

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2022] SC ABE 12

ABE-CA12-21

NOTE BY SHERIFF P MANN

Note to Interlocutor of 25 March 2022

In causa

ANDREW TOLLERTON and GLORIA TOLLERTON, spouses, residing at Southmuir,
Greenbank Road, Falkirk, FK1 5PU

Pursuers

against

HIGHLAND FUELS LIMITED a company incorporated under the Companies Acts
(Company Number SC032343) and having its registered office at Union Plaza (6th Floor),
1 Union Wynd, Aberdeen, AB10 1DQ

Defender

Aberdeen 01 April 2022

The Interlocutor

[1] On 25 March 2022, following the pronouncement of an extempore judgment in terms of ordinary cause rule 12.3(1) and (2) at the conclusion of a preliminary proof, I pronounced an interlocutor in this commercial action in the following terms:

“The sheriff, evidence having been led and concluded, having heard agents’ submissions and having delivered an extempore judgment, sustains the defenders’ objection to the leading of secondary evidence as to the condition of the oil tank; Finds the pursuers liable to the defenders in the expenses of preparation for and conduct of the preliminary proof just concluded; Allows the defenders to lodge an account thereof and remits the same when lodged to the auditor of court to tax and to report; thereafter, Continues the cause to a Case Management Conference on 29 April 2022 at 11.00am; Ordains parties to lodge Notes of Proposed Further Procedure and Notes in Support of any Preliminary Pleas on which they seek to rely at said hearing no later than 4pm on 26 April 2022.”

[2] On 29 March 2022 the pursuers lodged a request for this note in terms of rule 12.3(3).

Findings in Fact

[3] My findings in fact are as follows:

1. The pursuers reside at the Property.
2. The oil tank was filled with approximately 1,400 litres of kerosene oil by the defender on 4 November 2019 pursuant to an order placed by the pursuers.
3. The oil tank was located at the side of the Property on a concrete base with a brick bund around the perimeter of the concrete base.
4. On the morning of 5 November 2019, Gloria Tollerton discovered oil leaking from the bottom of the oil tank.
5. Gloria Tollerton telephoned her insurers, Saga Group plc, on 5 November 2019 to report the oil leak.
6. Acromas Insurance Company Ltd ("Acromas") is the underwriter of Saga Group plc.
7. Acromas appointed CHMC Limited ("CHMC"), another Saga Group holding, to manage the pursuers' claim on its behalf.
8. Jo Scott of CHMC was the claims handler of CHMC appointed to manage the pursuers' claim.
9. Due to the initial reserve for the claim, Jo Scott was required to seek approval from Ian Marsh (Head of Property Claims for Acromas) about how the claim was to be progressed.
10. Luke Crowe of Stream Claims Services ("Stream") was appointed by Acromas as the loss adjuster for the pursuers' claim.

11. Luke Crowe's point of contact at Acromas was via Jo Scott.
12. Luke Crowe was required to seek approval from Jo Scott for remediation works to proceed.
13. On 5 November 2019, Stream instructed RSK Raw Limited ("RSK") to carry out spill response and remediation works at the Property.
14. Luke Crowe's point of contact at RSK was Steve Lyduch.
15. Steve Lyduch is Alan Chisholm's line manager.
16. The pursuers took no involvement with Stream's appointment or instructions.
17. The pursuers took no involvement with RSK's appointment or instructions.
18. On 5 and 6 November 2019, representatives from RSK attended the Property to stem the leak from the oil tank and carry out mitigation works.
19. On 5 November 2019, Paul Moody from Hawkins & Associates Limited (on Acromas' instructions) attended at the Property, inspected the oil tank and took photographs of it and produced a report dated 7 November 2019.
20. On 7 November 2019, Douglas Ferguson from Angus Oil Tank Solutions (on RSK's instructions) attended the Property to drain the oil tank of remaining oil and connect a temporary tank to the Property's heating system.
21. On 8 November 2019, representatives from RSK Raw Limited attended the Property to take soil samples.
22. On 20 November 2019, Alan Chisholm of RSK prepared a cost estimate for the remediation and reinstatement works ("the Cost Estimate"). The cost estimate included estimated costs for removal and disposal of the oil tank from the Property under Phase 3 of the works.

