OUTER HOUSE, COURT OF SESSION

[2019] CSOH 63

A95/14

OPINION OF LORD TYRE

In the cause

(FIRST) THOMAS CHALMERS and (SECOND) GAIL CHALMERS

Pursuers

against

DIAGEO SCOTLAND LIMITED

Defenders

Pursuers: Moynihan QC; Balfour & Manson LLP
Defenders: Connal QC; Pinsent Masons LLP

13 August 2019

Introduction

[1] The pursuers live in a house in a development in Bonnybridge, Falkirk, which is adjacent to, and usually downwind from, a whisky aging facility owned and operated by the defenders. As the defenders' whisky matures, a small percentage of the ethanol (often referred to as "the angels' share") evaporates from the casks into the surrounding atmosphere. In this action the pursuers claim that the release of ethanol into the atmosphere is a nuisance that has caused them loss and damage. They aver that ethanol vapour has caused damage to their house and outdoor furniture, and that the value of their property has been diminished. The sum sued for is £40,000.

[2] The action has already been the subject of a debate before Lord Ericht, when the defenders sought dismissal of the action *inter alia* on the grounds that the pursuers had failed to aver a relevant case of nuisance, and that in any event any cause of action that they might have had had prescribed. In an opinion dated 3 March 2017, Lord Ericht decided that enquiry was necessary before those matters could be determined. He also rejected certain arguments by the defenders that the pursuers' pleadings were insufficiently specific to give fair notice of their case in relation to the defenders' alleged liability.

[3] As regards quantum, however, Lord Ericht's view was that the defenders' argument that the pursuers' case lacked adequate specification had force. He noted a number of matters in respect of which he considered that the defenders were entitled to fair notice. In circumstances where he had held that there was a case suitable for enquiry on the merits, Lord Ericht regarded it as appropriate to give the pursuers an opportunity to seek leave to amend their pleadings in order to give fuller specification of their averments of loss. In due course the pursuers lodged a minute of amendment which was answered on behalf of the defenders and, on 7 March 2018, the record was amended in terms of the minute and answers. The defenders, however, remained dissatisfied regarding the relevancy and specification of the pursuers' pleadings in relation to quantum. After a further amendment procedure, the case was again appointed to the procedure roll for debate.

The pursuers' averments of loss and damage

[4] The nuisance alleged by the pursuers is that the ethanol vapour in the atmosphere causes the deposit of black fungus on houses throughout the development, including their own house. In relation to quantum they aver as follows:

"The black fungus covers the pursuers' house and outdoor property. It covers the verge tiles, the gutter, fascias, the soffits and the walls. The roof has visible black staining. The prevalence of black fungus on properties within the area is well known. The pursuers have suffered a reduction in the value of their house. The capital value of their house has been reduced as a result of the fungus. In particular, even if the house were cleaned of fungus its market value would be adversely affected because of the obvious effects of the fungus on adjacent houses. Discolouration attributable to the fungus is obvious on a large number of properties in the vicinity. It is therefore obvious that the pursuers' house is also adversely affected. In 2002 the pursuers paid £139,950 for the house. It was a new build property. The market value of the house in May 2017 is in the region of £190,000 to £195,000. The value of the house has been reduced by about 5% to 10% because of the effects of the fungus on properties in that area. The adverse effects of the fungus on the property became apparent within about a year after the pursuers moved in. They began cleaning the fungus from the house at about that time. Further, the pursuers require to clean the fungus from the property from time to time. Thus far the pursuers have done most of that work themselves. The first pursuer cleans the back of the house once per year. He has found by trial and error that thin bleach works best. It requires 16 bottles of bleach to clean the back of the house. The side of the house is too high to clean fully. It would require specialist equipment such as a cherry-picker to reach the top of the side of the house. The first pursuer has from time to time spent about a day a year cleaning the fungus from the gutters and plastic fascia of the house. The task involves emptying the gutters, applying bleach and then scrubbing the surfaces. The pursuers have now paid for this work to be done, about once every two years at a cost of £170. The first pursuer has also spent about a day twice per year cleaning the fungus from the patio and sundeck. The task includes power washing and then bleaching the affected stones and oiling the sundeck. He is on his third power washer. They cost about £60 each. They have had to replace the sundeck once already at a cost of £300. They do not know how long the replacement will last. He has also had to paint the garden fence every other year. A dark colour of paint has to be used, in order to reduce the visual impact of the fungal discolouration he uses about 4 tins of paint. The above work will have to continue to be done on the property in future, owing to the continuing effects of the fungus. The first pursuer is physically unable to continue to do the work. He has a degenerative back condition, resulting from an injury in about 2010 in which he suffered a fractured vertebra and displaced several discs. He is unable to perform heavy manual work. The condition of his back continues to get worse. The pursuers will therefore have to pay for the above work to be done in future. It is in any event reasonable that they do so, given the amount of work involved. The pursuers regularly get people at their door offering to clean the exterior of the house. The fee quoted is about £1,000. The cost of the task of cleaning the gutters and plastic fascia is £170 a year. The cost of cleaning the building, patio and sundeck is estimated at £600 a year. The annual cost of oiling the sundeck is estimated at £150 for labour and £50 for oil. The cost of painting the fence is estimated at £300 for labour and £75 for paint, every other year. Further, the pursuers' wooden garden furniture has been affected by the fungus. The fungus caused the wood to become covered in an unsightly black staining. Two sets of wooden garden furniture were covered by the

