OUTER HOUSE, COURT OF SESSION

[2022] CSOH 27

PD1166/12

OPINION OF LORD CLARK

In the cause

DAVID MATHEWSON

Pursuer

against

SCOTTISH POWER UK LIMITED

Defender

Pursuer: Christine; Thompsons Solicitors
Defender: Wilson; Shepherd and Wedderburn LLP

18 March 2022

[1] This action was raised in June 2012. Mr Mathewson sought damages from the defender for asbestos-related lung cancer. By decree dated 19 March 2014 the Lord Ordinary awarded Mr Mathewson provisional damages amounting to £30,000. At that time, there was considered to be a risk that an upper right lobectomy procedure which Mr Mathewson had gone through could cause or materially contribute to his death. The award of provisional damages was based on the assumption that the procedure would not cause or materially contribute to his death. As a result, leave was reserved to apply for an award of further damages in this process.

[2] Mr Mathewson died on 9 February 2019. On 7 February 2022, a motion in respect of three minutes was intimated to the defender's agents. The minutes comprised (i) a minute of sist, seeking to sist the widow, daughter and two grandchildren of the deceased into the action as pursuers; (ii) a minute of amendment, setting out the damages claims by these connected persons; and (iii) a minute for further damages, on behalf of the widow as the executor of the deceased.

[3] The defender lodged its opposition to the motion on 24 February 2022. The ground of opposition is that the claims now sought to be made are time-barred in terms of section 18 of the Prescription and Limitation (Scotland) Act 1973. The motion was heard on 4 March 2022.

Submissions

Defender

[4] The minuters had no standing to amend the claim. They could only move the minute of amendment and minute for further damages once the minute of sist had been granted. Mere intimation of the motion was not sufficient to interrupt the triennium. Reference was made to MacPhail *Sheriff Court Practice* (3rd ed), at 10-42:

> "Where it is sought to introduce, by minute of amendment or by minute of sist, a new pursuer into an action timeously brought, the introduction of the new pursuer will be treated as the bringing or commencement of an action for the purposes of the running of the time-bar in terms of section 17 or 18 of the 1973 Act. If, therefore, the attempted introduction takes place outside the statutory time-limit, the action so far as at the instance of the new pursuer will be time-barred. In a death action, a 'connected person' will be sisted, but the crave will not be amended to allow the addition of a crave for that person's claim, unless the time-bar can be overridden by the court's exercising its discretion in terms of section 19A."

[5] A number of authorities were cited by the authors in support of that passage, in particular: *MacLean* v *British Railways Board*, 1966 SLT 39; *McArthur* v *Raynesway Plant Ltd* 1980 SLT 74 and *Marshall* v *Black* 1981 SLT. In each of those cases, additional connected persons were brought into the case and the amendments to allow them to proceed with their claims were refused as time-barred. In *MacLean,* Lord Fraser (at 40) had explained that the action at the instance of the second to sixth-named pursuers was "commenced" at the time when legal proceedings were begun by them, that is, when they were added by amendment as pursuers in the action. That was the position here: the minuters could only commence their claims once the minute of sist had been granted.

[6] The minuters relied on a recent decision of the Sheriff Appeal Court, *Gillies' Executrix* v *Arjo Wiggins Ltd* 2020 SLT (Sh Ct) 53. There was no material difference between the procedural rules on intimation of minutes referred to in that case and those which applied in the current case. There were some similarities in the facts, but four reasons existed for not accepting the reasoning of the Sheriff Appeal Court. Firstly, it was not binding on this court. Secondly, the circumstances could be distinguished from the present case. The person seeking to introduce the connected persons as pursuers by amendment in that case was already a pursuer in the action and hence a party capable of giving notice. Thirdly, the case was wrongly decided by the Sheriff Appeal Court. It should have been recognised that it was a minute of amendment purporting to bring claims on the part of new pursuers. The reasoning in *Gillies* was in contradistinction to the earlier cases noted above. Fourthly, it relied heavily on *Boyle* v *Glasgow Corporation* 1975 SC 238, but that case, when correctly analysed, addressed a different point. There was an existing pursuer seeking to add a further case of fault after the expiry of the limitation period. Intimation of the minute of amendment was held to give fair notice, but this was an existing cause and did not

involve the introduction of new parties. Fair notice cannot be given by a potential litigant when that individual is not a party to the action. What was required, as set out in *Boyle,* is fair notice within the judicial process. Here the minuters do not have any role in the judicial process until sisted in the action. While it was competent to intimate a minute of sist, that was quite different from intimating a minute of amendment or minute for further damages.

