SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON

[2020] SC LIV 20

A27/18

JUDGMENT OF SHERIFF DOUGLAS A KINLOCH

in the cause

VIPOND FIRE PROTECTION LIMITED

Pursuer

against

SPP PUMPS LIMITED

Defender

Livingston, March 2020

The Sheriff, having resumed consideration of the cause, sustains the defenders' first and second plea in law to the extent of refusing to admit to probation the pursuers' pleadings relating to the "design case", as introduced by amendment, as follows:

(i) Article 6 of condescendence: "The defender designed and installed a guard to cover the coupling device."
(ii) Article 9 of condescendence from the words: "The coupling having failed …" down to the words "… will be founded upon."
(iii) Article 10 of condescendence delete the words "design and".
(iv) Article 10 of condescendence delete the words: "They had a duty to take account of relevant guidance, as condescended upon above".

Appoints the cause to call at a Procedural Hearing on 1 April 2020 at 10.00 am within the Sheriff Court House, Civic Centre, Howden South Road, Livingston, in order to determine further procedure in the case; Reserves meantime all questions of expenses as arising from the debate.

NOTE:

[1] This case called before me at Livingston Sheriff Court on 10 January and 5 February 2020 for debate on the defenders' preliminary plea and on their second plea in law which relates to prescription. The pursuers were represented by Mr Pugh, Advocate, as instructed by Clyde & Co, Solicitors, Edinburgh, and the defenders by Mr Manson, Advocate, as instructed by BTO, Solcitors, Glasgow. The action had originally been raised in the Court of Session but was remitted to Livingston Sheriff Court by interlocutor dated 25 January 2018 after the pursuers amended the sum for which they sued so that it came below the privative jurisdiction of the Sheriff Court.

[2] The first issue with which I wish to deal is whether part of the pursuers' case as introduced by amendment is a new case which is excluded by the operation of prescription. This issue is said to involve a novel point regarding the operation of prescription under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 which has not been considered by the Scottish courts before. In order to understand the arguments, it is necessary to set out the background circumstances which led to the action being raised.

Background circumstances

[3] The background to the action is that on 17 January 2013 a Mr Alan Derwin was injured in an accident which occurred during the course of his employment as a service engineer with the pursuers (Vipond). He was servicing a pump which a company called WL Gore & Associates, based in Livingston, had installed in their premises as part of their fire sprinkler system. WL Gore had purchased the pump from the present defenders, SPP Pumps Ltd, and the pump was installed in WL Gore's premises in 2007 by another company called SPIE Matthew Hall. That company (SPIE Matthew Hall) placed the pump machinery

in the correct position in the premises and connected it to the pipework for the sprinkler system. Having been installed the pump machinery was "commissioned", that is brought into service, by two employees of the defenders, a Mr Lennon and a Mr Cunningham.

[4] The pump was in fact quite a large piece of machinery, and it is shown in a number of photographs lodged by the present pursuers in their second inventory of productions. The pump machinery consisted of a diesel engine which was attached to a pump by a coupling system, and the pump was then attached to the fire sprinkler system.

[5] After the machinery was installed it was serviced by the defenders in November 2009 and May 2010. Another company called MB Firepumps Ltd then took over servicing of the pump and carried out periodic inspections for a period after May 2010. At some point after that the pursuers were taken on to carry out the servicing of the pump machinery. Mr Derwin, the original pursuer who was injured in the accident in 2013, worked for the pursuers as a service engineer, and was carrying out a service of the pump machinery on the day when he was injured.

[6] The accident happened, according to the present pursuers' averments in Article 3 of Condescendence, when Mr Derwin was carrying out pressure testing of the pump machinery and one of the "coupling assemblies on one of the pumps failed causing the assembly itself to be ejected from the coupling guard. Shrapnel struck Mr Derwin causing him to sustain physical and psychological injuries".

