



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 21

CA126/21

OPINION OF LORD SANDISON

In the cause

HIGHLANDS AND ISLANDS ENTERPRISE

Pursuer

against

GALLIFORD TRY INFRASTRUCTURE LIMITED

First Defender

and

A.F. CRUDEN ASSOCIATES LIMITED (IN LIQUIDATION)

Second Defender

**Pursuer: G Walker KC et Ower; Brodies LLP
First Defender: MacColl KC et MacColl; DWF
Second Defender: No appearance**

10 March 2023

Introduction

[1] In this commercial action the pursuer seeks decree for joint and several payment to it by the defenders of a sum by way of damages in excess of £11.5 million. The matter is due to proceed to proof before answer later in the year, but in the meantime the first defender seeks to have its contention that the claim against it has prescribed determined by way of debate. The second defender did not participate in the debate.

Background

[2] From 1999 the pursuer entered into arrangements for the design and construction of a funicular railway which came to be known as the Cairngorm Mountain Railway, near Aviemore. It contracted with the first defender for the construction of the railway and with the second defender as the project civil and structural engineer. It claims that the first defender was also obliged by its contract to co-ordinate, supervise and administer the design work of the second defender. The railway runs for a little short of two kilometres horizontally and rises about 600 metres along the way. For most of its length it is supported on a predominantly concrete viaduct with 94 spans about 18 metres apart. The rails are supported on top of pairs of concrete beams on reinforced concrete piers with precast cross heads. The railway began operations on 24 December 2001. After certain defects in it were identified in circumstances shortly to be described, its operations were suspended in October 2018.

[3] The pursuer claims that in the years between completion of the works and 2008 the second defender carried out a number of inspections of the railway and reported no significant concerns about what it had observed to the pursuer or to the then lessee of the railway, Cairngorm Mountain Limited. By 2008 the lease arrangements had been altered and the pursuer engaged the second defender directly to continue to carry out regular inspections of the railway and to identify any defects or required repairs and maintenance. The second defender produced reports following its inspections until it was replaced in that role after 2014 by a company called ADAC Structures Limited. In 2015 ADAC reported on potentially serious structural issues that it had observed during its inspection of the railway. Its concerns mounted in the course of subsequent inspection cycles until they were regarded as sufficiently serious to warrant suspension of the railway operations in 2018.

[4] The pursuer's position is that the defects in the railway are the result of breaches of contract and delictual duties on the part of the defenders in the design and construction of the railway. It maintains that it was presented from the outset with a railway which was fundamentally defective, on which it will now have to incur major repair costs. In response to the first defender's argument that any claim against it in relation to such alleged breaches of duty must have prescribed, the pursuer maintains that it was not aware, and could not with reasonable diligence have been aware, that it had suffered relevant loss, injury or damage until the 2015 ADAC report, and separately that until that point it was induced to refrain from making a claim against the defenders or either of them because it was labouring under error induced by them as to the state of the railway and could not until then have discovered its error by the use of reasonable diligence. So far as directed against the first defender, that latter suggestion proceeds on the basis that the railway was handed over to the pursuer by it, and payment (including a retained payment) for it requested, without any indication of the presence of material defects.

Relevant statutory provisions

[5] Section 6 of the Prescription and Limitation (Scotland) Act 1973, so far as material, provides:

“6.— Extinction of obligations by prescriptive periods of five years.

(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—

(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 obligation shall be extinguished:

...

(3) In subsection (1) above the reference to the appropriate date ... is a reference to the date when the obligation became enforceable.

(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section—

(a) any period during which by reason of—

...

(ii) error induced by words or conduct of the debtor or any person acting on his behalf,

the creditor was induced to refrain from making a relevant claim in relation to the obligation ...

shall not be reckoned as, or as part of, the prescriptive period:

Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph."

At all material times for present purposes, the relevant parts of section 11 of the 1973 Act provided:

"11.— Obligations to make reparation.