23. The Cost Estimate was issued by Steve Lydych to Luke Crowe by email on 20 November 2019.
24. On 21 November 2019, Jo Scott sought approval from Ian Marsh of Acromas for Phase 2 works. Ian Marsh granted approval for Phase 2 works on 27 November 2019.
25. On 12 December 2019, Steve Lydych received authorisation from Luke Crowe to commence Phase 2 works.
26. The oil tank was moved from its original location to the rear garden of the Property.
27. On 22 January 2020, Steve Lydych emailed Luke Crowe attaching a cost estimate detailing Phase 3 works and asking if RSK could dispose of the oil tank.
28. On 24 January 2020, Harper Macleod LLP (appointed by Acromas) issued a letter of claim to the defender on behalf of the pursuers.
29. On 28 January 2020, Luke Crowe emailed Steve Lydych with confirmation that Phase 3 costs were authorised.
30. Steve Lydych informed Alan Chisholm that Phase 3 works had been authorised and Alan Chisholm arranged for those works to commence.
31. The defender instructed Crawford and Company as their loss adjusters on 31 January 2020.
32. On 31 January 2020, Callum Pollock of Crawford and Company left a voicemail for Graham Horsman (solicitor of Harper Macleod LLP) requesting to inspect the oil tank.
33. On 4 February 2020, Callum Pollock left a further voicemail for Graham Horsman.
34. On 4 February 2020, Jo Scott had a telephone call with Steve Lydych in which she confirmed to Steve Lydych that Phase 3 costs had been approved by the pursuers' insurers.
35. On 6 February 2020, Graham Horsman called Callum Pollock to confirm that there was no objection to the oil tank being inspected.

36. On 6 February 2020, Callum Pollock emailed Graham Horsman to arrange suitable dates for the inspection.
37. On 11 February 2020, Callum Pollock emailed Graham Horsman to propose 18 February 2020 as the date for the inspection.
38. Callum Pollock intended to bring Ian Taylor, the defender's oil delivery driver who made the delivery on 4 November 2019, to the inspection.
39. On 17 February 2020, Callum Pollock called Graham Horsman to check if the inspection was going ahead but there was no response.
40. On 17 February 2020, Graham Horsman emailed Callum Pollock to request that the inspection be rearranged as Acromas were unable to have a representative attend the Property on 18 February 2020.
41. On 19 February 2020, Callum Pollock emailed Graham Horsman to propose alternative dates for the inspection and indicating that the defender's regional manager wished to be present.
42. On 19 February 2020, Steve Lyduch emailed Luke Crowe advising that the oil tank had been removed from the Property and that photographic evidence was available.
43. On 19 February 2020, Luke Crowe emailed Steve Lyduch asking if the oil tank had been disposed of.
44. On 19 February 2020, Steve Lyduch emailed Luke Crowe advising that the oil tank had been removed the week prior (i.e. sometime between 10 and 16 February 2020).
45. The oil tank was removed from the Property sometime between 10 and 16 February 2020 by Angus Oil Tank Solutions and was thereafter scrapped.

46. On 24 February 2020, Graham Horsman emailed Callum Pollock advising that Acromas had been advised by Steam that the oil tank had been removed and that he was liaising with Stream to determine its location and whether inspection was still possible.

47. On 3 March 2020, Graham Horsman emailed Callum Pollock advising that the oil tank had been disposed of. Mr Horsman advised that “Stream had agreed for the tank to be removed by RSK in order to facilitate the mitigations works required. Unfortunately, unknown to my client, Stream or their insured, the tank has been disposed of by the removal company. The disposal of the tank formed no part of Stream’s instruction, this was effectively an error between RSK and the removal company”. Graham Horsman asked if a site inspection was required. Graham Horsman enclosed Stream’s preliminary report and a letter from Douglas Ferguson of Angus Oil Tank Solutions.

