SHERIFF APPEAL COURT

[2022] SAC (Civ) 1
STI-A65-16

Sheriff Principal M W Lewis
Sheriff Principal C D Turnbull
Appeal Sheriff N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in appeal by

T A MILLARD (SCOTLAND) LIMITED

Pursuer/Respondent

against

TRUSTEES OF THE CARDRONA CHARITABLE TRUST

Defenders and Appellant

and

THE HIGHLAND COUNCIL

Third Party and Respondent

Pursuer and Respondent: Lord Davidson of Glen Clova QC, L C Kennedy, advocate; Macnabs LLP
Defender and Appellant: Dean of Faculty (R W Dunlop QC); Balfour & Manson LLP;
Third Party and Respondent: A W Mackenzie, (sol adv); Harper Macleod LLP

24 January 2022

Introduction

[1] This appeal is in relation to the decision of the sheriff of 12 April 2021, following a preliminary proof, in terms of which he sustained the first plea-in-law in the counterclaim

for the pursuer and respondent ("the respondent"); and dismissed the counterclaim for the defender and appellants ("the appellant"). The sheriff subsequently found the appellant liable to the respondent in the expenses of the counterclaim.

[2] The appellant and the respondent entered in to a contract in relation to certain flood prevention works in the vicinity of Ness-side House, Inverness-shire. The garden was vulnerable to flooding. The respondent designed an embankment, or bund. To prevent seepage below the bund, an impenetrable "toe" extending up to four metres underground was part of the design. The toe was reduced to one metre at the request of the appellant. The design included provision for seepage below the bund, by means of a catch pit and pump. At a meeting on 19 July 2011 the appellant's Mr Macdonald queried the effectiveness of the bund at preventing flooding. He was informed that the design would slow, but not stop, flow and that a standby pump was required. The works were completed in 2011. In about 2015 a flood occurred. Separately, the appellant and The Highland Council ("the Third Party") had entered in to a minute of agreement whereby the Third Party were to procure the flood prevention works in accordance with the respondent's design; and were to be ultimately responsible for reimbursing the respondent's construction costs. The respondent raised the present action in June 2016 seeking payment by the appellant in respect of certain unpaid invoices relative to the works (the works having been largely paid for in 2011). By amended counterclaim dated August 2017 the appellant first raised a claim in negligence, based upon the allegation that that the flood had been caused by seepage below the bund, and that the prevention measures designed by the respondent were defective.

[3] For the purposes of this opinion, the precise nature of the allegations and alleged defects in the design are of limited significance. No challenge is taken against the findings

in fact made by the sheriff. The sole question in the appeal is the legal consequences of those facts. The issue is whether or not the obligation upon which the counterclaim proceeds had prescribed by August 2017.

[4] The determination of the appeal rests on whether the appellants knew or ought to have known that they had suffered loss (section 11(3) of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act")) prior to the flooding in 2015; and, if so, whether anything said by the respondent at the meeting on 19 July 2011 was such as to induce the appellant to refrain from making a relevant claim prior to the 2015 flooding (section 6(4) of the 1973 Act).

Section 11(3) of the 1973 Act

[5] Insofar as relevant for present purposes, section 11 of the 1973 Act is in the following terms:

> "**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.
>
> (2) …
>
> (3) In relation to a case where on the date referred to in subsection (1) 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."

Submissions for the Appellant

[6] Standing the decision of the Inner House in *WPH Developments Ltd* v *Young & Gault LLP (In Liquidation)* 2021 SLT 905, the appellant accepted that the known incurring of expenditure would be sufficient to prevent any suspension of the prescriptive period under section 11(3) of the 1973 Act. The appellant argued that the present case could be distinguished from *WPH Developments Ltd* by reason of the terms of the minute of agreement whereby the Third Party agreed to pay for the flood prevention works. A party which notionally incurs expenditure in a situation where that expenditure is in fact paid by someone else is one situation where section 11(3) can be invoked; see *Heather Capital Ltd (In Liquidation)* v *Levy & McRae* 2017 SLT 376 at paragraphs [59] to [60]. If the expenditure constitutes the *damnum* but is made in a situation in which the claimant is not itself out of pocket, there is no awareness that the expenditure is "loss, injury or damage".

Submissions for the Respondent

[7] The respondent submitted that the reimbursement by the Third Party did not alter the fundamental position. Expenditure had been incurred by the appellant. The effect of the appellant's argument was that there was a loss when the invoices were paid by them, which loss flew off when the appellant was reimbursed by the Third Party. If there was no reimbursement the loss would remain. The appellant's reliance upon *Heather Capital Ltd* misunderstood the liquidator's position in that case. The liquidator was unaware of any loss (see paragraph [32]). In the present case there was actual awareness on the part of the appellant, because the appellant had paid the respondent for work done. The sheriff had been correct and section 11(3) of the 1973 Act was not engaged.

Submissions for the Third Party

[8] The Third Party adopted their Note of Argument and the submissions made on behalf of the respondent. We address the position of the Third Party below at paragraph [20].