[7] The minuters were seeking to avoid time-bar by taking advantage of procedural rules. But these cannot take precedence over statutory limitation rules. They could only bring a minute of amendment and minute for further damages after being sisted. Notice given by them when they were not parties did not count.

Minuters

[8] The case of *Gillies* was in point and was properly decided. The principle it took from *Boyle,* and applied, should be followed. In essence, there was fair notice. The present case did not involve use of a procedural mechanism of sisting in additional pursuers to circumvent issues of time-bar. The central point in the older authorities relied upon by the defender was that the claims were being made outwith the triennium, whereas here notice was given within the triennium. *Boyle* indicated that time-bar is interrupted when a minute of amendment is intimated and that was done within the triennium in this case. A connected person being sisted is a procedural matter and the issue then becomes whether the minute of amendment was timeously brought. The minuters come in to the process when the motion is intimated. Once that is done, the defender has notice of the new pursuers, how many of them and what are their claims. Fair notice of the vital information was given at that time.

Decision and reasons

The law

[9] Section 18(2) of the Prescription and Limitation (Scotland) Act 1973 provides:

> "…no action to which this section applies shall be brought unless it is commenced within a period of 3 years after—(a) the date of death of the deceased…"

The fundamental issue in this case is whether intimation of a minute of sist within the triennium, along with a minute of amendment and minute for further damages, and a motion to grant them, suffices to constitute an action being commenced, or whether the action can be commenced only once the motion for the minute of sist is granted.

[10] Viewed broadly, the authorities founded upon by the defender (*MacLean* v *British Railways Board, McArthur* v *Raynesway Plant Ltd and Marshall* v *Black*) each involved an existing pursuer, a motion for other family members to be brought into the action and amendment to include their claims. In each case the motions were intimated and dealt with either several months, or many months, after the expiry of the triennium. In *MacLean* v *British Railways Board*, Lord Fraser (at page 40) referred to *Miller* v *National Coal Board* 1960 SC 376 where it was held (at page 389) that the expression "it is commenced", read in its context, referred to the date when legal proceedings are begun. By what Lord Fraser described as a parity of reasoning, his opinion in *MacLean* was that the action at the instance of the second to sixth pursuers was "commenced" at the time when legal proceedings were begun by them, "that is to say on 26th May 1965 when they were added by amendment as pursuers in this action". He had earlier expressed the view that the second to sixth pursuers commenced their litigation with the defenders when they "entered the process". While in *McArthur* v *Raynesway Plant Ltd* and *Marshall* v *Black*, Lord Fraser's approach was adopted and applied, in none of these three cases was the question of an action being "commenced"

as a result of intimation considered. The last two cases were decided after *Boyle* v *Glasgow Corporation* but as intimation within the triennium had not occurred *Boyle* was not mentioned. However, even if the approach taken in *Boyle* had been adopted the results in those three cases would have been the same.

[11] In *Boyle,* the relevant statutory provision (section 6(1) of the Law Reform (Limitation of Actions, etc.) Act, 1954) uses language that is for present purposes the same as in the 1973 Act. A minute of amendment was intimated before the expiry date of the triennium but granted after that date. The Lord Ordinary (Lord Dunpark, at page 247) reached a similar view to that of Lord Fraser (although *MacLean* was not referred to) and held that the action was "commenced" when the motion to allow the minute of amendment was granted. In the reclaiming motion, the Second Division disagreed with that view. It was noted by the Lord Justice-Clerk (Wheatley) (at 250-251) that:

> "The lodging of a minute of amendment brings it into the judicial process. Intimation to the defender of the motion to the Court asking for the Minute to be received and answered within a specified period brings to the attention of the defender that the minute of amendment has been lodged, and it is at that point available to the defender. That seems to me to constitute fair notice. It is true that at that stage the amendment has not yet been allowed, and eventually may not be allowed, by the Court; but at least the pre-requisite of fair notice has been satisfied within the judicial process in which the defender is already involved, and if this has been done within the triennium, then that is as near to equiparation to the service of a summons as the situation permits.
>
> … If the contention of defenders' Counsel is correct, and the *punctum temporis* is the date at which the Court allows the Record to be amended in terms of the Minute of Amendment, the situation could arise where the Minute was lodged and intimation given timeously, but the procedure which followed thereon took the case outwith the triennium before the final authority of the Court to allow the Record to be amended was granted. That, in my considered opinion, would be contrary to the intent of section 6(1) and would not harmonise with the comparison which I have sought to draw with the initiation of an action. The Lord Ordinary took a different view…. For the reasons which I have given I regard that as the wrong approach. When fair notice within the judicial process and within the prescriptive period has been given, I consider that the purposes and the provisions of section 6(1) have been effected. The

> case of *Miller* v *National Coal Board* 1960 SC 376, dealt with a different point, and the decision in itself provides no assistance to the issue here."