[7] After the accident Mr Derwin raised an action for damages in the Court of Session against Vipond in their capacity as his employers and also against WL Gore as occupiers of the premises. He sued for the sum of £500,000, and that action settled by Mr Derwin accepting a joint offer made by Vipond and WL Gore. That settlement resulted in the Lord Ordinary pronouncing an interlocutor on 8 February 2016 which decerned against the

present pursuers and WL Gore for payment to Mr Derwin of the agreed extra judicial settlement sum together with expenses.

The present action

[8] In this action Vipond now seek a contribution under section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 from the manufacturers and suppliers of the pump machinery, SPP Pumps Ltd, towards the sum Vipond paid to Mr Derwin in order to settle his action against them. Section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 is in the following terms: –

> **"3. – Contribution among joint wrongdoers**
>
> (1) …
> (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."

[9] It was common ground between the parties that any claim for contribution under section 3 was subject to a prescriptive period of two years. This prescriptive period comes from section 8A of the 1940 Act which is as follows: –

> "**8A Extinction of obligations to make contributions between wrongdoers.**
>
> If any obligation to make a contribution by virtue of section 3 (2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 in respect of any damages or expenses has subsisted for a continuous period of two years after the date on which the right to recover the contribution became enforceable by the creditor in the obligation –
>
> (a) without any relevant claim having been made in relation to the obligation; and
> (b) without the subsistence of the obligation having been relevantly acknowledged;
>
> then as from the expiration of that period the obligations shall be extinguished."

[10] It was, again, common ground that the commencement date of the prescriptive period was to be taken as the date on which the Lord Ordinary pronounced the decree in favour of Mr Derwin, that is 8 February 2016. It was further agreed that the two-year prescriptive period had been interrupted when the present action was raised in the Court of Session in November 2017.

Prescription

[11] The question of prescription arises in this action because the pursuers amended their pleadings by way of a Minute of Amendment which was intimated to the defenders on 13 March 2019, which was more than two years after the commencement date of the prescriptive period on 8 February 2016. The defenders contend that the amendments made by the pursuers seek to introduce a new case based on faulty design of part of the machinery by the defenders ("the design case"). They say that the original pleadings in the present action contained no averments to the effect that the defenders had been negligent in their design of the pump machinery, and that this design case is therefore a new case which cannot be introduced after the expiry of the prescriptive period. Although the defenders' pleadings have actually been amended the pursuers seek to prevent the pleadings relating to the design case to proceed to probation.

Defenders' submissions

[12] In his submissions the defenders' Counsel stated that it was common ground that, although Vipond had paid damages to Mr Derwin, for the present pursuers to succeed with their claim against the defenders for a contribution to those damages they had to show that the defenders had also been negligent, and that their negligence had caused or contributed

to the accident sustained by Mr Derwin. There is no doubt, it seems to me, and as confirmed by the recent case of *Glasgow City Council* v *First Glasgow 2020 Rep LR 12* that this is correct.

[13] In relation to demonstrating negligence on the part of the defenders, Counsel for the defenders' position was that originally Vipond had averred in the present action that the defenders were vicariously liable for negligence by the defenders' employees when servicing the machinery. He argued, however, that a second ground of alleged liability was introduced after the expiry of the two-year prescriptive period. At that point Vipond amended their pleadings to introduce a case based on faulty design of a part of the pump machinery. That second ground of alleged liability was therefore said to be a new case against the defenders which was introduced after the expiry of the two year prescriptive period, and was accordingly time-barred.

[14] The defenders' Counsel referred me to well established rules as to when averments which are sought to be introduced by amendment will be seen as being time-barred and accordingly ruled to be inadmissible. These rules are summarised in, for instance, the textbook Prescription and Limitation, second edition, by David Johnston, at page 415. There it is said as follows: –

> "There is an important preliminary point. At the stage of amendment the court has a discretion to allow or to refuse receipt of a minute of amendment … It is now settled that the question of whether to allow amendment is a matter of discretion rather than competency. In the case of prescription, whether a right or obligation still exists is the substantive question … In many cases what will be at issue is whether the minute of amendment actually does introduce … a new claim which is alleged to have prescribed or whether it is simply an elaboration of a claim which was raised in time … if the minute of amendment merely adds to or substitutes grounds for making a claim in relation to the original obligation or is a reformulation of that claim but does not proceed on a fundamentally different basis, it will raise no issue about prescription."

