OUTER HOUSE, COURT OF SESSION

[2018] CSOH 95

PD386/17

OPINION OF LADY CLARK OF CALTON

In the cause

KRISS SPENCER

Pursuer

against

RICHARD CRUDDAS AND OTHERS

Defenders

Pursuer: Milligan QC; Slater & Gordon Lawyers
First and Second Defenders: Stuart QC; Gildeas

25 September 2018

Summary

[1] In this action, the pursuer claimed that on 6 July 2014, he was a pillion passenger on a motorbike driven by the first defender. As the first defender made to overtake a Toyota MR2 motorcar driven by the third defender on the A836 Main Street, Castletown, the third defender turned right. In the collision between the motorbike and the motorcar, the pursuer sustained various injuries. Solicitors instructed by the pursuer sought to raise an action under chapter 43 procedure claiming damages jointly and severally from four defenders: the driver of the motorbike as the first defender; the first defender's insurers as the second defenders; the driver of the motorcar as the third defender; and the third defender's insurers as the fourth defenders. There were procedural problems encountered by the

pursuer's solicitors which commenced with difficulties in effecting service on the third defender of a summons signetted on 16 June 2017 ("the first summons"). Thereafter a further summons was signetted on 20 September 2017 and that summons is the basis of the present action.

[2] The issue before the court at the procedure roll debate was whether the present action should be allowed to proceed in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973 (the 1973 Act). It was not disputed that the present action was time barred under section 17 of the 1973 Act as it was commenced more than three years after 6 July 2014. Counsel were agreed that no proof about the procedural history was necessary and that the relevant facts were sufficiently clear from the pleadings and the further information advanced by agreement in the oral submissions. By the date of the procedure roll, the pursuer, the third and fourth defenders had agreed by joint minute to settle the action extrajudicially and the third and fourth defenders had been assoilzied from the conclusions of the summons. The present action therefore proceeded only against the first and second defenders who maintained the claim was time barred and should not be allowed to proceed.

The procedural history

[3] This is not a claim which in any sense could be regarded as a stale claim in relation to the first and second defenders. It was a claim in which there was active engagement by the solicitors for the pursuer and the first and second defenders from an early date. The initial focus of the pursuer's claim appeared to have been in relation to the third and fourth defenders and that claim was intimated to the fourth defenders in or about April 2015. In or about June 2015, the fourth defenders indicated that the second defenders would deal with the

pursuer's claim albeit liability remained in dispute as between the defenders. Intimation was made to the second defenders by the pursuer's solicitors in about July 2015. After investigation in or about January 2016, the pursuer's solicitors requested an interim payment of £5,000 from the second defender's solicitors. In or about March 2016 an offer of an interim payment of £2,000 was made. The pursuer's solicitors sent the second defenders' solicitors a copy of various expert reports and information about the pursuer's wage loss. The second defenders made an interim payment to the pursuer of £5,000 in about May 2016. Thereafter the second defenders arranged an appointment with a consultant orthopaedic surgeon for 24 October 2016 and the pursuer attended for examination. Further medical records were provided to the second defenders' solicitors by the pursuer's solicitors. There were problems about valuation of damages because the pursuer required to undergo surgery and the solicitors of the second defenders were so advised. "The first summons" in name of the pursuer citing all four defenders was signetted on 16 June 2017. On or about 23 June 2017, the second defenders' solicitors wrote to the pursuer's solicitors with acceptance of service endorsed on behalf of the first and second defenders. On or about 26 June 2017 the pursuer's solicitors sent a postal citation to the third and fourth defenders. On or about 29 June 2017 the pursuer's solicitors gave instructions to their court runner to lodge "the first summons" for calling on 17 July 2017 but that was unsuccessful. At some date after 1 July 2017 the citation for the third defender was returned by the court with no answer. The action was served on the fourth defender. On or about 3 July 2017, the second defenders' solicitors sent defences to the pursuer's solicitors. A further attempt was made to serve "the first summons" by post on the third defender on or about 7 July 2017 but this was returned unserved on or about 20 July 2017.