(1) Subject to subsections (2) and (3) below; any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.

(3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware."

First defender's submissions

[6] Senior counsel for the first defender argued under reference to section 11(1) of the 1973 Act and *David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48, 2014 SC (UKSC) 222 that any claim against it in respect of losses said to have arisen as a result of defects in the railway must *prima facie* have become enforceable at the latest by the date upon which the railway was completed and entered into service, namely 24 December 2001. Accordingly, unless the pursuer was able to demonstrate some legal ground apt to postpone the commencement of the prescriptive period, its claim against the first defender would have been extinguished by operation of prescription under section 6(1) of the 1973 Act as at 24 December 2006. The action was not commenced against the first defender until 11 June 2019.

[7] The pursuer sought to defer the date upon which prescription started to run by reference to both sections 6(4) and 11(3) of the 1973 Act, but its attempts to do so were fundamentally irrelevant and thus bound to fail. The pursuer maintained, as part of its case against the second defender, that as from 2008, when that defender began carrying out inspections of the railway on its behalf, it should have issued regular annual inspection reports indicating that the railway was not free from material defects and was not in a good condition, because of the observable presence of the defects now forming the basis of the action. So much appeared from an expert report obtained by the pursuer in 2020 and incorporated into its pleadings. It was for the pursuer to plead (and in due course prove) that it enjoyed the protection of section 6(4) or section 11(3), including that the "reasonable diligence" proviso did not operate against it - see *Adams v Thorntons WS (No. 3)* 2005 1 SC 30, 2005 SLT 594 per Lord Penrose at [36], cf Sir David Edward at [73]. It was clear that the pursuer's own position on the facts was that it could with reasonable diligence - i.e. had the

inspections it commissioned been properly carried out - have become aware of the existence of the defects upon which its case was founded from 2008 at the latest. For it formally to claim otherwise against that factual background was a situation which at least called for the application of the "weaker alternative", to the effect of rendering the case against the first defender irrelevant.

[8] Section 6(4) did not operate to suspend the running of any prescriptive period after a point in time at which the pursuer could (not "should" or "would") with reasonable diligence have become aware that it was labouring under the error inducing it not to make a claim. In this case, the only error relied upon by the pursuer was the error that the railway was not suffering from material defects. As that could with reasonable diligence have been identified as an error by 2008, section 6(4) could not have operated to postpone the running of prescription beyond 2008, which was plainly substantially more than 5 years prior to the commencement of the action.

[9] Similarly, section 11(3) did not operate to postpone the running of prescription beyond a point in time at which the pursuer could with reasonable diligence have become aware that it had suffered the loss and damage upon which it now based its action. For the same reasons advanced in relation to section 6(4), that point in time had been reached in 2008 and the raising of the action in 2019 was far too late. Further, it was apparent from the pursuer's pleadings and from the expert report on which it relied that, at the very least, certain cracking to scarf joints on the structure of the railway had been noted in the course of the second defender's inspections and were reported to the pursuer, and that expense had been incurred by the pursuer in repairing those cracks, all long before the five year period before the raising of the action. That rendered s.11(3) inapplicable to that element of the loss and damage which was now claimed for; the pursuer was actually aware of it having been

suffered and in that regard there was no need to consider the issue of reasonable diligence. The pursuer's attempts to describe the cracks and the sums spent on dealing with them as immaterial were too inspecific to warrant enquiry, if indeed they were not simply irrelevant. Reference was made to *Gordon's Trs v Campbell Riddell Breeze Paterson LLP* [2017] UKSC 75, 2017 SLT 1287, per Lord Hodge at [21] - [22]. If loss and damage was actionable, it was material for the purposes of starting the running of the prescriptive period.

