OUTER HOUSE, COURT OF SESSION

[2023] CSOH 43

A95/14

OPINION OF LADY CARMICHAEL

In the cause

THOMAS CHALMERS AND ANOTHER

Pursuers

against

DIAGEO SCOTLAND LTD

Defenders

Pursuers: Moynihan KC, Nicholson-White; Balfour and Manson LLP
Defenders: Cormack KC (sol adv), Turner; Pinsent Masons LLP

30 June 2023

Introduction

[1] The pursuers, Mr and Mrs Chalmers, own and live in a house which is part of the Woodlea Park development in Bonnybridge. Their house lies approximately 350 metres east north east of bonded warehouses owned and operated by the defenders, Diageo. Whisky is matured in casks in the warehouses. During maturation ethanol leaves the casks. Mr and Mrs Chalmers claim that ethanol vapour (sometimes called "the angel's share") escapes into the surrounding atmosphere and encourages the germination, growth and development of a fungus which I will refer to as *Baudoinia*. During the life of this action, the taxonomy relating to the fungus has changed. Between 2007 and 2016 the genus *Baudoinia*

was regarded as having a single species, *Baudoinia compniacensis*, which included a number of variants or ecotypes. Since 2016 five variants have been classified as species, rather than ecotypes. Nothing turns on that for the purpose of the procedure roll debate. The change in taxonomy formed part of the background to a motion for expenses of a discharged proof and of an amendment process which I deal with below.

[2] Mr and Mrs Chalmers aver that the emission of ethanol vapour from Diageo's bonded warehouses amounts to a nuisance. The say their house is affected by black sooty deposits or staining caused by *Baudoinia*.

[3] The action has a lengthy procedural history. In March 2017, after debate, Lord Ericht found that the pursuers' case on liability was relevant, and gave them an opportunity to amend to remedy defects of specification in their averments on loss: *Chalmers* v *Diageo Scotland* [2017] CSOH 36. After amendment the defenders remained dissatisfied as to the relevancy and specification of the pursuers' pleadings in relation to quantum. Lord Tyre heard a further debate on the procedure roll in 2019. He allowed proof before answer: *Chalmers* v *Diageo Scotland* 2019 SLT 1184. The defenders reclaimed, then withdrew their reclaiming motion. A proof was fixed for 2 February 2022, which was discharged on the unopposed motion of the defenders, and a new 16 day diet set for 13 September 2022 and the following days.

[4] In June 2022 the pursuers intimated a minute of amendment. It dealt with the change in taxonomy to which I have referred. The pleadings before amendment included the following:

> "Ethanol vapour is released from the bonded warehouses and is carried by the prevailing wind onto the pursuers' property. This has caused the exterior of the pursuers' house and some of their moveable property, including a car, to be discoloured by an unsightly black fungus. The black fungus is *Baudoinia compniacensis*."

[5] The minute of amendment sought to delete those averments from and including the words "unsightly black fungus" and to substitute:

> "black, sooty deposits or staining. These deposits have spread into the roof space of the pursuer's house. These deposits have also formed on trees and structures (including lampposts) downwind from the bonded warehouses and on plant pots, trampoline, a playhouse and structures in the pursuers' garden. These deposits are caused by *Baudoinia*. *Baudoinia* is a pioneer organism. Its germination and growth having been stimulated by ethanol it can inhabit surfaces that are hostile to biological colonisation. Once established its presence raises the water retention capacity of the surface permitting less tolerant organisms, including other fungi and fungus eating arthropods, to become established. Over time, as the community of organisms develops, the other organisms can swallow up the founding population of *Baudoinia*."

It sought also to add averments about testing of samples taken at various dates up to 31 March 2022. The defenders opposed receipt of the minute of amendment, saying that it would necessitate discharge of the proof. The Lord Ordinary allowed the Minute of Amendment to be received on 13 June 2022 with time for answers. The next interlocutor, of 29 June 2022, narrates that the Lord Ordinary refused "the defenders' motion to refuse the pursuer's minute of amendment", and discharged the proof, reserving the expenses of the discharge.

[6] On 8 February 2023 I heard an opposed motion for amendment in terms of the minute of amendment and answers as adjusted. I rejected the defenders' submission that the amendment was of such a radical nature and at such an advanced stage of proceedings that it should not be permitted at all. I allowed the record to be amended, and reserved questions of expenses arising from the amendment procedure and the discharged proof, on which I had been addressed. On the defenders' motion I appointed the cause to the procedure roll. In May 2023 I heard the debate on the procedure roll, and was again addressed in relation to matters of expenses.