slightly black staining and had to be disposed of. They had cost £500 for each set. The second set was replaced with an aluminium table and chair set which cost about £250. Further, the playhouse has to be painted regularly. The paint and brushes cost about £30 on each occasion. Further, the pursuers have incurred the cost of bleach which they to clean the fungus from their property. The bleach costs about 27p a litre and about 100 litres are required to clean the entire house. Each of the pursuers has a car. The fungus grows on the cars. An ordinary power wash does not remove the fungus. A detailed valet is required as a normal valet is not effective to remove the fungus. Each car requires to be valeted at least once, and sometime twice, per year at a cost of about £100 for each clean. The expenditure condescended upon is likely to continue for so long as the defenders fail to abate the emission of ethanol. With the first pursuer's deteriorating health the work cleaning the property takes longer. In 2018-2019 car valeting, and the cleaning of window frames, facia, down pipes and gutters was done by others. It is estimated that cleaning the patio now takes the first pursuer about 2 days and the sundeck about 2 days. Cleaning the external walls of the house takes him about 2 weeks, with a similar amount of time required to clean the fence. The patio needs cleaned in spring and late autumn. In 2018 he cleaned the walls once with one coat of bleach because he has become frustrated with the work. The costs incurred in 2018 are estimated as follows:

[Figures are stated for patio and deck cleaner, all PVC windows, fascia, down pipes and gutters, paint brushes, paint tray and rollers, bleach, sprayer, car valet and plastic sheets.]

In addition, the pursuers have suffered a loss in their enjoyment of the use of their property. They are restricted in the type of materials they can use in their garden. They require to use aluminium rather than wood. They are restricted in the design and layout of their garden. The pursuers are restricted in their choice of the colour of paint they can use in their garden. They require to choose colours which attempt to reduce the visual impact of the black fungus."

[5] The defenders aver in answer that the blackening complained of is indistinguishable visually or in impact from blackening found in a wide range of other locations, and that it does not cause serious disturbance, substantial inconvenience or material damage. Any impact, it is asserted, is not *plus quam tolerabile.* It has no impact on property values.

Argument for the defenders

[6] On behalf of the defenders it was submitted that the pursuers had still failed to state a relevant and adequately specific case in relation to quantification of their alleged loss and

damage. Two criticisms were made. Firstly, as a matter of principle, the pursuers' claims for both diminution in value and cleaning costs amounted to double counting. On the hypothesis that the pursuers were fully compensated by the defenders for their cleaning costs, there was no basis for claiming in addition a diminution in value resulting from the presence of fungus. Alternatively, if the loss was said to arise from the existence of blackening, the costs of cleaning were not recoverable. The pursuers did not aver that sale of the house was likely in the near future. In order to allow future loss to be assessed, it was incumbent upon the pursuers to state how many years they would be likely to continue to live in the house, so that the court could be satisfied that they were not receiving compensation for cleaning costs to be incurred during the period after the house had been sold at a hypothetical diminished value. Reference was made to the decision of the Court of Appeal in *Raymond* v *Young* [2015] HLR 805.

[7] The second criticism was that it was still impossible to tell from the pleadings how the sum sued for was arrived at. In relation to costs allegedly incurred, the figures contained in the pursuers' pleadings were mutually irreconcilable. Neither a multiplicand for annual expenditure nor a multiplier for future expenditure was specified. No calculation had been provided demonstrating in a coherent manner that the sum sued for, in so far as consisting of past and anticipated future costs, was reasonable.