Pursuer's submissions

[10] On behalf of the pursuer, senior counsel accepted that *prima facie* prescription would have operated to extinguish the obligations that it sought to enforce against the first defender by 24 December 2006, and that the pursuer's case accordingly depended on it being able successfully to invoke one or other (or both) of section 6(4) or 11(3) of the 1973 Act. He submitted, however, that whether or not that could be done was a matter that could only be determined after proof.

[11] The pursuer contended that it was unaware of the presence of material defects in the works carried out by the first defender until it was notified of them in late 2015. The cracking to the scarf joints which was reported to it before then was immaterial in character and was considered to fall within the ambit of normal maintenance requirements. Reference was made for the need for apparent loss and damage to be material, rather than negligible, insignificant or trivial, before knowledge of its existence would start prescription running - *Huntaven Properties Limited v Hunter Construction (Aberdeen) Limited and Ors* [2017] CSOH 57, per Lord Doherty at [45], and the authorities there cited, and to *David T Morrison*, where Lord Hodge at [95] had described a need for "more than minimal" loss.

[12] The pursuer further contended that, until late 2015, it was labouring under the mistaken understanding that the works carried out by the first defender were carried out in a manner that complied with its contractual obligations not to construct the railway in a materially defective manner. On its pleadings, therefore, prescription did not begin to run until 2015 because it was only at that point in time that the pursuer acquired the requisite awareness of material defects and was disabused of the error under which it had previously been labouring. No account should be taken of the first defender's "weaker alternative" argument; the pursuer was not offering to prove alternative and inconsistent facts - on the contrary, it was consistently offering to prove that it had no actual knowledge of any material defects in the works until 2015.

[13] The first defender's argument was that the pursuer was exercising reasonable diligence by instructing the second defender to inspect the railway, that those inspections ought to have revealed the material defects in question by 2008, and that the pursuer ought therefore to have been taken to have been capable of becoming aware of the existence of the defects and of its previous error at that point. However, neither the pursuer (nor indeed the first defender) actually advanced any claim as to what "reasonable diligence" required in the circumstances of the case; the first defender's argument proceeded on a misconception of the role played by that concept in sections 6(4) and 11(3); and proof would in any event be required to determine what would have happened had the second defender performed its inspections properly.

[14] On the first of those matters, what reasonable diligence required in any particular case was a matter of fact - *Heather Capital Ltd (In Liquidation) v Levy & McRae* [2017] CSIH 19, 2017 SLT 376 at [72] and [100]. The pursuer's pleadings claimed that the first defender's acts or omissions had contributed to it being placed into an erroneous belief that the works were

not defective and to it being unaware of the presence of material defects. Those averments were not challenged by the first defender. Rather, the first defender concentrated on the issue of reasonable diligence. Before that issue could be determined at debate, the court would require to be able to decide what reasonable diligence required in the circumstances of the case and to conclude that its use could have resulted in the discovery of material defects and of the pursuer's error that none such existed by some point more than 5 years before the action commenced. The first defender's argument about reasonable diligence was predicated on the suggestion that the pursuer's instruction of the inspections carried out by the second defender from 2008 represented the exercise of reasonable diligence on the part of the pursuer. However, the pursuer did not aver that the exercise of reasonable diligence by it required it to instruct those inspections. The closest that the pursuer's pleadings came in that regard was an averment to the effect that reasonable diligence did not require it to do more than it had done. That was not to say that reasonable diligence required it to do what it had in fact done, merely that nothing more (and quite possibly much less) was required of it. Further, since the first defender had itself averred nothing about the requirements of reasonable diligence, even though the onus of doing so was on it - see *BP Exploration Operating Co Ltd v Chevron Shipping Co* [2001] UKHL 50, 2002 SC (HL) 19, per Lord Millett at [110], cf the rather less positive stance taken on that matter in *Heather Capital*, per Lady Paton at [77]. The question of reasonable diligence was simply not one that was in issue in the case, either at debate or at the forthcoming proof.