Submissions

Defenders

[7] The action should be dismissed. Alternatively, I should exclude particular passages of averments from probation because they were lacking in specification. A complaint about the use of a plan in the body of the record was not advanced in oral submission, although it had featured in the defenders' note of arguments.

[8] Whether an alleged intrusion on the enjoyment of property was actionable in nuisance depended on the circumstances: Gloag & Henderson, *The Law of Scotland* (14th Ed) paragraph 28.08. The court required to balance the freedom of a proprietor to use his property as he pleased, and his duty not to inflict material loss or inconvenience on adjoining proprietors or property: *Watt* v *Jamieson* 1954 SC 56 at p57-58. What was more than tolerable depended on considerations of fact and degree. The interference must be substantial, in the sense of exceeding a minimum level of seriousness to justify the law's intervention: *Fearn* v *Board of Trustees of the Tate Gallery* [2023] UKSC 4, paragraph 23. What was a material or substantial interference was not judged by what the pursuers, subjectively, found annoying or inconvenient, but by the standards of an ordinary or average person in their position: *Arrott* v *Whyte* (1826) 4 Murr 149, page 158; *Fearn* paragraph 23. The effects complained of must be caused by the fault of the defender: W J Stewart & D Brodie, *Reparation: Liability for Delict*, Vol 1, A28-012. The wrong must at least have contributed materially to the exacerbation of an existing situation: *Simmons* v *British Steel Plc* 2004 SC (HL) 94. Damages were compensatory, so it was necessary to consider what the position would have been absent the alleged nuisance.

[9] In the light of those authorities, the pursuers' case was irrelevant, or at least lacking in specification in material respects. The pursuers' case had been that ethanol vapour in the atmosphere caused the deposit of black fungus on their house and other property. On the previous pleadings, the presence of *Baudoinia* was essential to their claim based in nuisance. They now averred that *Baudoinia* was the basis for a claim in nuisance, possibly even if no *Baudoinia* were present at all. The only sensible reading of the averments in Article 4 of Condescendence, including those relating to *Baudoinia* as a pioneer organism was that the deposits or staining were not *Baudoinia,* or not entirely *Baudoinia*. It was unclear whether the pursuers were offering to prove that a fungus, or any particular fungus, was involved at all. That was not an academic complaint, as the defenders needed to know what type of expert to instruct. At some points in the pleadings, however, the pursuers still referred to "black fungus" rather than "deposits or staining"

[10] The pursuers made no averments as to what the position would have been absent the alleged nuisance, but instead averred the presence of: "black, sooty deposits or staining more substantial than commonly encountered on damp surfaces of many kinds". There was therefore no basis on which the court could determine that the nuisance was substantial, that it was more than tolerable or that the pursuers had suffered loss.

Pursuers

[11] The case was a simple one. Ethanol vapour was emitted from Diageo's premises. It caused the germination and development of a fungus called *Baudoinia* that caused discolouration to the pursuers' property. There was no need to plead a baseline level of discolouration. What was more than tolerable was essentially a jury question: *Arrott*, pages 158-159; *Fearn*, paragraphs 106-108. The defenders were able to discern what the case

against them was and to respond to it. The defenders pled that the blackening was indistinguishable from that found in a wide range of other locations. The pursuers' averments that the staining was more substantial than that commonly encountered where *Baudoinia* was absent was a response to that.

[12] The pursuers' case was that testing of samples had consistently shown that *Baudoinia* was present in those samples: pages 13-15 of the Closed Record. The pursuers required to prove the presence of *Baudoinia*. There were four questions essential to their case:

(i) whether *Baudoinia* was present;

(ii) whether its presence was caused by ethanol;

(iii) whether the ethanol came from Diageo's premises; and

(iv) whether the germination and stimulation of *Baudoinia* caused by the ethanol caused the discolouration to the pursuers' property.

[13] It was immaterial whether the discolouration was itself the fungus, or was caused by the fungus. The point was that but for the presence of *Baudoinia* the black staining would not be there. The pursuers had disclosed the expert reports on which their pleadings were based, and there was no basis on which it could be said that the defenders did not know the nature of the case they had to meet.