[4] On 20 July 2017 the second defenders' solicitors wrote to remind the pursuer's solicitors that they had said that "the first summons" would be lodged for calling on 17 July. On or about 3 August 2017, a further unsuccessful attempt was made on behalf of the pursuer's solicitors to lodge "the first summons" for calling at the General Department. The General Department would not allow the summons to be lodged for calling without service having been effected on the third defender. According to counsel for the pursuer, due to administrative oversight, no motion was made to extend the period for lodging the summons for calling. He explained that the solicitor dealing with the pursuer's case had been on holiday for a period and a mistake had been made.

[5] The service and calling of "the first summons" was regulated by Rule 43.3 which states:

> "**43.3.-** (1) Where a summons in an action to which this Chapter applies is to be executed, a copy of the summons which has passed the signet shall be –
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> (a) served on the defender with a citation in Form 43.3 attached to it; and
>
> (b) intimated to any person named in a warrant for intimation.
>
> (2) Where a summons has not called within three months and a day after the date of signeting, the instance shall fall.
>
> (3) Where a summons cannot be served within the period of notice determined in accordance with rule 13.4 and called before the expiry of the period mentioned in paragraph (2), the court may –
>
> (i) on the application of the pursuer by motion; and
>
> (ii) on cause shown.
>
> extend that period.
>
> (4) An application under paragraph (3) shall be made before the expiry of the period mentioned in paragraph (2)."

The instance of "the first summons" fell on 19 September 2017 and the second defenders' solicitors so advised the pursuer's solicitors on 20 September 2017. The pursuer's solicitors arranged for a further summons to be signetted on 20 September 2017. The terms were the same except the name and address of the second defenders differed. The second defenders' solicitors accepted service of the summons on behalf of the first and second defenders on or

about 26 September 2017. The pursuer's solicitors instructed messengers-at-arms to serve the summons on the third defender and service was effected. Counsel for the pursuer explained that this had not been done previously as there were some additional costs attached to service by messengers-at-arms. Postal service was effected on the fourth defenders. The second summons was successfully lodged for calling on 23 October 2017.

Submissions by counsel for the first and second defenders

[6] Counsel for the first and second defenders sought dismissal of the action and submitted that the court should not grant the pursuer a remedy under section 19A of the 1973 Act. He highlighted the history of inactivity by the pursuer's solicitors and he submitted that the pursuer's remedy lay against his solicitors. The main challenge was to the pursuer's averment that the defenders would not suffer prejudice. He sought to rely on well-established Inner House authority in which the courts have recognised that defenders who are denied the benefits of the statutory time bar, which provides a complete defence, are prejudiced. Counsel having drawn attention to the procedural history submitted there was nothing in the present case to remove it from the class of cases where the courts have refused to exercise discretion in favour of the pursuer because an alternative remedy exists. Although it was accepted that the principles illustrated in the case law should not be rigidly applied, the cases illustrate a clear approach which the Inner House have supported and applied over the years. Consistency was important in this area of law. Reference was made to *Donald* v *Rutherford* 1984 SLT 70, Lord Cameron at page 77: *Forsyth* v *A F Stoddard & Co Ltd* 1985 SLT 51, Lord Justice Clerk (Wheatley) pages 54-55; Lord Hunter page 56: *Clark* v *McLean* 1994 SC 410: and *Jacobson* v *Chaturvedi* [2017] CSIH 8, Lord President (Carloway) paragraphs 15-19. As a recent example

of decision making, in the Outer House upholding the defenders' time bar plea, I was referred to *Grant Gordon* v *Durham City Transport Ltd*, 11 October 2017.

