SHERIFF APPEAL COURT

2020 SAC (Civ) 7
GLW-CA30-19

Sheriff Principal C D Turnbull
Appeal Sheriff A M Cubie
Appeal Sheriff N McFadyen CBE

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in appeal by

WPH DEVELOPMENTS LIMITED

Pursuer and Respondent

against

YOUNG & GAULT LLP (IN LIQUIDATION)

Defender and Appellant

Defender and Appellant: Manson, advocate; DWF LLP
Pursuer and Respondent: J M Conn, solicitor; Mitchells Roberton

4 August 2020

Introduction

[1] The pursuer and respondent appointed the defender and appellant to provide architectural services in relation to a proposed residential development in Newton Mearns, to the south of Glasgow. The pursuer and respondent averred that the defender and appellant's drawings were erroneous in that they (a) incorrectly identified the boundaries of the development whereby boundary walls were constructed on land which the pursuer and

respondent did not own; and (b) erroneously depicted the extent of the individual residential sale plots.

[2] The present action commenced on 21 November 2018. The *injuria* relied upon by the pursuer and respondent comprises two discrete wrongful acts. The first relates to the drawings which depicted the boundaries of the development and is averred to have taken place on 8 November 2012 and to have been repeated thereafter. The second relates to the drawings which depicted the individual residential sale plots and is averred to have taken place "in or around autumn 2013".

The sheriff's decision

[3] The sole question debated before the sheriff was whether or not the obligations founded upon by the pursuer and respondent had been extinguished by the operation of the short negative prescription provided for by section 6(1) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").

[4] In a comprehensive decision (see [2020] SC GLA 27) the sheriff concluded that *damnum* had occurred as soon as the pursuer and respondent, in reliance upon the erroneous drawings, incurred expenditure to contractors who built upon land which the pursuer and respondent did not own. On the facts averred by the pursuer and respondent, the relevant works commenced more than five years prior to the action being raised.

[5] The pursuer and respondent averred that issues with the boundaries of the development were first brought to its attention on 20 February 2014; and that on 20 May 2014 correspondence was received from solicitors acting for the purchaser of one of the affected residential plots advising that the Keeper of the Land Registers of Scotland had refused to register the disposition of the plot in question due to discrepancies between the

boundary depicted in the individual plot sale plan appended to that disposition and the boundary depicted in the pursuer and respondent's registered title. The pursuer and respondent averred that it was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage had occurred prior to 20 May 2014; or, alternatively, prior to 20 February 2014.

[6] The sheriff concluded that these averments were relevant; sustained the pursuer and respondent's preliminary pleas in so far as directed against the defender and appellant's averments *anent* prescription; excluded certain of the defender and appellant's averments from probation; and allowed parties, before answer, a proof of their remaining averments.

[7] In doing so, the sheriff reached the conclusion that *Midlothian Council* v *Raeburn Drilling and Geotechnical Ltd* 2019 SLT 1327 was wrongly decided, the Lord Ordinary having misapplied the decision of the UK Supreme Court in *Gordon's Trustees* v *Campbell Riddell Breeze Paterson* 2017 SLT 1287. Notably, in *Midlothian Council* (at paragraph [23]) the Lord Ordinary stated, in terms, that he had followed the interpretation of section 11(3) of the 1973 Act in *Gordon's Trustees*.

[8] The defender and appellant has appealed against the sheriff's decision, contending that the sheriff ought to have assoilzied the defender and appellant or to have dismissed the action. The matter in controversy in the appeal, at least from the defender and appellant's perspective (answers are yet to be lodged by the pursuer and respondent), is the sheriff's conclusion that, on a proper application of section 11(3) of the 1973 Act, the pursuer and respondent had made relevant averments to avail itself of the benefit of that sub-section.

Motion for defender and appellant

[9] The defender and appellant has moved the court to remit the appeal to the Court of Session in terms of section 112 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). That motion is not opposed by the pursuer and respondent. The sheriff's judgment was issued, and the appeal marked, during the Coronavirus pandemic. The court invited submissions from parties in relation to the motion to remit. Both parties lodged written submissions and we thereafter heard parties in relation to the motion to remit.