[15] Lord Macphail, in Sheriff Court Practice, third edition, also deals with the question of the extent to which amendment may be permitted after the expiry of the prescriptive period at paragraphs 10.33 onwards. It is said at 10.34 as follows: –

> "General principles as to the making of amendments by a pursuer after the expiry of a time limit were stated by Lord Justice Clerk Cooper in a dictum in *Pompa's Trustees* v *Edinburgh Magistrates* which has been very frequently cited. It may be paraphrased thus: after the expiry of a time limit which would have prevented him from raising proceedings afresh, a pursuer will not in general be allowed by amendment: … (iii) to change the basis of his case … In the absence of a statutory provision making it incompetent to amend in an action which has itself been brought within the time limit, the allowance of an amendment is a pure question for the discretion of the court in all the circumstances of the particular case …"

At 10.37 it is said as follows: –

> "There is also room for debate over whether a proposed amendment "changes the basis of" the pursuer's case. In *McPhail* v *Lanarkshire County Council* it was said that a permissible amendment is one which changes "not the basis of the action so much as the method of formulating the ground of action" … There is, however, no clear-cut dividing line of really practical application for determining whether amendment should be allowed, and the question in any particular case is inevitably one of degree."

[16] Volume 16 of the Stair Memorial Encyclopaedia has a short section which deals with amendment of the pursuer's case after the expiry of the time-bar period. It is at section 2157 onwards, and in those sections the cases of Pompa's Trustees and McPhail are also referred to.

[17] Leaving aside for the moment the separate question as to whether the design case is simply a development of the original case against the defenders, to which question I will return, the defenders' counsel in accordance with the principles set out above accordingly submitted that the design case, being a new ground of liability, could not be added by way of amendment after the expiry of the two-year prescriptive period. It ought to be deleted and should not be allowed to proceed to probation.

Pursuers' submissions

[18] The pursuers' Counsel offered two responses to this argument. The first was that the design case was not a new case, but rather was just an elaboration of the case that was there before. I will return to this argument. The second response is more complicated, and therefore more difficult, and it was said to involve an argument that has not been considered before by the Scottish courts. I will deal with this argument first.

[19] The argument advanced on behalf of the pursuers, as I understood it, was that in relation to actions based on section 3 of the 1940 Act, the competency or relevancy of the present pursuers' case was to be tested at the date that the present action based on a right of contribution was raised. The reason for this, Counsel for the pursuers argued (as I understood him), was that the action for relief was based on a single obligation, namely the obligation which arose under section 8A of the 1940 Act "to make a contribution by virtue of section 3(2)" of the 1940 Act. As the action was based on a single obligation, then, he argued, there was only a single date which applied to determine time bar issues. According to the argument, once the two year prescriptive period had been interrupted by raising a court action, the pursuer was at liberty to add and to plead as many different grounds of action as he wished because the competency of all of the grounds of action was to be tested as if they had been put before the court when the action by the present pursuers was raised. This was to be contrasted with other situations where a party might be able to sue on a variety of different obligations which all arose out of one transaction, and all of which might therefore have their own different starting points for the time bar period. Here there was only one obligation being founded upon, which gave rise to one prescriptive period, and once that was interrupted questions of time bar no longer arose.

[20] In support of his argument, if I understood it properly, Counsel for the pursuers referred me to the case of *Farstad Supply AS* v *Enviroco 2010 SC (UKSC) 87*. This was a decision of the Supreme Court, and in his judgement Lord Hope considered the situation which arises in the present action where a party has been sued and has been found liable in damages, and that party then seeks a contribution from another party who was not sued. Lord Hope commented that the defender who was found liable in damages is not prevented from seeking a contribution from the other party simply because the original pursuer would no longer be able to sue the other party because of time bar. Provided the original action against the original defender was competently brought, then the original defender can seek a right of relief and contribution against any other party who might have sued, even although the original pursuer's claim against the other party would be time-barred by the time the action for contribution and relief is brought. This is my understanding of the following passage at page 99 by Lord Hope: –

> "Secondly, the defender is not disabled from seeking relief against the third party by reason of the fact that the pursuer's claim against him has been held to have been, or would be time-barred … This is because the words "if sued" assume that the third party has been "relevantly, competently and timeously sued by the pursuer … The question whether the third-party has been sued "relevantly, competently and timelessly" falls to be tested at the date when the pursuer sued the person who is seeking relief. It is enough that he could have sued the third-party at that date" [my emphasis].