Decision

Relevancy and specification

[14] The pursuers' case is that their property has been and continues to be damaged by black deposits or staining caused by *Baudoinia,* and that *Baudoinia* growth is promoted by ethanol vapour from the defenders' premises. The pursuers cannot succeed unless they prove that the black deposits or staining are caused by fungus of the genus *Baudoinia*.

Without colonisation with *Baudoinia* as the cause of the deposits or staining, the pursuers do not have a case in nuisance.

[15] Article 5 includes averments about the results of testing:

> "Samples of black sooty deposits or staining taken in July 2012 from the pursuers' house and other structures in the vicinity were found on laboratory analysis to contain *Baudoinia*. Using the terminology common at that time, the lab results in 2012 reported a number of 'ecotypes' including 'Scotland' and 'Continental'. Given the shortcomings of The Health Protection Scotland investigation the defenders were afforded an opportunity to participate in the sampling carried out on behalf of the pursuers for the purposes of the present action. The parties agreed jointly to take samples of the black fungus. Samples were taken on 12th February 2013 by Dr Summerbell of Sporometrics in the presence of a representative of the defenders' solicitors and a mycologist instructed by the defenders. The defenders were provided with half of each sample for testing by them. The pursuers obtained a report dated 11 December 2013 from Drs. Scott and Summerbell. This was disclosed to the defenders in July 2015. The lab results for the 2013 samples (appended at page 61 of that report) confirmed the presence of *Baudoinia*. Using the terminology common at that time, the 2013 lab results reported a number of 'ecotypes' including 'Panamerica' and 'Scotland'. Since 2016 the findings in 2012 and 2013 would be reported as the *Baudoinia* species: 'panamericana'; 'caledoniensis' for 'Scotland'; and 'companiacensis' for 'Continental'. The defenders have not disclosed to the pursuers their findings from the 2013 samples. It is understood that the defenders lost those samples. Further samples were taken on a shared basis in July 2021. The pursuers have obtained a report from Drs Scott and Summerbell dated 27 April 2022. Examination of the 2021 samples is reported using current terminology. The visible blackening in the samples was caused by ethanol-induced vegetative proliferation of *Baudoinia*. The July 2021 samples were taken on the pursuers' behalf by Dr Taylor, mycologist. On 31 March 2022, Dr Taylor took tree branch specimens from the woods between the defenders' bonded warehouses and the Woodlea estate. *Baudoinia* was present in all samples obtained by Dr Taylor. She found no source of ethanol in the vicinity other than the defenders' bonded warehouses."

The pursuers offer to prove that *Baudoinia* was actually present in the samples taken from the property and from property nearby. That is subject to a possible exception, at least so far as the use of language in the pleadings is concerned, in relation to the 2021 samples, where what is averred is that that the blackening in the samples was caused by ethanol-induced vegetative proliferation of *Baudoinia*. I say at least so far as the use of language in the pleadings is concerned, because Mr Moynihan referred in submissions to a report which

appeared to show that the pursuers' witnesses had discovered *Baudoinia* in samples taken in 2021. For the purposes of the debate, however, I must confine myself to the terms of the pleadings. It is clear, even without reference to the pleadings about the testing of samples, that the growth of *Baudoinia*, causing deposits or staining, is central to the pursuers' case. I reject the defenders' contention that the pursuers' case is irrelevant because of the pleadings introduced, in particular to Article 4, by amendment. There is no lack of clarity as to the case that the defenders have to answer.

[16] The suggestion that the pleadings on loss are not sufficiently specific to be relevant is without merit. The pursuers aver the following in Article 6:

> "The black fungus covers the pursuers' house and outdoor property. It covers the verge tiles, the gutter, fascias, the soffits and the walls. The roof has visible black staining. The prevalence of black fungus on properties within the area is well known. The pursuers have suffered a reduction in the value of their house. The capital value of their house has been reduced as a result of the fungus. 'In particular, even if the house were cleaned of fungus its market value would be adversely affected because of the obvious effects of the fungus on adjacent houses. Discolouration attributable to the fungus is obvious on a large number of properties in the vicinity. It is therefore obvious that the pursuers' house is also adversely affected. In 2002 the pursuers paid £139,950 for the house. It was a new build property. The market value of the house in May 2017 is in the region of £190,000 to £195,000. The value of the house has been reduced by about 5% to 10% because of the effects of the fungus on properties in that area. The adverse effects of the fungus on the property became apparent within about a year after the pursuers moved in. They began cleaning the fungus from the house at about that time. Further, the pursuers require to clean the fungus from the property from time to time. Thus far the pursuers have done most of that work themselves. The first pursuer cleans the back of the house once per year. He has found by trial and error that thin bleach works best. It requires 16 bottles of bleach to clean the back of the house. The side of the house is too high to clean fully. It would require specialist equipment such as a cherry-picker to reach the top of the side of the house. The first pursuer has from time to time spent about a day a year cleaning the fungus from the gutters and plastic fascia of the house. The task involves emptying the gutters, applying bleach and then scrubbing the surfaces. The pursuers have now paid for this work to be done, about once every two years at a cost of £170. The first pursuer has also spent about a day twice per year cleaning the fungus from the patio and sundeck. The task includes power washing and then bleaching the affected stones and oiling the sundeck. He is on his third power washer. They cost about £60 each. They have had to replace the sundeck once already at a cost of £300. They do

not know how long the replacement will last. He has also had to paint the garden fence every other year. A dark colour of paint has to be used, in order to reduce the visual impact of the fungal discolouration he uses about 4 tins of paint. The above work will have to continue to be done on the property in future, owing to the continuing effects of the fungus. The first pursuer is physically unable to continue to do the work. He has a degenerative back condition, resulting from an injury in about 2010 in which he suffered a fractured vertebra and displaced several discs. He is unable to perform heavy manual work. The condition of his back continues to get worse. The pursuers will therefore have to pay for the above work to be done in future. It is in any event reasonable that they do so, given the amount of work involved. The pursuers regularly get people at their door offering to clean the exterior of the house. The fee quoted is about £1,000. The cost of the task of cleaning the gutters and plastic fascia is £170 a year. The cost of cleaning the building, patio and sundeck is estimated at £600 a year. The annual cost of oiling the sundeck is estimated at £150 for labour and £50 for oil. The cost of painting the fence is estimated at £300 for labour and £75 for paint, every other year. Further, the pursuers' wooden garden furniture has been affected by the fungus. The fungus caused the wood to become covered in an unsightly black staining. Two sets of wooden garden furniture were covered by the slightly [*sic*] black staining and had to be disposed of. They had cost £500 for each set. The second set was replaced with an aluminium table and chair set which cost about £250. Further, the playhouse has to be painted regularly. The paint and brushes cost about £30 on each occasion. Further, the pursuers have incurred the cost of bleach which they [use] to clean the fungus from their property. The bleach costs about 27p a litre and about 100 litres are required to clean the entire house. Each of the pursuers has a car. The fungus grows on the cars. An ordinary power wash does not remove the fungus. A detailed valet is required as a normal valet is not effective to remove the fungus. Each car requires to be valeted at least once, and sometime twice, per year at a cost of about £100 for each clean. The expenditure condescended upon is likely to continue for so long as the defenders fail to abate the emission of ethanol. With the first pursuer's deteriorating health the work cleaning the property takes longer. In 2018-2019 car valeting, and the cleaning of window frames, facia, down pipes and gutters was done by other [*sic*]. It is estimated that cleaning the patio now takes the first pursuer about 2 days and the sundeck about 2 days. Cleaning the external walls of the house takes him about 2 weeks, with a similar amount of time required to clean the fence. The patio needs cleaned in Spring and late Autumn. In 2018 he cleaned the walls once with one coat of bleach because he has become frustrated with the work. The costs incurred in 2018 are estimated as follows:

Patio & Deck Cleaner £72
All PVC windows Fascia down pipes gutters £200
Paint Brushes £10
Paint Tray and Rollers £30
Bleach £20
20L Sprayer £30
Car Detailed Valet £200
Plastic Sheets £10

> In addition, the pursuers have suffered a loss in their enjoyment of the use of their property. They are restricted in the type of materials they can use in their garden. They require to use aluminium rather than wood. They are restricted in the design and layout of their garden. The pursuers are restricted in their choice of the colour of paint they can use in their garden. They require to choose colours which attempt to reduce the visual impact of the black fungus."