[7] Counsel submitted that on the facts and circumstances of the present case, there was plainly a strong case against the pursuer's solicitors based on professional negligence. The importance of time bar provisions were well-recognised and there had been a number of opportunities and strategies available to the pursuer's solicitors to deal with the problems. The pursuer's claim for damages in respect of a road traffic accident had no complexity. Matters had now resolved to the extent that the liability of the first and second defenders to make reasonable reparation to the pursuer in respect of loss, injury and damage arising from the accident is admitted at page 21C-D of the record subject to the time bar which is insisted on. There would be no significant prejudice to the pursuer in having to seek a remedy against his solicitors.

Submissions by counsel for the pursuer

[8] In his primary submission, counsel for the pursuer invited the court to exercise its discretion to allow the action to proceed and determine the matter on the procedure roll without the need for hearing evidence. He discussed the timeline and made some general observations in relation to section 19A of the 1973 Act, which I did not consider to be in dispute. Counsel submitted that on the facts of this case I should determine what would be equitable in all the circumstances and consider in particular what prejudice, if any, resulted to the defenders and to the pursuer. This case was unusual in that not only did the first and second defenders receive "the first summons" within the triennium but they sent defences to the pursuer's agent before the triennium had expired. It was only due to a technicality that formal service was not effected and the technicality related to problems of service on the

third defender, not the first and second defenders. Counsel accepted that the first and second defenders had the loss of a "windfall" defence but this was outweighed by the real prejudice which existed to the pursuer. The pursuer will lose his right of action against the true wrongdoer, namely the first defender who has insurers. The fact that the pursuer may have an alternative remedy against his solicitors is only one of a number of factors and is not decisive. Reference was made to *AS* v *Poor Sisters of Nazareth* 2008 SC (HL) 146 paragraph 13. There were a number of reasons why equitable discretion should be exercised in favour of the pursuer namely: interim damages were paid; liability is now admitted; any action against the first and second defenders is very straight forward and quick; that is not the case with an alternative action for professional negligence against the pursuer's solicitors as there would be further delay and problems with quantification; the progress of an action of professional negligence would not have the advantages of chapter 43 or chapter 42A procedure; there was no prejudice to the defenders in their investigation of the case as "the first summons" was served within the triennium and defences prepared; in the whole circumstances the delay was understandable and arguably excusable taking into account the lack of clarity about the practice of Scottish Court Service in refusing to allow a summons to call in circumstances where there are no clear rules about whether a summons can call against one defender when another defender has not been served. Counsel submitted that in any action against the pursuer's solicitors, they may wish to explore the decision making of the Scottish Court Service with consequent delays and problems for the pursuer. In conclusion, counsel submitted that the error in this case was a highly technical error with little delay involved and there would be an unduly harsh result for the pursuer not to be able to proceed with an action against the first and second defenders when there was now admitted liability.

[9] In developing his oral submissions, counsel did not dispute the case law relied on by counsel for the defenders but emphasised that there was no automatic rule or principle favouring the defenders because there was an alternative remedy. He accepted that the onus was on the pursuer to persuade the court that the equitable discretion should be exercised in favour of the pursuer. Counsel referred to D Johnston, *Prescription and Limitation,* second edition, chapter 13 relating to the exercise of the equitable discretion under section 19A of the 1973 Act and adopted the criticisms made in paragraph 13.25 in which the author questioned whether, if properly analysed, it can be concluded that there is prejudice to a defender in circumstances where the protection of section 17 is the only loss and not any loss occasioned by some additional factor such as loss of evidence in the face of an old claim. Counsel submitted that in the present case there was justification for allowing liability to fall on the person responsible for the accident (and his insurers) rather than the pursuer's solicitors (and their insurers) based on a technical error or errors in the pursuit of a claim. Counsel also drew attention to some of the criticisms made by Lady Justice Hale in a lecture dated 20 May 2014, to the effect that there are difficulties and limitation where reliance is placed on an alternative rather than a direct remedy and he adopted her views into his submissions. As an example of a decision in a similar case where the equitable discretion was exercised in favour of the pursuer, reference was made to *Lois Pack or Clark* v *West Dumbartonshire Council*, a decision of the sheriff court (61/13).