The pursuers' Counsel argued that the reasoning in Farstad applied also to the present case, and meant that all questions as to time bar had to be considered and tested as at the date Vipond's action was raised. He argued that as the present action had been relevantly, competently and timeously brought against the defenders in November 2017, the question of time bar, and whether a new case was time-barred, could not now be looked at in relation to any different date.

Decision on prescription

[21] I can deal with the case of Farstad quite briefly because all that it decided, as I understand it, is that although it would not have been open to Mr Derwin to sue the present defenders in 2017 (when Vipond raised the present action) as his case would have been time-barred by then, that did not prevent Vipond from suing them. The reason for this, as I understand it, is that it has to be assumed that if Mr Derwin had also sued the present defenders as well as the present pursuers in 2017, then his action would have been within the limitation period, and it would have been a good case, that is, relevantly pled, and would not have been dismissed.

[22] Thus it is said in an article on section 3 by Eleanor J Russell, to be found in 2010 SLT (News) 169 as follows: –

> "The phrase "any other person who, if sued, might also have been held liable" was subject to detailed consideration in Farstad … Further consideration was given to the expression "if sued" in *Dormer* v *Melville Dundas & Whitson Ltd 1989 SC 288, 1990 SLT 186*. A personal injuries action was raised against the defenders about a month before the expiry of the three-year limitation period. The defenders brought a third party into the proceedings and the pursuer thereafter amended his conclusion to seek decree against the third party. The pursuer's action as against the third-party was dismissed as time-barred but the Inner House held that the fact that the pursuer sued the third-party out of time did not have the effect of destroying the defenders' right of relief against the third party. This was because the words "if sued" assume that the third-party has been "relevantly, competently and timeously sued" by the pursuer – in other words, that all the essential preliminaries to a determination of the other party's liability have been satisfied … It is clear from Dormer that the question of whether the third-party has been sued "relevantly, competently and timeously falls to be determined at the date when the pursuer sued the person who is seeking relief. If, at that date, the pursuer could have sued the other wrongdoer, then the party sued can seek a contribution from that other wrongdoer, whether or not the pursuer's claim against that other wrongdoer became time-barred thereafter."

[23] So even although the present defenders were not sued by the original pursuer, and even although the original pursuer's claim against the present defenders would now be time

barred, the present action is competent. And even if the original pursuer had sued the present defenders but his action against them had been hopelessly irrelevant (in terms of the case pled) and would have been dismissed, that does not matter. The right of relief against the third party still exists. That is the extent of Farstad and I cannot see that the reasoning goes beyond that in a way which might assist the defenders.

[24] Leaving aside Farstad, none of the textbooks referred to above suggest that there is any special category of claim which has its own special rules in relation to amendment of pleadings after the expiry of a time-barred period, whether that is a limitation period or a prescriptive period. The inference from this, to my mind, is that the rules regarding the introduction of a new case by amendment after the expiry of a prescriptive period apply to all cases.

[25] This inference supports the conclusion to which I have come, which is that the argument advanced by the pursuers' Counsel cannot be correct. I think that the fallacy of it, in my very respectful view, is that while it may well be correct that the present pursuers found on a single obligation (to contribute to the damages paid by Vipond), and while it must therefore follow that it is also correct that this single obligation gives rise to a single starting point for the two-year prescriptive period, it ignores the fact that there may be a variety of different grounds on which it is said that the defenders were negligent. The argument, in my respectful view, ignores the need to put forward all the separate grounds of action, even if based on a single obligation, within the prescriptive period. While the present pursuers had two years from the date that the obligation was created (namely the date of the Lord Ordinary's interlocutor) to raise a court action, that does not then mean that as the action was raised within that period they are free for ever more from time bar considerations. In my view the correct position is that the present pursuers had two years

