OUTER HOUSE, COURT OF SESSION

[2021] CSOH 127

CA16/18

OPINION OF LORD BRAID

In the cause

LORETTO HOUSING ASSOCIATION LIMITED

Pursuer

against

(FIRST) CRUDEN BUILDING & RENEWALS LIMITED; (SECOND) CAMERON + ROSS LIMITED

Defenders

and

(FIRST) THE FORMER FIRM OF COOPER CROMAR, AND TOM CROMAR, DAVID GORDON DOOL, AND ALAN WATSON STARK AS THE FORMER PARTNERS THEREOF; (SECOND) SHEILA BUNTON, FORMERLY TRADING AS JOHN ARNOTT ASSOCIATES; (THIRD) BRIAN MICHAEL BROWN; (FOURTH) JAMES SHAW

Third Parties

First Defender: Howie QC; TC Young LLP
Second Third Party: Manson; Anderson Strathern LLP

21 December 2021

Introduction

[1] The issue in this case is a short one: does a person who settles a court action, obtaining decree of absolvitor in their favour, have a right of relief against any joint wrongdoer under section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland)

Act 1940, failing which at common law? It might be thought that the latter question, at least, had been authoritatively decided in the negative by *National Coal Board* v *Thomson 1959 SC 353*. However, the first defender argues that *Thomson* can be distinguished; alternatively, that it was wrongly decided.

Background

[2] Until August 2021, this was an action by Loretto Housing Association Ltd, in which it sought damages jointly and severally from Cruden Building & Renewals Ltd, the main contractor, and Cameron + Ross Ltd, the structural engineers, in respect of building works carried out at 243 Duke Street, Glasgow. They are, respectively, the first and second defenders. Loretto averred, in relation to Cruden, that construction work had been carried out defectively in a number of respects, in breach of the contract between them. Cruden, while denying liability (which, on the pleadings it continues to do) convened as a third party (among others) Sheila Bunton, trading as John Arnott Associates, the clerk of works on the building contract. She is the second third party. Cruden averred that any loss sustained by Loretto had been caused or materially contributed to by Ms Bunton's breach of her separate contract with Loretto, and in the event that Cruden was found liable to Loretto, it averred that it was entitled to a right of relief against Ms Bunton in terms of section 3(2) of the 1940 Act.

[3] The action was due to go to proof in August 2021. Shortly before the proof was due to begin, Cruden reached a settlement with Loretto. The terms of that settlement have not as yet been proved or admitted but there is no reason to doubt Cruden's position, which is that it paid the sum of £971,250 to Loretto in full and final settlement of Loretto's claim against it. Subsequently a joint minute was lodged as between Loretto and Cruden in terms of which

Cruden was assoilzied from the conclusions of the summons. Settlement was also reached with Cameron + Ross, but the amount paid by it is irrelevant for present purposes. That defender, too, has been assoilzied.

[4] However, settlement was not reached with Ms Bunton. Cruden wishes to recover from her a proportion of the sum it paid to Loretto. It has amended its pleadings to make reference to the settlement. It now avers that through the use of its money, Ms Bunton has been relieved of her obligations to Loretto, for which, if sued by the pursuer, she might have been found liable along with Cruden. Its primary case is that it should recover such fraction of the sum of £971,250 as is just, in terms of section 3(2) of the 1940 Act. However, it has also introduced an alternative case, averring that if it is not entitled to a contribution under the 1940 Act, it has a common law right of relief, in which event it would be entitled to recover on a *pro rata*, that is a *per capita* basis, which would be one third of the sum paid, there being three joint wrongdoers. Ms Bunton's position is that there is no right of relief on either basis.

[5] The case called before me for debate on the relevancy and competency of Cruden's case against Ms Bunton, both in relation to the statutory case, and the common law one. I will deal with each in turn. Henceforth in this opinion, for simplicity, I will refer to Cruden as the defender, and to Ms Bunton as the third party.

The section 3 case

[6] Section 3 of the 1940 Act is in the following terms:

> "**3.— Contribution among joint wrongdoers.**
>
> (1) Where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses, they shall be liable inter se to contribute

> to such damages or expenses in such proportions as the jury or the court, as the case may be, may deem just:
>
> Provided that nothing in this subsection shall affect the right of the person to whom such damages or expenses have been awarded to obtain a joint and several decree therefor against the persons so found liable.
>
> (2) Where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid, he shall be entitled to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded, such contribution, if any, as the court may deem just.
>
> (3) Nothing in this section shall—
>
> (a) apply to any action in respect of loss or damage suffered before the commencement of this Act; or
> (b) affect any contractual or other right of relief or indemnity or render enforceable any agreement for indemnity which could not have been enforced if this section had not been enacted."