The court decided that the new case was therefore "brought" within the triennium.

[12] Thus, the Second Division concluded that intimation, giving fair notice, sufficed to constitute commencement of the new claim. It is well-established that service of a summons marks the commencement of the action. The Second Division equiparated intimation with service. There is, of course, a requirement for signetting of a summons, if it is in order, prior to service, but there is no such requirement for a minute of amendment or a minute of sist. The reasoning of the court says nothing about the new claim having to be brought by a person who is already a party to the action; rather, it focuses on fair notice. The decision in *Miller,* founded upon by Lord Fraser in *MacLean,* fell to be distinguished.

[13] In *Gillies,* a minute of amendment was prepared, the existing pursuer seeking to introduce the second to ninth pursuers and substantially increase the sums claimed. It was intimated four days prior to the end of the triennium, along with a motion to allow the minute of amendment. In accordance with the court timetable, the motion and the minute of amendment were lodged on the day after the end of the triennium. The Sheriff Appeal Court noted (at [37]) that the question was what the phrase "brought into the judicial process" means. The court was satisfied that, appropriate intimation having been made, the "pre-requisite of fair notice" was met. That analysis was said to be consistent with *Boyle*. While in that case the Lord Justice-Clerk had said that "the lodging of the minute of amendment brings it in to the judicial process", that did not mean, under the current Sheriff Court rules, that the minute is not and cannot be part of the judicial process until it has been lodged. The emphasis was on fair notice. The existing rule provided for the lodging of the principal document after the motion procedure has concluded, either by agreement or by

opposition. Actual lodgement of the minute of amendment was, in this context, "a red herring".

Application of the law

[14] The first issue in the present case is whether the factual circumstances in *Gillies* differed from those in *Boyle*, and had the consequence that in *Gillies* the court erred in following *Boyle.* This comes down to whether a different view is to be reached between fair notice of a motion and a minute of amendment by an existing pursuer to bring in a new head of claim (as in *Boyle)* and fair notice of a motion in respect of such a minute by an existing pursuer to bring in new pursuers with new claims (as in *Gillies*). In my opinion, there is no material difference between these factual circumstances and in particular none which impinges upon the reasoning in *Boyle* and the principle of fair notice. I do not regard a minute of amendment of the kind in *Boyle* as differing materially from the kind in *Gillies;* they were each about altering the pleadings, albeit in different ways. I agree with the view of the Sheriff Appeal Court that *Boyle* fell to be applied.

[15] The second issue is whether the reasoning in *Boyle*, followed in *Gillies*, is to be applied when there is no existing pursuer. When the summons has passed the signet and been served on the defender that does of course bring about a judicial process and so in the present case there was an already established and extant judicial process. However, there was no pursuer left in this action after the deceased passed away. In those circumstances, the connected persons were entitled to intimate their minute of sist and motion to be sisted into the action (Rule of Court 43.18). In light of the authorities above, I do not consider there to be a sound basis in law for the defender's position that the action can only be commenced for the purposes of the 1973 Act if the connected persons' motion to be sisted into the action

is granted within the triennium. In my view, the principle in *Boyle*, as followed in *Gillies*, applies. Where the existing pursuer has died and hence no other pursuer is in place, intimation of the minutes, including the minute to sist, and the motion to grant them constitutes fair notice and causes the action, in its new form, to be commenced.

[16] The pursuers' suggested procedure would also mean that delay arising in motions in this kind of case could result in the claim being time-barred. Here, the motion and the minutes were intimated on 7 February 2022. In accordance with Rule of Court 23.1J (5)(a), opposition was allowed until 25 February 2022, and was lodged on 24 February 2022. The defender's opposition did not restrict itself to specific parts of the motion and hence bore to be against all three parts. In submissions at the opposed motion hearing there was in fact no particular opposition to the minute of sist itself (and indeed in the earlier cases referred to by counsel it was viewed as requiring to be granted). If the defender is correct that it is only after the connected persons were granted their motion in terms of the minute of sist that the action commenced and they could intimate their minute of amendment and minute for further damages, neither of these events could happen until after the expiry of the triennium (a point also adverted to in *Boyle* as supporting the court's decision).

[17] For these reasons, the action was commenced as a result of fair notice by the minuters, within the triennium, of coming into the action and of their minute of amendment and minute for further damages.

Disposal

[18] I shall therefore grant the motion of the minuters, reserving in the meantime all questions of expenses.