from the date of the Lord Ordinary's interlocutor to advance all the grounds of action they considered to be competent, but once the two-year period had expired it was not open to them to advance any new, separate, ground of action. To take any other view would, in my view, put the present pursuers in a preferential position in comparison with virtually every other, or possibly every other, pursuer faced with a time bar period. It would go against the purpose of the rules on prescription which seek to prevent stale claims. It would create a special category of case where, unlike, as far as I am aware, every other case, the pursuer in a claim for contribution would be allowed to present any new case at any time, even after the expiry of the relevant prescriptive period.

[26] I accordingly reject the argument put forward on behalf of the pursuers. The design case is not saved, in my view, from being time-barred by virtue of an approach which requires the question of time bar to be looked at once only, as at the date the present pursuers' action was raised.

[27] I will accordingly delete the averments introduced by amendment and as relating to the design case and refuse to remit them to probation.

Is the design case a new case?

[28] In case I am wrong in the conclusion to which I have come, I must now return to deal with the other argument put forward by Counsel for the pursuers. He also argued that the design case was not a new case, but only an elaboration or reformulation of the original claim which was raised in time. In support of that argument he referred me to Walker, The Law of Delict in Scotland (2nd Edn) pages 608 – 621. There, under the heading "Dangerous Goods" Prof. Walker explorers various grounds of fault which may give rise to a liability in delict on the part of the manufacturer, such as a defect in design, a failure in the course of

the manufacturing process, the inadequacy of the container, in the assembly or repair of goods, and so on. The relevance of that seemed to be the idea that all these grounds of liability were linked. The argument, as I understood it, was that the original case referred to and founded upon the failure of the present defenders to fit a guard to the pump which would retain the parts which escaped and injured Mr Derwin. It was said that every piece of machinery has to be designed, and therefore Vipond had always effectively been founding upon what was said to be the faulty design of the guard.

[29] This argument does not really give me any difficulty. The original pleadings did not contain any explicit reference to the defenders being negligent in their design of any part of the pump machinery prior to the Minute of Amendment. The case was based on errors said to have been made by the defenders' employees when servicing the machinery. The design case in my view is plainly a new ground of liability, and therefore a new case. It is a case based more than simply the fact that the guard, according to Vipond's averments, did not work and did not do what it was supposed to do. The design case is based on the negligent design of the guard by the defenders. I do not therefore see it as being in any way an elaboration or reformulation of the original case. On that basis it is also my view that the averments introduced by way of minute of amendment are time-barred.

Is the design case lacking in specification?

[30] I need also to deal with the defenders' further, and separate, subsidiary argument that the design case as contained in the averments added by amendment is lacking in specification, and is therefore irrelevant.

[31] The pursuers' averments regarding the design case are largely contained in condescendence 10. There it is said, in a few sentences, that: "the defenders were under a

duty to take reasonable care to design and fit a guard over the coupling that retained the rotating parts in the event of an accident". The defenders criticise these averments as being lacking in specification. I think there is merit in that criticism. There is no explanation as to whether the admirable goal advanced is actually achievable or is just a bald assertion. It is also averred that the defenders had "a duty to take account of relevant guidance, as condescended upon above". Even when that averment is read together with previous averments it is not clear to me what relevant guidance is being referred to, which the pursuers say the defenders should have taken into account.