48. On 5 November 2020, Graham Horsman provided the following documentation to Callum Pollock by email: (i) written statement of Douglas Ferguson of Angus Oil Tank Solutions; (ii) written statement of Simon Peters, delivery driver; (ii) excerpts from The Professional’s Guide to Domestic Commercial Requirements for Oil Storage & Supply Equipment and the Federation of Petroleum Suppliers Guidelines for Safer Deliveries; and (iii) photographs of the Tank taken on 5 November 2019.

49. On 10 December 2020, Callum Pollock emailed Graham Horsman and stated that “having considered this evidence it is accepted that the condition of the tank was such that the delivery should not have been made”.

50. This action was raised on 25 March 2021.

51. The defender instructed a forensic report by Danny Pointon of Burgoynes Consulting Scientists and Engineers dated 3 November 2021.

52. Danny Pointon of Burgoynes Consulting Scientists and Engineers drafted a letter dated 20 January 2022. In this letter he states that: “Had I been able to inspect the tank, I would have: (a) Inspected the tank and, in particular, the areas where rust was evident, and the area where the leak had occurred. I would have attempted to inspect the tank on a dry day (or would have erected a tent/enclosure to dry it out), so that the best evidence of the general condition and the best evidence of the nature and extent of the leak/failure was obtained. (b) I would also have arranged to inspect the tank accompanied by the driver, in similar or identical conditions to those on the day in question i.e. similar light levels and similar rain/weather conditions, in order to identify what the driver could or should have observed. This might have indicated how easy it was to identify the damage, and how easy it was to identify the severity of the damage. It would also have allowed me to consider the driver’s actions based on a direct observations of his actions whilst on site. (c) Following these enquires (which would be non-destructive), I would have sought to identify the extent of the leak, possibly by investigating (“poking”) with tools, before seeking to remove the tank and/or cutting relevant sections of the tank out, for safe keeping. Moving the tank would also allow full inspection of the base, including the area around the tank supports, which is possibly where the leak occurred. This would not have been visible with the tank in place. (d) I would probably have sought to test the bund, or at least to have inspected the bund in greater detail,”

53. The tank was disposed of prior to the defender having an opportunity to inspect it.

54. The tank was disposed of by those for whom the pursuers were responsible.

55. The defender has been prejudiced by its inability to inspect the tank. It has been deprived of any basis for challenging the pursuers’ contentions as to the condition of the tank based on the inspection of it by their experts.

56. The prejudice to the defender is not removed by the availability of photographs of the tank lodged in process.

57. The best evidence of the condition of the tank is the tank itself. That evidence has been lost by the disposal of the tank.

58. The pursuers knew, or ought to have known, that the defender would be prejudiced by an inability to inspect the tank for itself.

59. The pursuers and those for whom they were responsible failed to take all proper steps and failed to use all due diligence to preserve the oil tank.

Findings in Fact and Law

[4] My findings in fact and law are as follows:

1. The pursuers ought to have preserved the tank for inspection by the defender and they had a duty to do so.
2. The pursuers were at fault in failing to preserve the oil tank.
3. The pursuers failed in their duty to preserve the oil tank.

Findings in Law

[5] My findings in law are as follows:

1. The best evidence of the condition of the oil tank having been lost due to the fault of the pursuers and the defender having been prejudiced thereby, the pursuers are not entitled to lead secondary evidence as to its condition.
2. Secondary evidence as to the condition of the oil tank is inadmissible in this litigation.

Note to Interlocutor***Introduction***

[6] This is a commercial action seeking reparation for damages caused by the leaking of oil from a domestic oil tank at the pursuers' property. The pursuers claim that the defender, through its delivery driver, was negligent in delivering oil to the tank when the driver ought to have known that it was in an unfit state to contain the oil.