[15] On the second of those matters, even if what the pursuer had done did represent what reasonable diligence required of it, it had still as a matter of fact been left in ignorance of the existence of the material defects present in the railway. That ought not to put it in the position of having time run against it for the purposes of prescription. The purpose of

section 6(4) was to avoid injustice which would otherwise arise if the circumstances which led to the delay in making a claim were brought about by fraud on the debtor's part or by error induced by the debtor's words or conduct and the pursuer had not been negligent in looking after his interests - *BP Exploration* per Lord Hope at [27]. The same ought to apply, *mutatis mutandis*, to the same concept of "reasonable diligence" in section 11(3). In essence, a pursuer who had not exercised reasonable diligence risked it being established that, had it done so, loss and damage would have been identified earlier than in fact it was. However, if a pursuer had exercised reasonable diligence and in fact still not discovered the loss and damage, even though the steps that were taken ought to have had that result, that did not operate to begin the running of the prescriptive period. That had been recognised in *ANM Group Ltd v Gilcomston North Ltd* [2008] CSOH 90, 2008 SLT 835, per Lord Emslie at [55] to [56], and in *Royal Bank of Scotland v Halcrow Waterman Ltd* [2013] CSOH 173, per Lord Tyre at [29].

[16] Thirdly, proof was in any event required as to what would have happened had the second defender carried out its inspections more competently, as well as to when anything of materiality in relation to loss and damage might have been reported to the pursuer. Reference was made to the observations of Lord Glennie in *Heather Capital* at [100], to the effect that many questions of fact raised by prescription arguments, particularly concerning reasonable diligence, involve value judgments which should seldom, if ever, be made on the basis of the pleadings alone.

Decision

[17] The pursuer's averments are sufficient - in some respects, barely so - to entitle it to proceed to a proof before answer with the first defender's prescription plea standing. It is

common ground that the pursuer's claim, that it was presented from the outset with a railway which was defective in consequence of breach of duty on the part of the defenders, entails that *prima facie* prescription would have operated to extinguish the obligations that it seeks to enforce against the first defender by 24 December 2006. In such circumstances, it is for the pursuer, as the putative creditor in the obligation in question, relevantly and specifically to aver circumstances capable of bringing the case within the ambit of the primary provisions of either or both of sections 6(4) or 11(3) of the 1973 Act. If it does so, it will be for the putative debtor in the obligation in question relevantly and specifically to aver circumstances capable of bringing the case within the ambit of the "reasonable diligence" proviso to either or both subsections. That is the result of what Johnston calls "normal principles of statutory construction" (*Prescription and Limitation* (2nd ed) para 6.109) - an observation with which I agree - and was the approach favoured in the unreported Outer House decisions in *Arif v Levy & McRae*, 17 December 1991, per Lord Coulsfield, and *Graham v Bell*, 24 March 2000, per Lord Hardie, and most significantly by the House of Lords in *BP Exploration*, especially per Lord Hope at [26] and Lord Millett at [105] and [110], all in relation to section 6(4). I consider that the same approach must apply equally to the same pattern of provisions contained in section 11(3). I do not understand the apparent contrary view as to the proviso common to both provisions which was set out by Lord Penrose in *Adams* at [36] to represent the wider view of the Division in that case. Finally in relation to onus, I consider that the observation of Lady Paton in *Heather Capital* at [77], that questions of onus in respect of the proviso to s.6(4) are best addressed once evidence has been led, was directed at the intensely complex and interlocking features of the cases then under consideration, rather than being of wide, far less universal,

application. In most cases it will be possible - and in some, as here, necessary - to determine questions of where the onus of averment and of proof lies in advance of that stage.