Argument for the pursuers

[8] On behalf of the pursuers it was submitted that their averments on quantification were relevant and sufficiently specific to go to proof. On the double counting point, the defenders' approach was said to be erroneous in two respects: firstly, it proceeded on the basis that the pursuers were claiming cleaning costs for ever into the future and, secondly, it

assumed that the cost of cleaning was an exhaustive measure of the damages sustained. Revenue costs were only one aspect of the pursuers' losses: separately, and independently, there was the diminution in value of the property resulting from the loss of amenity caused by the blackening and consequent need to carry out frequent cleaning. Those were separate heads of loss. Reference was made to *Raymond* v *Young* (above) and to the speech of Lord Hoffmann in *Hunter* v *Canary Wharf Ltd* [1997] AC 655. It was accepted on the basis of those authorities that the pursuers could not claim both diminution in value and, separately, a sum representing either loss of amenity or inconvenience and distress. One or other of those could be claimed, along with cleaning costs and the cost of replacement of damaged furniture. But it was not possible to be confident without enquiry which would be the appropriate measure: if, for example, evidence of diminution in value was inconclusive, the pursuers might have to rely instead upon a more generalised claim for loss of amenity.

[9] As regards the multiplier, the starting point was that the pursuers did not aver any intention to move house. The multiplier should therefore be based in the first instance, as in actions for personal injury, on an actuarial calculation using the pursuers' life expectancy. It was accepted, however, that the claim for future costs could only cover the period prior to a future sale. It would be a matter for the court to decide whether, and if so to what extent, the multiplier should be reduced to take account of the possibility of the pursuers selling up and moving away. Any hypothetical future purchaser would not be able to make a claim for cleaning costs during his or her period of ownership because all of the elements of damages would have been reflected in a reduced purchase price paid to the pursuers.

[10] In response to the defenders' second criticism, it was submitted that the purpose of pleading was to give fair notice, not prescriptive and exhaustive detail. Fair notice had been given of the items of expenditure that were relevant to pecuniary loss. It was neither

possible nor necessary to plead a particular multiplier for future expenditure. How the averments translated into a final figure could only be determined after proof.

Decision

[11] In my opinion the issue of double counting will be better resolved after enquiry. I am further satisfied that the pursuers' averments in relation to costs and expenses are sufficiently specific to justify the allowance of proof before answer.

[12] The relationship between a claim for diminution in value and a claim for loss of amenity was considered by the House of Lords in *Hunter* v *Canary Wharf Ltd* (above) and by the Court of Appeal in *Raymond* v *Young.* In the former case, Lord Hoffmann observed (page 706), under reference to *Bone* v *Seale* [1975] 1 WLR 797 which concerned nuisance consisting of smells from a pig farm:

> "…Diminution in capital value is not the only measure of loss. It seems to me that the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not. In the case of a transitory nuisance, the capital value of the property will seldom be reduced. But the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted. To some extent this involves placing a value upon intangibles. But estates agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case: compare *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] A.C. 344.
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> There may of course be cases in which, in addition to damages for injury to his land, the owner or occupier is able to recover damages for consequential loss. He will, for example, be entitled to loss of profits which are the result of inability to use the land for the purposes of his business. Or if the land is flooded, he may also be able to recover damages for chattels or livestock lost as a result. But inconvenience, annoyance or even illness suffered by persons on land as a result of smells or dust are not damage consequential upon the injury to the land. It is rather the other way about: the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness."

For present purposes the last two sentences are of significance: they emphasise that diminution of the amenity value of land is not something separate from the inconvenience or other form of damage suffered by the occupant of the land.

[13] Lord Hoffmann's observations were concerned with what he described as a transitory nuisance which, because of its temporary nature, did not cause a diminution in value of the land, with the consequence that the claim had instead to be framed in terms of loss of amenity. *Raymond* v *Young*, on the other hand, was concerned with the interaction between diminution in value and loss of amenity in circumstances where the nuisance was likely to continue in the future. The facts were unusual in that the nuisance consisted of aggressive and anti-social behaviour by a neighbour, which the judge at first instance found was likely to affect future occupants in the event that the claimants sold the property. The judge awarded the claimants the sum of £155,000 for diminution in value, on the basis that the nuisance would continue in the future, and a further sum of £20,000 in respect of loss of amenity and also anxiety and distress. The Court of Appeal held that the judge had erred in making both awards. Having cited a passage from Lord Hoffmann's speech in *Hunter* which included the dictum that I have already set out, Patten LJ (with whom the other members of the court agreed) observed at paragraphs 27 and 28:

> "27. … I read the passage I have quoted as an endorsement of the principle that damages for what is commonly described as loss of amenity are damages for the diminution in the value of the right to occupy the affected property and not merely damages for the personal distress or inconvenience suffered by the individuals concerned. They are intended to and do compensate the claimant landowners for the distress and loss of amenity which they experience as a result of the nuisance but only in terms of the consequent loss in the use value of their property…
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> 28. It must, I think, also follow from this that it is not appropriate to make separate awards of damages for distress in cases of nuisance. The consequences in terms of personal distress or discomfort which the claimant may experience as a result of the nuisance are, as I have said, simply part of the assessment of the claimant occupier's loss of amenity."