[7] The condition of the oil tank at the time of the delivery of the oil is of critical importance in determining liability. The oil tank was inspected by experts on behalf of the pursuers, instructed by the pursuers' insurers. Those experts prepared a report which is in process. The tank was thereafter disposed of by contractors employed by the pursuers' insurers before the defender had had an opportunity to have it inspected on its behalf.

[8] At a continued case management conference the defender stated an objection to the leading by the pursuers of secondary evidence, in particular the expert report, as to the condition of the oil tank on the basis of the best evidence rule, the best evidence being the oil tank itself. Given the critical importance of the issue of the condition of the oil tank Sheriff Miller assigned a preliminary proof to determine the issue. The proof was assigned for 28 January 2022, with an order pronounced at a later date for the evidence in chief of all witnesses to be by way of affidavit.

[9] The proof commenced before me on 28 January 2022. The pursuers were represented by Miss Grosvenor, Solicitor, and the defender was represented by Miss Brown, Solicitor. The first two witnesses, Mr and Mrs Tollerton, were led. They each adopted their respective affidavits in chief and were then cross examined. It was apparent to me that the affidavit evidence of these two witnesses had not been challenged in any material way. I enquired of agents whether or not any of the affidavit evidence to be led in chief would be challenged.

They both advised me that there was no intention to do so. In these circumstances, with the agreement of agents, I discharged the diet and continued the cause for the lodging of a joint minute of admissions and for submissions.

[10] A joint minute of admissions, for which I am extremely grateful to agents, was duly lodged and I then heard submissions on 25 March 2022. Each agent referred to two sets of written submissions which had been lodged by each of them at the request of the court. The first set of submissions had been submitted in advance of the preliminary proof diet of 28 January 2022 and the second set had been lodged in advance of the hearing on submissions on 25 March 2022. All of these submissions are in process and I do not intend to go into them in detail here. Again, I am very grateful to agents for these written submissions which I found to be of great assistance.

[11] At the conclusion of submissions on 25 March 2022 I pronounced an extempore judgment in terms of ordinary cause rules 12.2(4)(a) and 12.3 sustaining the defender's objection. I have taken the opportunity here to recast two findings which I categorised as findings in fact and law in my extempore judgment as findings in law. I have also taken the opportunity to amend finding in fact 59 which I stated in my extempore judgment so as to add reference to those for whom the pursuers were responsible.

[12] Findings in fact 1 – 52 are taken directly from the joint minute.

Objection to Evidence at the Preliminary Proof

[13] At the preliminary proof the defender objected to the pursuers leading evidence as to Callum Pollock's statement that "having considered this evidence it is accepted that the condition of the tank was such that the delivery should not have been made". I heard that evidence under reservation. I dealt with it in my extempore judgment as follows:

“The defenders took objection to the leading of that email in evidence on the basis that it was privileged by virtue of its having been sent with a view to achieving a settlement of the pursuers’ claim. They refer to the case of *Gordon v East Kilbride Development Corporation* 1995 SLT 62. It seems to me that the defenders’ objection was well founded. The email, and in particular the acceptance stated within it that the condition of the tank was such that the delivery should not have been made, read in the context of the whole email, was clearly tendered as being conditional on the pursuers accepting the defenders’ position. It was part of the negotiation for settlement of the pursuers’ claim. It was not, for example, tendered with a view to discouraging the pursuers from having the tank inspected and, in fact, it was tendered well after the date when the tank had been inspected on behalf of the pursuers and thereafter disposed of. I am, therefore, sustaining the defenders’ objection and in consequence thereof I take no cognisance of the email.”

[14] I ought not to have dealt with the Callum Pollock statement in that way. Parties had agreed the terms of finding in fact 49 in their joint minute. It must follow that the defender no longer insisted in its objection, albeit that the pursuers in submission clearly regarded this as still being a live issue by saying “such an admission strikes at the heart of Mr Pollock’s credibility and should be admitted as evidence as a result, despite the objection raised by the defender at the hearing on 28 January 2022”.