[10] Section 112 of the 2014 Act is in the following terms:

> **"112 Remit of appeal from the Sheriff Appeal Court to the Court of Session**
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> (1) This section applies in relation to an appeal to the Sheriff Appeal Court against a decision of a sheriff in civil proceedings.
> (2) The Sheriff Appeal Court may—
> (a) on the application of a party to the appeal, and
> (b) if satisfied that the appeal raises a complex or novel point of law, remit the appeal to the Court of Session.
> (3) Where an appeal is remitted to the Court of Session under subsection (2), the Court of Session may deal with and dispose of the appeal as if it had originally been made direct to that Court."

Submissions for the parties

[11] The defender and appellant argues that the appeal raises complex and novel points of law in connection with the law of prescription, particularly the correct interpretation of section 11(3) of the 1973 Act and the scope and applicability of the Supreme Court's decision in *Gordon's Trustees* to professional negligence cases such as this. In support of its motion, the defender and appellant relies upon four sets of considerations.

[12] First, the determination of this appeal will be of considerable importance to parties and practitioners engaged with professional negligence litigation in Scotland. There is said

to be a significant body of such cases currently in dependence before both the Court of Session and the sheriff court in which the correct interpretation of section 11(3) of the 1973 Act and the recent cases which consider that are in issue. The outcome of this appeal will have a significant bearing on most, if not all, of those cases.

[13] Second, the sheriff has held that the case of *Midlothian Council* was wrongly decided and that the decision of the Lord Ordinary therein ought not to be followed. The decision in *Midlothian Council* is said to have had a very significant impact on professional negligence litigation in Scotland. Consideration of the decision in *Midlothian Council* presents a novel and complex issue. There are now irreconcilable judgments in the Court of Session and in the sheriff court on this important area of the law. If this court were to uphold the sheriff's decision that position would remain. That would be unsatisfactory. It would place solicitors and counsel in Scotland advising on prescription in an even more difficult and uncertain position than that which already pertains in relation to this difficult area of law. The defender and appellant submitted that it would be appropriate for the Inner House of the Court of Session to consider this appeal and to issue a binding decision which all first instance courts can follow.

[14] Third, the sheriff has taken an approach which calls into question whether or not it is necessary for first instance courts to apply all aspects of the UK Supreme Court's decision in *Gordon's Trustees*. As the sheriff acknowledges in his judgment, parts of the Supreme Court's judgment in *Gordon's Trustees* support the defender's position in this case. These parts cannot be reconciled with the disposal arrived at by the sheriff. Whether or not the sheriff was correct in this connection is another novel, complex and important question. The sheriff has called into question whether or not first instance courts require to follow what the

defender and appellant contends are critical parts of a UK Supreme Court decision in a Scottish case.

[15] Fourth, remit to the Court of Session at this stage would avoid the potential for a practical problem to arise in due course in connection with an "onward appeal" (i.e. one under section 113 of the 2014 Act). Put shortly, if the defender and appellant were to succeed in an appeal before this court, that would result in a "final judgment" for the purposes of section 113(1) of the 2014 Act, in terms of which the pursuer and appellant could seek permission to appeal to the Court of Session. If, however, this court were to refuse the appeal, that would not result in a final judgment and the defender and appellant would be unable to seek permission to appeal. The defender and appellant describes this as an "unfortunate function" of the way in which section 113 of the 2014 Act has been drafted. It leaves a party in the position of the defender and appellant (i.e. one who maintains it has a complete legal defence to an action on the pleadings) with no competent means of settling the question before the Inner House of the Court of Session prior to a final judgment on the merits.

[16] The pursuer and respondent neither opposed nor consented to the motion to remit the appeal. It did, however, make submissions in respect of those aspects of the defender and appellant's submissions which it maintained lacked detail or did not conform to the pursuer and respondent's understanding. Additionally, however, the pursuer and respondent submitted that the matters raised in this appeal are of time-limited significance to practitioners given the pending amendments to the 1973 Act that will be made by way of section 5 of the Prescription (Scotland) Act 2018 ("the 2018 Act").

Discussion

[17] On an application being made by a party to an appeal, this court is required to apply a two-stage test when determining if an appeal should be remitted to the Court of Session by virtue of section 112 of the 2014 Act. First, the court requires to consider if the appeal raises a complex or novel point of law (see sub-section 112(2)(b)). Second, if it is so satisfied, the court retains a discretion as to whether or not to remit the appeal standing the wording of sub-section 112(2) and requires to consider whether or not the appeal should be remitted. We consider each stage in turn.