Decision on section 11(3)

[9] A useful staring point in a consideration of the section 11(3) issue is paragraph [26] of the sheriff's judgment, which is in the following terms:

> "It is accepted that the [appellant] had incurred expenditure in relation to the design of the bund. Mr Macdonald accepted that the [appellant] had instructed the [respondent] and had the initial responsibility for their fees. The [respondent's] position is that such expenditure constitutes a loss. The [appellant's] position is that as Highland Council reimbursed the [appellant] they did not therefore incur a loss in 2011. For my part, I am satisfied that the fact that the [appellant] were to be reimbursed by Highland Council does not alter the fundamental position which is that the [appellant] did incur expenditure as a result of having contracted with the [respondent] for the design of flood prevention measures. If the design was defective then that constituted the *iniuria* and the incurring of the expenditure constituted the *damnum*. In those circumstances, section 11(3) of the 1973 Act it does not assist the [appellant]."

[10] The sheriff found in fact that the initial invoices issued by the respondent to the appellant were paid. The final invoices issued in 2011 were not paid. Taken with what is said at paragraph [26] of the sheriff's judgment, this finding, which is not challenged by the appellant, is sufficient to address the appellant's argument under section 11(3) of the 1973 Act. The expenditure in question was not "notional". It was incurred by the appellant. The fact that the appellant was subsequently reimbursed by the Third Party does not make the expenditure notional. Until reimbursement the appellant was out of pocket. The reimbursement was made in terms of an agreement to which the respondent was not a

party. Accordingly, we reject the argument advanced by the appellant under section 11(3) of the 1973 Act. It is accordingly necessary to address the section 6(4) argument.

Section 6(4) of the 1973 Act

[11] Insofar as relevant for present purposes, section 6(4) of the 1973 Act is in the following terms:

> "**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:
> …
>
> (2) Schedule 1 to this Act shall have effect for defining the obligations to which this section applies.
>
> (3) In subsection (1) above the reference to the appropriate date, in relation to an obligation of any kind specified in Schedule 2 to this Act is a reference to the date specified in that Schedule in relation to obligations of that kind, and in relation to an obligation of any other kind 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—
>
> (i) fraud on the part of the debtor or any person acting on his behalf, or
> (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, and

(b) any period during which the original creditor (while he is the creditor) was under legal disability,

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.

(5) Any period such as is mentioned in paragraph (a) or (b) of subsection (4) of this section shall not be regarded as separating the time immediately before it from the time immediately after it."

Submissions for the Appellant

[12] The appellant submitted that whilst the sheriff had held that, because the appellant knew that water could pass under the bund, section 6(4) of the 1973 Act was not available to them, the sheriff did not explain why findings-in-fact (3) and (4) (see paragraph [16] below) did not engage that section. At the meeting on 19 July 2011 the appellant was not told that the design was defective. The appellant was reassured that it was not. Having raised a question as to whether the design was effective and having been told that a combination of the toe and a standby pump meant that any flow of water would be intercepted, there was no basis for the appellant to have brought a claim. This is a clear instance of error induced by that reassurance, causing the appellant to refrain from bringing a claim.

[13] It is a clear example of a party (ie the appellant) who was "unaware of the obligation [arising from defective design] because its existence was being concealed from him … by error induced by the debtor's words or conduct", see *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Steam Ltd* [2011] CSIH 26 at paragraph [12]; applying *BP Exploration Operating Co Ltd* v *Chevron Transport (Scotland)* 2002 SC (HL) 19 at

paragraphs [31] to [32]. There was, in the reassurance given to the appellant, a "representation … that not only induced payment but also subsequently induced the [appellant] to refrain from making a relevant claim in reparation": *Rowan Timber Supplies (Scotland) Ltd* at paragraph [18]; *Kidd* v *Lime Rock Management LLP* 2021 SLT 35 at paragraphs [73] to [74]; and *Loretto Housing Association Ltd* v *Cruden Building & Renewals Ltd* [2019] CSOH 78 at paragraph [55].

Submissions for the Respondent

[14] The respondent submitted that the appellant's criticism of the sheriff for allegedly not explaining the context for his finding on section 6(4) was misconceived. The sheriff had found that the respondent expressly told the appellant that they were not getting the design which Mr MacDonald expected. Reference was made to the following part of paragraph [22] of the sheriff's note:

> "For my part, I am satisfied that Mr Howell's[1] note is accurate and that the possibility of water passing under the bund was disclosed to Mr MacDonald at the meeting in July 2011. I have therefore found as a fact that the [appellant] were aware in 2011 that the bund had not been designed in such a way as to prevent water from passing underneath the bund. In his evidence Mr Macdonald stated that his understanding of the contract with the [respondent] was that they were to design a bund that would prevent water from passing underneath it. If that were the case then the [appellant] would have been in breach of contract by designing a bund that did not achieve that result. If that failure was a breach of contract then Mr Macdonald was aware of the breach of contract in July 2011."