[17] As the defenders recognised, what is more than tolerable depends on all the circumstances, and involves questions of fact and degree. The averments of damage here are sufficient to permit inquiry. They include a number of allegations about, in particular, a need to clean property to an extent that is on its face much more than one would normally expect to be the case. Indeed, so far as inquiry as to whether the results of the defenders' activities were more than tolerable is concerned, Lord Ericht was satisfied that the averments of damage before him were sufficient: *Chalmers* v *Diageo Scotland* [2017] CSOH 36, paragraph 14. The averments of loss before me are as they were when Lord Tyre dealt with the case, having been expanded by amendment following Lord Ericht's decision. The introduction of the new averment that the deposits or staining are more substantial than those commonly encountered on damp surfaces makes no difference to the sufficiency of the averments in Article 6 for inquiry on this point.

[18] It is true that there is some inconsistency of language in the pleadings. In Article 6 there is reference to "black fungus", "black staining", "the fungus", "the effects of the fungus" and "discolouration attributable to the fungus". The expressions appear to be used interchangeably. For consistency it might be better if all references were to "black sooty deposits or staining". I do not, however, consider that the use of language in Article 6 either in isolation or read along with Article 4 is productive of any genuine risk of confusion on the part of the defenders as to what the pursuers' case is.

[19] I will therefore allow proof before answer.

[20] This is a case in which the use of pleadings and ordinary action procedure has not been particularly successful in promoting a speedy resolution of the issues of fact that divide the parties. I have in mind that there have now been three debates at the instance of the defenders, none of which has been dispositive of the action. On the face of matters this is a case that requires the resolution of issues of fact on the basis of disputed evidence from skilled witnesses on identifiable and discrete issues.

Expenses

[21] So far as the expenses of the procedure roll debate before me are concerned, parties accepted that they should follow success. The pursuers have been completely successful, and I find the defenders liable to the pursuers for the expenses of the debate.

[22] Mr Cormack submitted that the pursuers had changed radically the pleadings and the basis of their case by amendment, particularly as to what the discolouration was said to be. The expenses of the amendment procedure should be dealt with in the usual way. It could not be disputed that the amendment caused the discharge of the proof, and the pursuers should be found liable for the expenses of the discharge.

[23] Mr Moynihan submitted that the Minute of Amendment had been of a formal nature, dealing with questions of taxonomy in response to matters raised by the defenders. The "pioneer organism" case was not a change of a fundamental nature. The exercise of amendment and discharge had proven to be unnecessary, and the pursuers should be found entitled to their expenses from May 2022. Alternatively, I should reserve the expenses of the amendment process and the discharge.

[24] The normal rule is that the party initiating an amendment process should pay the expenses of that process. There is no reason to depart from that in this case. It does not

avail the pursuers to submit that the process was not necessary. If it was not necessary in order to focus the matters necessary for the resolution of the dispute between the parties, it should not have been undertaken. I find the pursuers liable to the defenders in the expenses of the amendment process.

[25] There were two aspects to the minute of amendment. The first was in relation to the change of taxonomy. It appears that the change in taxonomy had been known about in the field of mycology for a number of years, and it is on the face of matters difficult to see that a reference to *Baudoinia compniacensis* in pleadings drafted before the change in taxonomy should have caused any real confusion to experts instructed in the matter. The defenders' answers to the minute of amendment acknowledge the identification by the pursuers' witnesses of different ecotypes in samples from the site dating back to 2013, although the defenders say they should have been described as differences in genotype, rather than ecotype.

[26] The other aspect of the minute of amendment was the introduction of the "pioneer organism" averments. That was the alteration characterised by the defenders as radical or fundamental at the hearing on the opposed motion to amend, and again at the debate on the procedure roll. The defenders' response to this part of the pursuers' case was to aver that no scientific literature referred to by the pursuers or reasonably discoverable by the defenders relates to any species of *Baudoinia* as a pioneer organism. Their case now on record is essentially that the "pioneer organism" hypothesis is not established science. I rejected the submissions for the defenders that the amendment was of so fundamental a character that it ought not to be allowed. Having heard debate on the procedure roll, I am satisfied that the pursuers' case has not been rendered irrelevant, and that the basis of their case is still that the property has been damaged because of the presence of *Baudoinia*. It is not self-evident

that the proof required to be discharged for the defenders to produce an answer that "pioneer organism theory" is not established science. The fault-lines between the scientists instructed for each party may not be fully explored until such time as evidence is heard. In all the circumstances I find the expenses of the discharge of the proof to be expenses in the cause.