[10] I was advised in oral submission that the second defenders were now in bankruptcy and a joint minute of agreement was lodged to the effect that the parties are agreed that:

> "1. On 8 May 2018 the second defenders were put into bankruptcy with Boris K Frederiksen, Vester Farimagsgade 23, 1606 Kobenhavn V, being appointed the trustee in the Bankrupt Estate. Claims intimated to the second defenders prior to or for a defined period after said bankruptcy would, in the appropriate circumstances, be met by the Danish Guarantee Fund for Non-Life Insurance Companies ('the Guarantee Fund'). Claims made against

bankrupt insurance companies are transferred to other non-life insurance companies to administer. Any damages paid by the Guarantee Fund are met though contributions made into the fund by non-life insurance companies authorised by the Danish Financial Supervisory Authority.

2. The second defenders have made a number of interim payments and in the event that this action is time barred the second defenders waive their right to repayment …"

Decision and reasons

[11] There was no significant dispute about the law. The cases cited were helpful but turned on their own facts and circumstances. I consider that section 19A gives the court very wide discretion to be exercised within the context of the particular facts and circumstances of the individual case. For policy reasons Parliament has made certain decisions about time limits. Although discretion is given to the court, I consider that it is important to recognise that the statutory scheme set out in the 1973 Act does give important protection to defenders. Counsel for the pursuer made a powerful submission. Part of the history which I considered to be of particular importance was the early history of engagement about the claim between the pursuer's solicitors and the solicitors of the first and second defenders; the payment of interim damages; the timeous service of the summons on the first and second defenders; the ability of the first and second defenders to draft defences; and the fact that liability is now admitted.

[12] When I considered the availability of a remedy for the pursuer against his solicitors, I was persuaded that there is a very strong *prima facie* case of professional negligence. It is not clear what any defence might be to such a claim and none was suggested which would avoid all liability. There was a possibility raised of defending any action of professional negligence in whole or in part on the basis of a challenge to the decision making of the General Department. Even if such a challenge was well founded, I am of the opinion that

the decision making by the pursuer's solicitors about the mode and timing of service and the clear problems which had arisen had nothing to do with any decision by the General Department. I considered that there were a number of actions over a period which the pursuer's solicitors could have taken to avert the time bar problem.

[13] I also take into account that there was active engagement on behalf of the first and second defenders and the defenders' solicitor took positive steps to alert the pursuer's solicitors to the calling date they had planned. The joint minute clarified that the defenders do not seek repayment of any interim payments in the event that the action is time barred.

[14] I accepted that in practice there may be some delay and uncertainty for the pursuer if he requires to pursue an alternate remedy but in a case such as this I do not regard that as serious prejudice. I am not persuaded that the assessment of damages in relation to the pursuer could be a difficult exercise even taking into account the bankruptcy of the second defenders and any arrangements consequent thereon. Liability in relation to the accident is admitted. In this case, I would expect the pursuer's solicitors or their insurers to take a pragmatic approach. It is not a case in which I anticipate that the pursuer would lack a remedy or have that remedy long delayed.

[15] I considered there was some force in the submission by counsel for the pursuer that there is merit in liability falling on the wrongdoer who has negligently caused loss, injury and damage in a road traffic accident rather than a solicitor who has made an error or errors in administration or decision making in relation to pursuit of a claim with resulting time bar problems. In the circumstances of this case, however, this is not a factor which tips the balance in favour of the pursuer. Parliament enacted specific limitation and prescription provisions to give protection to wrongdoers and there are complex policy reasons for this. The first and second defenders appear to have engaged with the action and complied with

the rules of procedure and will suffer significant prejudice if they lose the protection of the statutory time bar provisions. I consider the prejudice to the defenders would outweigh the prejudice to the pursuer in this case.

[16] Taking into account all the circumstances, I am not persuaded that it is equitable to allow the pursuer to bring this action. Accordingly the action is dismissed.