[32] In my view, the defenders need to know, as a matter of fair notice, in what way they are said to have been negligent in their design of the guard. They need to know, for example, whether it is said that other manufacturers had designed guards in different and more effective ways, and that the defenders should have known about this. Or that there was a body of knowledge which they should have taken into account in designing the guard, but did not. I accept that having averments of this nature is not an absolute requirement in every case as there must be cases where circumstances are unusual and where consequently no standard practice exists. In that kind of case it may be that the pursuer can succeed by showing that the defender failed to take care that was patently and self-evidently necessary. There is however no suggestion by the present pursuers, as I read their pleadings, that any failure in the design of the guard fell into that category. So in my view the defenders need to know in what respects it is said that in designing the guard they were careless and therefore negligent. It is not enough, in my respectful view, for the present pursuers to state simply that the guard failed to contain the parts which escaped. That does not necessarily mean that the design was faulty. Some pieces of equipment can fail to work for reasons which cannot be predicted, and the simple fact that equipment fails

is not necessarily indicative of negligence. Nor is it sufficient for there to be a somewhat vague reference to a duty on the defenders to take into account "relevant guidance". In my view the design case is also lacking in specification, and I would have excluded it from probation on that ground also.

[33] I have therefore been persuaded by the defenders' subsidiary argument that the design case is lacking in specification, and for that reason also, even if it is not time barred, and even if it is not a new case, I will delete the averments.

Is the action as a whole irrelevant?

[34] The next question is whether, as the defenders argue, the action as a whole should be dismissed as being irrelevant. Logically, this question should perhaps have come first, but it was convenient to deal with the prescription point, being a novel one, at the outset.

[35] The present pursuers' averments do not contain very much detail as to how the accident happened. It is said in article 3 of condescendence that Mr Derwin was carrying out pressure testing of the pump machinery and the accident is described as follows: –

"During the pressure tests, one of the coupling assemblies on one of the pumps failed causing the assembly itself to be ejected from the coupling guard. Shrapnel struck Mr Derwin causing him to sustain physical and psychological injuries."

Vipond aver that the reason for this happening was that a "coupling" on the driveshaft which connected the diesel engine with the pump had become prone to movement as a result of incorrect tightening of "grub screws" which held the coupling to the driveshaft. It appears to be averred, although I find the averments somewhat difficult to follow, that the grub screws were not tightened properly at the time the pump machinery was supplied by the defenders to WL Gore. It is also averred that one of the defenders' service engineers

noted in November 2009 during a service of the pump machinery that the coupling had moved. It is averred that this employee should have tightened the grub screws to the "relevant level of torque", and had that been done the coupling would not have moved. It is averred that the failure to ensure that the grub screws were at the correct torque amounted to negligence of both the defenders and their service engineer, for whose negligence the defenders are vicariously liable.

[36] The defenders' Counsel argued that the present pursuers' averments do not properly explain the nature of the accident and what actually caused it. He contrasted the averments in condescendence 3 which refer to the "assembly itself" being ejected from the coupling guard, which in turn caused "shrapnel" to hit Mr Derwin, with the averments in condescendence 9 which refer to "rotating parts" being ejected. He argued that it was not clear on the averments why inadequately tightened the grub screws would have resulted in the ejection of any parts.

[37] In my view the present pursuers' averments, although, I think, somewhat sparse, and somewhat difficult to follow, are sufficient to allow the action to proceed to proof. In my view it is reasonably clear, just what case of negligence the present pursuers are averring. As I read the pleadings they are based on the fundamental premise, which must surely be a matter of common sense, that if a moving part is not properly tightened then it may come loose, and that could eventually cause danger by virtue of the moving part being ejected. The case being made out, as I understand it, is that the defenders failed to take reasonable care to ensure that certain "grub screws" were tightened properly when the pump was supplied by them. There is an additional case that the defenders are vicariously liable for failure of their employees to tighten the screws during servicing which took place in 2009. There is a further case that the guard fitted by the defenders was not sufficient to retain the

parts which were ejected, and that the defenders should have known about this. There is also further amplification of the reasons for movement which are contained in the present pursuers' averments in condescendence 7 which help explain the circumstances of the accident and why the defenders are said to be to blame.

[38] All of these averments are in my view sufficient to give the defenders fair notice of the case being made out against them, and why they or their employees are said to have been negligent, and I will allow the action to proceed to a proof before answer, under deletion of the averments regarding the design case. I would mention that I have not deleted the averments in Article 9 starting with: "Explained and averred …" and which continue down to "… flywheel adaptor" as they do not relate solely, in my view, to the design case.

[39] I have put the case out for a hearing to determine further procedure, and to deal with the question of expenses.