Reasonable diligence

[18] In relation to section 6(4), the pursuer sets out a case that it was induced not to make a claim against the first defender because it was under the erroneous belief that the works were free from any material defects, as a result of the railway being handed over, and payment for it requested, without any indication to the contrary. The relevancy and specification of that case is not challenged, no doubt having regard to the statements of principle about the potential effect of demands for payment in this connection made in *Rowan Timber Supplies (Scotland) Ltd v Scottish Water Business Streams Ltd* [2011] CSIH 26. The first defender in turn then avers that the claimed defects in respect of which the action proceeds “were matters which the pursuer could, with reasonable diligence, have been aware significantly more than five years prior to the commencement of the present action”, under reference to specific sections of the expert report relied upon by the pursuer, and goes on positively to aver that a reasonably diligent course of inspections would have made the pursuer aware of the alleged defects within a matter of months after the construction was completed. Contrary to the submissions for the pursuer, then, the first defender has indeed put in issue the proviso to section 6(4) and its averments in that regard will fall to be tested, both as to relevancy and specification and as to accuracy, at proof.

[19] For present purposes, however, what requires to be considered is what the pursuer avers about the issue of reasonable diligence. It avers in general terms that it could not, with reasonable diligence, have become aware of the erroneous nature of its understanding in relation to the state of the railway sooner than it did. Crucially, however, it does not aver

what it maintains would have constituted the exercise of reasonable diligence on its part. The closest it comes to that are averments that it acted “responsibly” by instructing the regular inspections which it did, and that reasonable diligence required nothing more of it than what it did. I do not accept the first defender’s submission that the pursuer’s position in this regard must be read as involving the tacit suggestion that what it actually did amounted to the exercise of reasonable diligence on its part, or, in consequence, that reasonable diligence would have disclosed the existence of material defects more than five years before the raising of the action. Although those might well be reasonable inferences to draw from the pursuer’s pleadings, they are not inevitable such inferences. That also disposes of the defender’s “weaker alternative” argument - on a proper construction of the pursuer’s pleadings, it is not offering to prove inconsistent factual scenarios. The pursuer’s position in this regard might be thought to be less than frank, but it is one that is open to it given that the burden of raising questions of reasonable diligence in this context rests with the defender. The benefit of such scant pleading which is gained for the purposes of debate may transpire to carry a disadvantage at proof, both in relation to the evidence which the pursuer is permitted to lead, and as to the incidence and scale of any award of expenses, should it transpire that its position in this connection was truly insupportable.

[20] Because the pursuer’s case largely elides the potential distinction between knowledge of the presence of material defects in the railway and knowledge of the error on its part which induced it to refrain from making a claim against the first defender, everything already said in relation to the role of reasonable diligence in the context of section 6(4) reads over, *mutatis mutandis*, to the role of the same concept in the context of section 11(3).

[21] I note further in connection with “reasonable diligence” that, if - as appears to be the case - the view has become widespread that Lord Glennie’s observations in *Heather Capital* at [100] to the effect that what constitutes reasonable diligence in any case is a value judgment not capable of being made without evidence having been heard, are apt to be universally and uncritically applied, that view would be misplaced. Although those observations will often be apposite, there will be cases in which the factual background will be conducive to determining at least the minimum features of reasonable diligence without the necessity of proof. The present case, involving as it does the question of reasonable diligence in the context of the operation and maintenance of a passenger railway in a highly-regulated environment, is one such case. It is the state of the pleadings, rather than any inherent intractability of the underlying facts in the abstract, that has resulted in the question of reasonable diligence being remitted to proof before answer in this case. Again, not everything which was said - undoubtedly correctly - in *Heather Capital* necessarily reads over without alteration to the circumstances of infinitely more straightforward litigations.