[7] Section 3(1) deals with the situation where a pursuer sues two or more joint delinquents, or wrongdoers, who are found jointly and severally liable by the court. It enables the court to find those persons liable among themselves in such proportions as the court deems just. Section 3(2) deals with the situation in the present case, where the pursuer does not sue all the wrongdoers in its action, and enables a wrongdoer who has been found liable to recover from any other person who might have been sued by the pursuer such contribution as the court may deem just.

[8] It is not disputed that the defender was entitled to convene the third party to the action, asserting a right of relief under section 3(2), before decree had been granted against it; nor, for that matter is it disputed that the defender and third party might have been found jointly and severally liable to the pursuer for breaches of separate contractual duties, owed under different contracts: *Grunwald* v *Hughes* 1965 SLT 209. The controversy arises over

whether the defender can continue to assert a right of relief following the granting of decree of absolvitor in its favour.

Third party's submissions

[9] The central plank of the submission of counsel for the third party was that an essential prerequisite of any right to relief under section 3(2) was that there should be a decree against the person asserting the right of relief, finding it liable to the injured party. That was plain from the requirement in subsection (2) that the person seeking a right of relief be found liable in any such action as aforesaid, but if any authority was required it could be found in *Farstad Supply AS* v *Enviroco Ltd* 2008 S.L.T. 703 per Lord Clarke at paragraphs 10-12 and Lord Mance at paragraph 53; McBryde, *The Law of Contract in Scotland*, paragraph 11.12; and *Gloag & Henderson*, paragraph 4.25. *Comex Houlder Diving Ltd* v *Colne Fishing Co Ltd* 1987 SC (HL) 85 had determined that the decree could be one giving effect to an agreed settlement, but that there must be a decree of a Scottish court. Here, the defender had not been found liable; the effect of the decree of absolvitor was quite the reverse.

Defender's submissions

[10] Senior counsel for the defender submitted that *Comex Houlder* illustrated that the phrase "found liable" had to be read in a less than obvious way, so as to encompass a person in whose favour decree of absolvitor had been granted following an agreed settlement. A decree which merely gave effect to an agreed settlement was empty of content, and a façade; no less so was a decree of absolvitor following an agreed settlement. The degree of "finding" by the court in both situations (effectively, none) was the same. This construction avoided the unsatisfactory result that whether a co-delinquent's contribution was to be such

amount as was just, or *per capita*, should turn on whether or not a defender elected to have decree pass against it or not (which it might have cogent reasons for wishing to avoid).

Decision

[11] The submission that it is less than obvious to hold that a decree of absolvitor is a decree finding a party liable, is something of an understatement. While I entirely take the point made by senior counsel for the defender that *Comex Houlder* significantly dilutes the significance of the phrase "found liable", nonetheless, a decree of absolvitor is not a decree finding a party liable but has precisely the opposite effect. The opening words of section 3(2) make clear that the party relying on that provision should have paid the sum specified in the decree – the sum "in which he has been found liable". That requirement cannot be satisfied in the case of a decree of absolvitor, which by definition, contains no reference to any sum, let alone does it find the defender liable to pay any sum. None of the authorities cited support the defender's argument. Not only can the defender not show that it does not satisfy the requirements of section 3(2) but on its averments it will never be able to do so, decree of absolvitor having been granted in its favour.

[12] Accordingly, the defender's case against the third party, insofar as it is founded upon section 3(2), is neither relevant nor competent.

The common law case

Submissions for the third party

[13] Counsel for the third party did not dispute that a common law right to relief existed in certain circumstances. That much was made clear by section 3(3) of the 1940 Act. However, the case of *National Coal Board* v *Thomson*, above, had authoritatively decided that

no right of relief was available where the party seeking a contribution had settled a claim without decree passing against it. That case could not meaningfully be distinguished from the present. Further, while one joint and several wrongdoer could recover from another, the decree of absolvitor here had the effect that the defender was not, and could never be, such a wrongdoer. The court had found it had done no wrong. There was no basis for it to recover a contribution. Although *Thomson* had been criticised, that was at least partly on the basis that it had the effect of encouraging a defender to fight a case to the death, but the need for that had been removed by *Comex Houlder*.