The credibility of Callum Pollock and Danny Pointon

[15] It is convenient to deal with this issue at this point. In my extempore judgment, after concluding that Callum Pollock’s statement was part of the settlement negotiations, I went on to say:

“Even if I am wrong in that, the email does not have the effect for which the pursuers contend. If it was a concession it was a concession that the defenders were and are entitled to withdraw just as they would have been entitled to withdraw it had it been made in the course of their pleadings on record. The pursuers do not plead any case of personal bar on record and, in any event, it is difficult to see how the pursuers could have relied, or did rely, on the concession to their prejudice.”

[16] The pursuers had contended that Callum Pollock could not be accepted as a credible witness because his affidavit was silent on his admission and as to the reason for its having

been made. His affidavit was, further, silent on the issue of prejudice and even if he had given evidence on that issue his credibility in relation thereto would have been undermined by his admission.

[17] The pursuers also attacked the credibility of Danny Pointon who gave evidence as to prejudice suffered by the defender in not having had the opportunity to inspect the condition of the oil tank. This was on the basis that he had originally provided a report to the defender on 03 November 2021 (6/12 of process) which was silent on the issue of prejudice and that he only commented on prejudice in a letter dated 20 January 2022, a few days before the preliminary proof, produced at the request of the defender, the inference being that the defender treated the issue of prejudice as an afterthought.

[18] The pursuers contended that the defender could not now claim that it was prejudiced by its inability to have the oil tank inspected because Callum Pollock's statement amounted to an unequivocal admission that the condition of the tank was such that the delivery of oil should not have been made. The statement was clear evidence that the defender had suffered no prejudice - presumably because it had been able to come to a view on the issue.

[19] I do not accept the pursuers' submissions on this issue. Callum Pollock's statement was no more than a statement of what was obvious with the benefit of hindsight. It was a concession made in the course of settlement negotiations. It was no more binding on the defender than if it had been a concession made on record and then withdrawn. It did not amount to an admission or a concession (albeit capable of being withdrawn) that the defender's delivery driver ought to have observed the unsatisfactory condition of the oil tank and thus ought not to have delivered the oil.

[20] There is no inevitable inference to be drawn from the dates of Danny Pointon's report and letter that the defender treated the issue of prejudice as an afterthought. It is tolerably clear that the defender considered by the date of the report on 03 November 2021 that it would suffer prejudice by the leading of secondary evidence as to the condition of the oil tank - because it stated that objection in a note of proposals for further procedure lodged on 09 November 2021. In his report dated 03 November 2021 Danny Pointon stated:

“In this case, it does appear that the driver has undertaken a visual inspection and has concluded that there were no particular problems. Within the context of what a delivery driver could do, this conclusion does not appear to me to be unreasonable: without full testing, there is no way to determine the current condition of the metal tank, and the tank is only slightly rusty, based on the photographs.”

The defender was clearly entitled to ask Danny Pointon to comment on the lack of opportunity to inspect the oil tank in preparation for the preliminary proof. He commented on that in his letter dated 20 January 2022. I see no reason to doubt the credibility of the evidence of Callum Pollock or Danny Pointon on the bases stated by the pursuers. I certainly do not doubt Callum Pollock's credibility on the basis that evidence that he never gave was undermined.

[21] No issues of credibility and reliability arise in respect of any other witnesses.

The law on the best evidence rule

[22] The defender referred to various cases for the law on this matter. It pointed to the following. In *Scottish and Universal Newspapers Ltd v Gherson's Trs.* 1987 SC 27 page 47,

Lord President Emslie said:

“From these passages I take the true rule applicable to a case such as this to be that secondary evidence of the contents of the missing records will be admitted only if it is shown that they have been destroyed or lost without fault on the part of the pursuers who had effective control of the records when the action began. A party in the position of the pursuers indeed will, according to Dickson, sec. 237, probably be

required to show a special causa amissionis not attributable to any fault on his part. It must be recognised accordingly that the leading of secondary evidence to prove the contents of missing documents – a manifestly unsatisfactory expedient – is a privilege to be earned by a party in the position of the pursuers in this case. The Lord Justice Clerk (Inglis) indeed, in *Clark v Clark's Trs...* called it an 'extraordinary privilege'... There is no difficulty in interpreting the word 'fault' in this context. It simply means failure in a duty to take all proper steps or to use all due diligence to see that these records were preserved and remained accessible for use in the proof."