The respondent submitted that this is a clear finding, based on the evidence heard by the sheriff. It is the exact opposite of inducement. The appellant was told in terms that they were not getting what they say they contracted for. They were told that water could pass

[1] An employee of the Third Party

underneath the bund. In evidence, Mr MacDonald stated that his understanding of the contract was that the design of the bund was to prevent, not merely slow, seepage of water. Whilst the appellant is not an expert, they were told in clear, understandable terms what the position was. The appellant's suggestion that the respondent had given some form of reassurance was an incorrect interpretation of what had been found by the sheriff. The appellant was told, in effect, that the design was one which was not acceptable to them. There was no finding of concealment of the fact that water could permeate under the bund. The sheriff found that the appellant were aware in 2011 that the bund had not been designed in such a way as to prevent water from passing underneath it.

[15] The respondent submitted that the appellant's position was difficult to follow. None of the cases spoken to by the Dean of Faculty contradicted the respondent's analysis of the sheriff's findings. Each of those cases were decided following debate; here, the findings were made after a preliminary proof. The *dictum* of Lord Hodge in *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287 at paragraph 21 was very much in point. This paragraph, which was relied upon by the sheriff, is in the following terms:

> "[21] It follows that s.11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. <u>It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought</u> or that he or she has incurred expenditure." [Underlining added].

The sheriff's findings make it clear that, on the appellant's position, as at July 2011 they were aware that they had not obtained that which they maintained they had sought, namely, a bund designed so as to prevent water from passing underneath it.

Submissions for the Third Party

[16] Again, the Third Party adopted their Note of Argument and the submissions made on behalf of the respondent in relation to this issue.

Decision on section 6(4)

[17] The appellant's argument under section 6(4) turns upon what was said at a meeting which took place on 19 July 2011. Findings-in-fact (3) and (4) are relevant. They are in the following terms:

> "(3) The final design for the bund included the installation of the filter trench with a catch pit and pump to deal with any water which passed below the bund.
>
> (4) At a meeting on 19 July 2011, Mr Macdonald questioned the ability of the bund to hold back water. He was informed that as the underlying gravel extended to depth the bund would slow flow but there was no guarantee that there would be no flow and that accordingly the bund had a drainage provision behind it with a sump such that any flow would be intercepted and pumped out over the bund using a standby pump."

[18] The relevant part of paragraph [22] of the sheriff's note is set out above (see paragraph [13]). It refers to a finding in fact which was not made, although it is clear that the sheriff intended to do so. It is also appropriate to consider the appellant's averments. Insofar as relevant for present purposes, they are as follows:

> "A suitable design in accordance with ordinary standards of reasonable skill and care for the site involved a soil bund combined with an impermeable core, of either a clay material or membrane in order to protect against overland flows. To restrict floodwaters passing through the natural soils beneath the soil bund, the impermeable core or membrane requires to be taken down to a depth at which the permeability of the ground is such that water flows are restricted naturally."

The use of the word "restrict" is unfortunate. Mr MacDonald's evidence was that his understanding of the contract with the respondent was that they were to design a bund that would prevent water from passing underneath it.

[19] The sheriff found that that there was no guarantee that there would be no flow of water under the bund; and that the design of the bund envisaged a certain amount of water passing beneath the bund. The sheriff's findings (which are not challenged) are both clear and unequivocal in their effect: the respondent's design would not prevent water from passing underneath it.

[20] The submissions of the respondent on the section 6(4) issue are to be preferred. The suggestion that the appellant were in some way misled is misconceived. In light of the appellant's position in evidence, it cannot be maintained that what was said by the respondent at the meeting in July 2011 amounted to a reassurance. On the appellant's position, it was the opposite of that. At the meeting the appellant was told that they had not received the design they had sought. On the findings made by the sheriff, after proof, there were no words or conduct of the respondent (or any person acting on their behalf) such as to induce error on the part of the appellant such that they refrained from making a relevant claim. No relevant facts were concealed from the appellant. Accordingly, we also reject the argument advanced by the appellant under section 6(4) of the 1973 Act.

The Position of the Third Party

[20] The Third Party was convened in relation to the principal action because the appellant contends that they are entitled to be relieved of any obligations for the costs of the works by the Third Party (albeit the appellant denies liability for the sums claimed in

the principal action) in terms of the minute of agreement. The Third Party has no interest in the counterclaim. They have, quite properly, not lodged answers to it.

Disposal

[21] The appeal will be refused, and the interlocutor of the sheriff adhered to. The cause will be remitted back to the sheriff to proceed as accords in relation to the principal action. The appellant will be found liable to the respondent in the expenses occasioned by the appeal. No award of expenses relative to the Third Party was made by the sheriff following the preliminary proof. In these circumstances, the Third Party's participation in the appeal is somewhat perplexing. We shall find no expenses due to or by the Third Party in relation to the appeal procedure. The Court will sanction the employment of senior counsel in relation to the appeal.