Submissions for the defender

[14] Senior counsel for the defender submitted that the common law was clear, namely that where one of two or more wrongdoers who were jointly and severally liable to the injured party settled a claim in excess of its *pro rata* or *per capita* share, that party was entitled to recover the excess from the other(s): Stair, *Institutions*, Book 1, Title viii, paragraph 9. A decree against the person asserting the right of relief was not required; the right to relief arose as a function of the law of unjust enrichment (formerly recompense). In support of this submission, senior counsel referred to the speech of Lord Watson in *Palmer* v *Wick and Pulteneytown Shipping Company* (1894) 21 R. (H.L.) 39 at page 44 where he referred to Kames and Bankton, and at page 45. It was the use of the claimant's money to relieve the other co-obligants or co-delinquents of their obligation to make payment, that gave rise to the right of relief, rather than the fact of decree having passed. The Lord Chancellor in *Palmer* had envisaged a decree or bond being sufficient to give rise to a right of relief. All that was required was that an illiquid claim become a liquid one, as could be achieved either by a decree or by contract; here, not a bond, but the settlement agreement between Cruden and

Loretto. The position at common law prior to *Thomson* was that a decree was not a *sine qua non* for the existence of a right of relief. The 1940 Act could not and did not remove the common law right. The reasoning of Lord Strachan in *Thomson* was to be preferred to that of the majority. The reasons given by the majority were unimpressive, for example the suggestion by the Lord Justice Clerk at page 364 that a settlement might not be genuine: that could not be said to be a real concern in a case which had been litigated almost to the point of proof, as the present had been, with all sides represented by counsel. A decree of absolvitor did not amount to a finding that the defender was not liable to the pursuer. *Thomson* had been the subject of some criticism, eg by McBryde at paragraph 11.-9, fn 55, where it was described as unfortunate; and two Inner House cases (referred to by the Lord Ordinary in *Comex* at page 92) had suggested that it might need to be revisited. *Thomson* could in any event be distinguished, on the basis that the payment there was regarded as a voluntary one, made before proceedings had been raised; whereas here, it was made pursuant to a binding settlement agreement to settle an ongoing litigation, which had the effect of liquidating the debt.

Decision

[15] In some respects the law may be thought to be in an unsatisfactory state, in that the defender who consents to a decree passing against it for an agreed sum will have a right of relief; whereas one who reaches the same settlement but who pays it to the injured party prior to decree, thus obtaining decree of absolvitor, will not. That may be perceived to have no basis in logic and to be contrary to the principle first enunciated in *Stair*. Nonetheless it has the advantage of certainty, in that defenders know that to preserve a right of relief a decree must be granted; and recovery will always be of such amount as is just. The position

contended for by the defender would also lead to an unsatisfactory state of affairs, since, if correct, the basis of recovery from any joint wrong-doers would vary according to whether decree was obtained (in which case the recovery would be of such amount as the court deemed just) or not (when recovery would be *pro rata*). A defender which bore a high share of blame could recover more than a fair share by opting for an extra-judicial settlement. It does not seem equitable that the fate of the joint wrong-doer from whom relief is to be sought should hinge on whether or not the defender in the original action chooses to have a decree pass against it.

[16] So, *Thomson* may or may not have been wrongly decided. Professor McBryde does not elaborate on why he considers it "unfortunate". It is true that in two Inner House cases the view was expressed in passing that it may have to be reconsidered one day, but that hardly amounts to trenchant criticism. But whether it is an unsatisfactory decision or not, I am bound by it. It is not open to me to prefer the dissenting opinion of Lord Strachan, strongly founded upon by senior counsel for the defender. The only question is whether it can be distinguished. The question addressed and answered in *Thomson* was whether a party seeking relief must be armed with a decree, or its equivalent, against it, the Inner House holding that it must. By equivalent was meant a bond or contract between or among the co-delinquents. In no way can a settlement agreement to which the third party was not party be regarded as the equivalent of a decree. As in the context of a claim under section 3(2), a decree of absolvitor will not do. There is no valid basis for distinguishing the facts in *Thomson* from those in the present case, since an extrajudicial settlement is just that, whether it is reached before or after proceedings have been raised. In neither case does a decree of payment pass. Indeed, as counsel for the third party submitted, on one view the defender here is in a weaker position than the pursuer in *Thomson* since there is a court

finding to the effect that it is not liable. It is nothing to the point that a formal settlement agreement between the pursuer and defender might have been reached. In principle, that is no different from any other agreement to resolve a disputed claim.

[17] Accordingly, the defender's case at common law is also irrelevant and incompetent.

Disposal

[18] I will sustain the (second) third party's first and second pleas in law, and dismiss the (first) defender's action directed against that third party. As requested, I will reserve all questions of expenses.