[23] At page 48 the Lord President said:

"To say... that the question of prejudice has no role to play in deciding upon the issue of secondary evidence of the content of documents is to go too far. In my opinion... it is entirely relevant in ascertaining the importance of the documents in the litigation to consider to what extent their absence will obviously prejudice the other parties. The greater the obvious prejudice which would be occasioned by the loss of the documents the more necessary will it be for the party who controls the documents to take whatever steps are required to see that they are not lost"

And:

"the pursuers had failed to take proper and elementary steps to see that they were preserved. Upon the evidence they were not entitled, having regard to the critical importance of the records, merely to assume that they would be available when they wanted them.... (W)hen the pursuers relinquished effective control over them to their associate company... it was all the more necessary that some simple special and practicable steps were taken to ensure that these records were kept separate from all other records ...and retained. No such steps of any kind were taken."

[24] In *Peacock Group Plc v Railston Limited* 2007 S.L.T. 269 Lord Drummond Young said at paragraph 10:

"*Scottish and Universal Newspapers Ltd. v Gherson's Trustees* involved the loss of documents, but in my opinion it is clear that identical principles must apply to the loss of non-documentary productions; items of real evidence may indeed be of even more fundamental importance to proving a case than items of documentary evidence."

And at paragraph 12:

"The pipe and fittings were lodged in process at a fairly early stage in the action, but some months later they were borrowed out of process by the pursuers' agents and went missing while in the hands of the pursuers' agents. Prima facie, therefore, the pursuers' representatives were responsible for the loss, and there was no suggestion that any other person was responsible, or that the cause of the loss was something outwith the control of the pursuers or their representatives."

[25] In *Scottish Water Business Stream Limited v Automatic Retailing (Scotland) Limited and Arthur McKay & Co Limited* 2014 CSOH 87 Lord Doherty said at paragraph 72:

“In my opinion the pursuers can be criticised for not taking immediate and appropriate steps to preserve the evidence. They knew they were dealing with a major incident. They knew or ought to have known that retaining the parts involved was important — Mr Topping appreciated that. At the time the non-return valve was produced it was incumbent upon them to clarify and locate the whereabouts of the other parts, and to secure their retention. Those obvious steps were not taken. Had they been it would have become apparent to them that the parts were still in their possession and control — within the machine.”

[26] In light of the foregoing authorities the defender submitted that the following principles applied to the best evidence rule:

- The leading of secondary evidence to prove the contents of missing documents is a privilege to be earned by a party seeking to rely on the secondary evidence.
- Secondary evidence as to the contents of documents will be admitted only if it is shown that the documents have been destroyed or lost without fault on the part of that party who had effective control of the records.
- The party seeking to rely on the secondary evidence requires to show a special *causa amissionis* not attributable to any fault on his part.
- “Fault” in this context simply means failure in a duty to take all proper steps or to use all due diligence to see that the records are preserved and remain accessible for use in the proof
- It is entirely relevant in ascertaining the importance of documents in a litigation to consider to what extent their absence will obviously prejudice the other parties. The greater the obvious prejudice which would be occasioned by the loss of the documents the more necessary will it be for the party who controls the documents to take whatever steps are required to see that they are not lost.

- The same principles as apply to documents fall to be applied where items of real evidence are no longer available.
- No distinction falls to be drawn where the loss of primary evidence is caused by a representative of the party seeking to found upon it rather than the party themselves.
- The duty to preserve the evidence arises once it is known that there is an incident and that the evidence is important to its resolution.

