste "in breach of statutory control" (*per* Article 5, quoted at para [19(4)], above). The pursuer's loss is said to flow from the accumulation of excess waste on the Site over time and the financial cost to him of removing that waste and restoring the Site. The essential basis of the pursuer's case concerns the Company's *storage* of the waste on Site. This is a distinct act or omission from any "depositing" by the defenders (even assuming that the activity of delivering a load of waste to the Company in charge of the Site may be equiperated with the defenders depositing that waste). The averments do not disclose a clear relevant causal link between any act of the defenders and the damage in respect of which the pursuers assert they sustained a loss. On this matter, however, had I found that the pursuer had otherwise pled a relevant case, I would have been minded to afford him an opportunity to amend.

[54] For completeness I should note that in light of the observations by the Court of Appeal in *Walker and Son (Hauliers) Ltd*, to the effect that the prosecution did not need to prove the defendant's knowledge that the conditions of the exemption or licence were breached, I am not persuaded that the pursuer's averments to instruct the defenders' constructive knowledge of the Company's breach of the quantity or time-limit restrictions are relevant. However, in the absence of argument on this point, I express no concluded view.

The prescription issue

[55] As noted in paragraph [17(7)] above, in order to meet the defenders' plea of prescription the pursuer invokes section 11(2) of the 1973 Act. Mr Sutherland fairly accepted

in submissions that the only factor he relied upon was the existence of "arrangements" between the defenders and the Company. However, the terms of these arrangements are unknown. No recovery of any documentation to support this averment was sought by the pursuer and, accordingly, this amounted to no more than a bare averment without any further detail.

[56] Parties were agreed that there was relatively little case law on section 11(2) of the 1973 Act. Reference was made to only two cases, namely *Johnston* v *The Scottish Ministers* and *John G Sibbald & Son Ltd* v *Douglas Johnston*. The first case concerned the promulgation of a statutory order which the Lord Ordinary (Lady Dorrian) regarded (in my view correctly) as a "one-off" act (see para 17). In doing so, she rejected the argument that "maintenance, prosecution or enforcement" of the order impugned constituted a continuing act as these activities were of a different character than the act of promulgation. In the second case, too, the Lord Ordinary (Lord Tyre) held that the contractual duties assumed by a professional firm of engineers to design a bridge were completed acts or defaults, not continuing ones (see para 8).

[57] In approaching a case under section 11(2) of the 1973 Act, the first step is to identify the act, neglect or default that is founded upon by the pursuer and from which the loss, injury or damage sued for is said to flow; and, after this is done, the next step is to determine whether or not the act, neglect or default is a continuing one: *per* Lady Dorrian in *Johnston* v *Scottish Ministers* at paragraph 17 and *per* Lord Tyre in *John G Sibbald & Son Limited* v *Douglas Johnston* at paragraph 8. As noted above, the only factor Mr Sutherland invoked was the fact of the "arrangements" between the defenders and the Company and that, for the purpose of the second step, he relied on the fact that these arrangements subsisted until about June 2012.

[58] Mr Dunlop QC argued that for the purposes of prescription each delivery by the defenders was a separate and completed act. On this approach any obligation in respect of deliveries prior to 3 March 2012 had been extinguished. Mr Sutherland sought to elide this, by arguing that one looked at the arrangements enabling those deliveries as the relevant act and which continued until June 2012. I have no hesitation in preferring the submissions for the defenders. Implicit in Mr Sutherland's submission is the proposition that the defenders' exercise of rights under unspecified "arrangements" with a third party (the Company), and which arrangements are not suggested to be irregular or contrary to public policy, constitute the wrongful act, default or omission giving rise to the pursuer's claim. Even assuming that to be the case, the pursuer's approach conflates the acts said to constitute the default (ie the deliveries of waste to the Site) with the arrangements under which those deliveries were made. It is the same kind of conflation Lady Dorrian rejected in *John G Sibbald & Son Limited* v *Douglas Johnston*. There was nothing to inform the court about the parties' respective rights under those arrangements. The terms of those arrangements are likely to be material to the question of whether there is a "continuing" act or default, eg whether those arrangements required the defenders to provide a minimum quantity of waste materials or simply permitted them to deliver waste materials to the Company as and when it wished; whether the arrangements regulated the frequency or amount of any deliveries and so on. There simply is no relevant averment that the act or default continued in a relevant sense, rather than being a series of individual deliveries completed on the day a load was delivered.

[59] In my view, the bare averment of the subsistence of those unspecified arrangements cannot, without more, confer on the individual acts of deliveries the requisite quality of a continuing act such as to bring section 11(2) into play. The pursuer's averments are not

sufficient to instruct a case of some continuing act or default for the purposes of section 11(2) of the 1973 Act.

[60] It follows that the defenders' plea of prescription should be sustained. Averments of any obligations arising prior to 3 March 2012 fall to be excluded. Any period of breach of duty on the part of the defenders would be confined to the relatively short periods from 3 March to April 2012 in respect of the plasterboard and from 3 March to June 2012 in respect of the waste carpet.

The averments of loss issue

[61] The defenders' criticisms of the pursuer's averments of loss had two aspects. As noted above, the pursuer seeks to recover the whole restoration costs from the defenders. They do so on the basis that, as averred, the defenders were the biggest contributors of waste to the Site. On this omnibus approach, the pursuer does not differentiate between the deliveries made by the defenders and those by the 37 other users of the Site at the relevant time. (Mr Sutherland candidly acknowledged that the pursuer was not aware of the identity of these other entities until the beginning of November, some three weeks or so before the debate.) Separately, the pursuer does not differentiate between the waste delivered prior to any breach by the Company of the Exemption (and which on a conventional approach would not give rise to any claim for loss because there was at that point in time no default or breach of section 33(1)(a)) and deliveries after the point in time at which the defenders may be said to be in default (ie on the pursuer's averments, from on or after 26 April 2012).

[62] In the course of his reply, Mr Sutherland acknowledged the force of these criticisms and offered to amend the pursuer's conclusion, although he did not propose any particular form of words or move any minute of amendment. Had I otherwise found the pursuer's

case to be relevant, I would not have been inclined to dismiss the pursuer's case on this ground alone. This would not be consistent with the practice and ethos of the Commercial Court which is to resolve the real issues in dispute between the parties. At the very least, I would have permitted the pursuer an opportunity to seek leave to amend and to consider the terms of any amendment. I would have done so, however, without prejudice to any ground of opposition by the defenders. This is because this action began life in the sheriff court before being remitted to the commercial roll in the Court of Session. The parties appear to have availed themselves of several opportunities to adjust their pleadings both in the sheriff court and in the Court of Session. That circumstance may, together with others, inform any discretion the court would have exercised in respect of any amendment proposed by the pursuer.

Decision

[63] It follows that the defenders' challenge succeeds and the pursuer's action falls to be dismissed. I reserve all question of expenses meantime.