[22] It is not necessary, given that the pleadings have been found apt for enquiry into the questions of what reasonable diligence would have amounted to in the circumstances of this case, and what its exercise would have found when, to express any concluded view on the pursuer’s fallback position that if what it did by way of instructing regular inspection did indeed represent what reasonable diligence required of it, and that inspection ought to have discovered material defects before 2015, time still ought not to be reckoned as having run against it before that point because it had until then, as a matter of fact, been left in ignorance of the existence of the material defects actually present in the railway. It may suffice to say for present purposes that neither of the cases cited in this connection (*ANM Group Ltd* and *Royal Bank of Scotland*) actually clearly vouches the proposition for which the

pursuer contends, since they were (*ANM*) obiter in this regard and based on an apparently mistaken view as to the terms of the proviso, or else (*RBS*) proceeded on the basis of an untested and somewhat intricate concession. Although the pursuer's position would chime with certain provisions of the (English) Limitation Act 1980, which do not fix a claimant with constructive knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice, that is not the approach expressly taken by the 1973 Act, and the suggestion that clear words in that Act ("could with reasonable diligence have discovered" or "could with reasonable diligence have been aware") can be given a construction contrary to their obvious and natural meaning because of some residual conception of where justice lies must at the very least be reckoned to have suffered a grievous blow in *David T Morrison and Gordon's Trs.*

Scarf joint cracking

[23] There remains the related matter of the significance of the pursuer's admitted actual knowledge of cracking to the scarf joints long before 2014. Since the head of claim said to result from the state of the scarf joints is comprehended within the pursuer's overall position that it was induced to refrain from making a claim as a result of error induced by the conduct of the first defender (in this regard because that conduct led it to believe that the cracking was an inherent and normal feature of the performance of the railway structure over time, rather than loss and damage) that head of claim will, like the rest of the case, proceed to proof before answer by dint of section 6(4). The only remaining question is whether it could in any event have proceeded to such proof by dint of section 11(3) on the basis that (absent any question of induced error) the pursuer was not aware that it had suffered loss and damage as a result of being informed about the cracking more than 5 years

before it raised the action. No issue of what could have been discovered by the use of reasonable diligence in terms of the proviso to section 11(3) arises in relation to the scarf joint cracking, since the pursuer had actual knowledge of the existence of that cracking before 2014.

[24] That question turns on the apparent materiality of the cracking which was observed and reported to the pursuer. That cracking is described in the pursuer's averments as "minor", "fairly minor" or "relatively minor", although it accepts that it was advised to repair the cracks on an ongoing basis, which it did at a cost to it. The pursuer's pleadings are coy about the actual cost of these repairs, choosing to state only that:

"In the context of an anticipated annual maintenance budget for the resort that exceeded £500,000, the cost of the minor works required to attend to these localised issues are insignificant. Those costs do not constitute material or significant loss caused by the defender's failures."

The descriptions of the cracking as "minor" or variants thereof, and of the cost of repairing it as "insignificant", are conclusionary in nature, and do not provide the underlying facts on which the conclusion is supposedly based. If there is some good reason why, for example, the amount of money paid out to repair the cracking could not have been frankly stated, that reason was not made known to me. In this regard, then, the pursuer's pleadings must be regarded as insufficiently specific, in relation to a matter on which the burden of pleading lies on it, to justify inquiry into its claim that it was not aware of having suffered loss and damage in relation to the scarf joints more than five years before it raised the action.

[25] There may well be cases in which the somewhat indefinite nature of the concept of "materiality" will operate to render a claim of lack of awareness of having suffered loss and damage by a particular point in time such a mixed question of fact and law as to warrant proof before answer on the matter. Had the pursuer given more detail about the nature of

the cracking as reported to it and the costs incurred by it in repairs, then it might have been that enough would have been put in issue to make an inquiry into the question of materiality appropriate. However, as matters stand the poverty of the pursuer's pleadings on the question simply fails to place before the court sufficient factual material to form a proper basis for any such enquiry. The pursuer's claim that it was not aware of having suffered loss and damage in relation to the scarf joint cracking more than 5 years before it raised the action is insufficiently specific to proceed to proof.

Conclusion

[26] The action will proceed to the proof before answer already scheduled with the first defender's prescription plea standing. The case will be put out By Order to discuss the consequences for the pleadings of my decision that the pursuer's section 11(3) case in relation to the scarf joint cracking is not apt to form part of that proof.