[27] I find the defender's submissions on the law to be persuasive and I accept them in preference to the pursuers' submissions where they diverge. For example, I do not accept the pursuers' assertion that they would be free to lead secondary evidence about the condition of the oil tank because the tank had been disposed of by the time that this action was raised and that secondary evidence is, therefore, the best attainable evidence that the pursuers can produce.

[28] I also do not accept the pursuers' assertion that photographs of the real thing, as in this case, can be equated with photocopies of documents in respect of which in the case of *Promontoria (Henrico) Ltd v Friel* 2020 S.C. 230 at paragraph [44] Lord Ericht commented that it was difficult to envisage that the decision in *Scottish and Universal Newspapers* would have been the same if it had been made in the modern era had photocopies of the documents been available. In the case of photocopied documents nothing turns on the look and feel of the words and figures. So long as the photocopies represent the actual words and figures and their layout that is all that is required. Not so with real objects such as the oil tank in this case where the look, feel and texture of the item could be of critical importance in determining its condition and whether a delivery driver ought to have observed that the tank was not in a fit condition to receive a delivery of oil.

[29] As was suggested by Lord Drummond Young in *Peacock Group PLC v Railston Ltd* what might have made a difference in this case would have been if an expert instructed by the defender had had an opportunity to examine the oil tank before it was disposed of. But, just as in the *Peacock* case that did not happen here and the defender cannot be said to be in any way at fault for not examining the oil tank.

Application of the law to the facts

[30] It is an irresistible inference from the facts agreed in the joint minute that the fault for the oil tank now being unavailable must lie at the door of the pursuers. The tank was under the control of those who were instructed by the pursuers' insurers. Although there was no evidence led on the point and hence no finding in fact I think that it is clear and that parties accept that the insurers are the real pursuers in this action in subrogation for Mr and Mrs Tollerton for the vast bulk of the sum sued for.

[31] It is nothing to the point that the tank might have been disposed of unintentionally due to some miscommunication or other. The insurers, for whose actings the pursuers must take responsibility, knew the importance of being able to establish the condition of the tank, otherwise they would not have instructed their own expert to examine it and to provide a report. That report can only have been commissioned with a view to the raising of these proceedings. The insurers had a duty to preserve the tank so that it would be available as evidence in these proceedings. They failed in that duty. They failed to take all necessary steps to ensure that it was preserved. There ought to have been seen to it that there was no miscommunication about its disposal. There was no reason for the tank to be disposed of but had its disposal been necessary the insurers ought to have ensured that the defender at least had the opportunity to examine it beforehand.

[32] The real nub of this case is whether the delivery driver ought to have observed the unsatisfactory condition of the oil tank. That is why the observable condition of the oil tank is so critical. That is why the defender ought to have had the opportunity to have the oil tank inspected so that it could assess its observable condition for itself and, depending on its conclusions, to be in a position to counter the pursuers' evidence on the issue. That is why the best evidence of the condition of the oil tank is the oil tank itself. That is why the defender was and is prejudiced by its inability to have the oil tank inspected. At paragraph [15] in the *Peacock* case Lord Drummond Young was dealing with a similar situation when he said:

“Counsel for the pursuers also contended that at a proof on the merits the court could rely on the evidence of the representatives of Burgoyne who had examined the pipe and fitting and on the photographs that they had taken..... That is no doubt true up to a point, but the fundamental problem remains that the productions, which are themselves of fundamental importance to the case, have not been examined by any expert acting for the third party; consequently the evidence about their condition is likely to be one sided. Indeed, unless representatives of the third party are able to examine the productions, it is very difficult to see how any effective cross examination could be mounted on the basic condition of the pipe and fitting. That seems to me to cause insurmountable prejudice to the third party.”

Those words apply with equal force in this case.

[33] For all of the foregoing reasons I have sustained the defender's objection to the admissibility of secondary evidence as to the condition of the oil tank.

Expenses

[34] Miss Brown moved for the expenses of preparation for and conduct of the preliminary proof. Miss Grosvenor did not resist that motion.