[14] On the facts of *Raymond* v *Young*, Patten LJ expressed his conclusions at paragraph 39 as follows:

> "The Recorder was wrong in my view to have awarded the claimants the full measure of their capital loss and also £20,000 by way of damages for loss of amenity. Unlike in [*Dennis v Ministry of Defence* [2003] EGLR 121], the loss of capital value figure has not been reduced to take account of the transitory nature of the nuisance and is historic in the sense that it represents the consequences of the defendants' acts of nuisance over the period up to the trial. There is therefore double recovery in this case by the award of both sums. They are alternative methods of calculating the diminution in value of the claimants' property and if damages are to be awarded for loss of capital value then damages for loss of amenity are excluded."

Patten LJ went on to emphasise that the same reasoning would apply if all or part of the £20,000 were treated as representing damages for distress: there would still be double counting because the distress was reflected in the damages awarded for loss of value.

[15] In the present case it is not averred on behalf of the defenders that steps are being or may be taken to put an end to the alleged nuisance complained of. For the purposes of the present discussion, therefore, the nuisance complained of must be regarded as a continuing one, and the case is in that respect analogous to *Raymond* v *Young*. As can be seen from the pleadings set out above, the pursuers have a claim both for diminution in the value of their house, and also for particular types of inconvenience and loss of amenity, such as the need to spend time and effort cleaning the external walls of the house, and restrictions on the types of materials that they can use in their garden and on their choice of colour of paintwork for external items. Senior counsel for the pursuers accepted that there was a degree of double counting here, and that the pursuers would not be entitled to both. I consider, however, that the proper measure of the pursuers' loss, if any, ought to be determined after the hearing of evidence, especially on the contentious issue of whether the presence of black discolouration has in fact caused a diminution in the value of their property.

[16] The principal area of controversy between the parties came to be whether the pursuers were entitled to claim both (a) diminution in value/loss of amenity and (b) past and future cleaning costs. In my opinion there is no double counting as between these two heads of claim. If the pursuers were to succeed in proving that the value of their house has been diminished, this would represent the loss of future amenity resulting from the occurrence of discolouration and the need to take regular measures to remove it. That is not, in my view, the same thing as either the past costs of cleaning, or future costs of cleaning likely to be incurred by the pursuers themselves. The claim for past costs may be regarded as analogous to the claim for consequential losses such as loss of profits mentioned by Lord Hoffmann in *Hunter* (above): they are additional to the damage to the property itself.

[17] With regard to estimated future cleaning costs, as senior counsel for the pursuers rightly acknowledged, any claim extending beyond the pursuers' period of ownership would overlap with the claim for diminution in value. Provided the claim for future costs is restricted to the period of the pursuers' ownership, the position is no different from the past: the claim for cleaning costs would be for a loss sustained in addition to the alleged diminution in value or loss of amenity. The requirement for the court to fix an appropriate multiplier is, of course, a complicating factor. But it is no different in principle from the task faced by the court in quantifying other kinds of continuing future loss, such as loss of earnings from employment or profits from business, or costs of provision of care. Again this is a matter that can only be properly assessed in the light of evidence led at proof. Addressing the question of relevancy that arises at this stage, the pursuers have in my view pled a relevant case that they will continue to incur cleaning costs for as long as they continue to occupy the property and the emission of ethanol vapour into the atmosphere continues.

[18] I turn finally to the question whether the pursuers have provided fair notice of the quantification of their claim for cleaning and other costs incurred. Senior counsel for the defenders criticised the pleadings as failing to provide a coherent explanation of the composition of the sum sued for. In my opinion, however, the pleadings contain fair notice, in accordance with the norms of ordinary action procedure, of the types and amounts of expenses that the pursuers claim to have incurred. It is not (yet) a requirement in ordinary actions that a pursuer produce a more precise valuation of his or her claim. There is, for example, no equivalent for ordinary actions of Rule of Court 43.6(1)(b) which provides, in personal injury actions, for the lodging by both parties of statements of valuation. In other forms of procedure, such as commercial actions or actions proceeding under Chapter 42A, the court might be minded, in exercise of its case management powers, to order a party to provide a breakdown indicating precisely how the sum sued for is arrived at. None of this applies to ordinary actions which remain governed simply by established principles of fair notice. In my opinion the pursuers have given sufficient notice of costs and other losses which, if all were to be established in evidence, might amount to the sum sued for or thereabouts. My view as just stated should not, of course, be interpreted as the expression of any opinion as to the likelihood of the pursuers succeeding on liability or, if they do so succeed, on their prospects of recovering the whole of the damages that they seek.

Disposal

[19] For these reasons I shall pronounce an interlocutor allowing proof before answer. Questions of expenses are reserved.