[18] The House of Lords and the UK Supreme Court have now considered the operation of section 11 on three occasions, namely, in *Dunlop* v *McGowans* 1980 SC (HL) 73; in *David T Morrison & Co Ltd (t/a Gael Homes Interiors)* v *ICL Plastics Ltd* 2014 SC (UKSC) 222; and in *Gordon's Trustees*. The facts of *Dunlop* and *Gordon's Trustees* are similar – each relating to a failure by solicitors to timeously serve a notice to quit of a tenant; *David T Morrison & Co Ltd* is materially different – it being concerned with observable physical damage to the pursuer's shop caused by an explosion in the defender's neighbouring business premises. In *Dunlop* and *Gordon's Trustees* the prescriptive period began to run from the date upon which the landlord would have gained vacant possession, but for the negligent act. In *David T Morrison & Co Ltd* it ran from the date of the explosion.

[19] It will be immediately observed that the cases which have been considered by the House of Lords and the UK Supreme Court each concern circumstances in which the occurrence of loss and damage was readily apparent. The present case is of a different type altogether. The pursuer and respondent averred that it was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage had occurred until

sometime after construction works had commenced in reliance upon the defender and appellant's erroneous drawings.

[20] As observed by Lord Hodge in *Gordon's Trustees* (see paragraph [1]) it is important that there is certainty as to when the clock starts in cases of this nature. It is an important matter which was acknowledged as having given rise to uncertainty prior to the decision in *Gordon's Trustees*. In cases of the current type, it would appear that uncertainty remains. The fact that the sheriff in this case has reached a different conclusion to that reached by the Lord Ordinary in *Midlothian Council* (and applied by him in *Loretto Housing Association Ltd* v *Cruden Building & Renewals Ltd & others* [2019] CSOH 78) highlights the uncertainty. Moreover, there is a dispute as to whether the amendments to section 11 which will be effected by the coming into force of section 5 of the 2018 Act address the point debated before the sheriff. The sheriff says they do not (see paragraph [69] of his judgment); the pursuer and respondent says they do; and the defender and appellant says there are circumstances in which they do not. We express no view on the issue, however, it highlights a further area of uncertainty.

[21] We are satisfied that the present appeal raises a complex point of law.

[22] The first stage of the test having been satisfied, we turn to consider whether we should exercise our discretion and remit the appeal to the Court of Session. The fourth point advanced by the defender and appellant falls to be considered in this regard. Whilst the defender and appellant's analysis of the effect of the provisions of the 2014 Act is correct, that effect of the provisions of the 2014 Act cannot be determinative. Parliament has concluded that "onwards" appeals should only apply in limited circumstances. The issue raised by the defender and appellant is addressed by way of this court's power of remit in terms of section 112. These particular circumstances were considered in *First Time Ltd* v

Liquidator of Denmore Investments Ltd 2016 SLT (Sh Ct) 430 at paragraph [12] in which this court offered the view that a decision at debate which raises a crisp point of law which is novel or complex may well be viewed as suitable for remit.

[23] It is implicit from what was said by this court in *Donnelly* v *Royal Bank of Scotland plc* (No. 2) 2016 SLT (Sh Ct) 333 that the possibility of the points of law with which the appeal is concerned being subsequently considered by the UK Supreme Court is a relevant consideration in a motion to remit. In this case, for the reasons explained in paragraphs [18] and [19] above, that is a possibility which cannot be excluded in this case.

[24] In *First* Time *Ltd*, at paragraph [10], it was suggested that to meet the statutory test to warrant a remit to the Court of Session this court requires to find that the case raises a point of wider interest which will have general application. Such a consideration is undoubtedly of relevance when considering what we have referred to as the second stage of the statutory test. It has no application to the first stage. For the reasons outlined by the defender and appellant, the present appeal is unquestionably one that raises a point of wider interest which will have general application.

Disposal

[25] For the foregoing reasons, we are satisfied that we should exercise our discretion and remit this appeal to the Court of Session. As the motion was not opposed, we shall find no expenses due to or by either party.