OUTER HOUSE, COURT OF SESSION

[2023] CSOH 88

A338/18

OPINION OF LORD RICHARDSON

In the cause

JAMES ADRIAN WATSON

Pursuer

against

GRAHAM EDWARD FLETCHER

Defender

Pursuer: Lindsay KC; Thorntons Law LLP
Defender: McKinlay; Lindsays LLP

6 December 2023

Introduction

[1] This case concerns a dispute, which I heard at debate, about the development of property in Portpatrick.

[2] This case arises out of the same factual circumstances and involves two of the same parties as a related case (*James Adrian Watson* v *Graham Edward Fletcher & Ors (A339/18)*). I heard a debate in that case immediately before the present case. My Opinion in the related case has been issued concurrently with this one.

[3] In this case, the pursuer sues as the assignee of a company, now in administration, Portpatrick Holdings Limited ("Holdings"). Holdings is the parent company of Croftshore

Limited. Croftshore is also now in administration. At the material time, the defender was a director of both Holdings and Croftshore. In the related case, the pursuer sues the defender, among others, as the assignee of Croftshore. In this case, both the pursuer and the defender adopt and incorporate their respective pleadings in the related case.

[4] Accordingly, in order to avoid unnecessary duplication, this Opinion should be read along with the narrative of the background and the pursuer's case which I have set out at paras [2] to [15] in my Opinion in the related case (*James Adrian Watson* v *Graham Edward Fletcher & Ors (A339/18))*.

The pursuer's case

[5] In this case, the pursuer seeks to recover as damages the costs incurred by Holdings as a result of its entry into administration on 26 August 2015. The pursuer's case is that Holdings entered administration as a result of its wholly owned subsidiary, Croftshore, having entered administration immediately beforehand on 24 August 2015. The pursuer avers further that Croftshore's administration was caused by the defender's breaches of fiduciary duty. In particular, the pursuer avers that Croftshore's entry into administration was caused by the first defender's actions, in breach of his fiduciary duties, in walking off the Croftshore development site and in failing to co-operate with the handover to a new contractor and a new site supervisor.

[6] In the related case, the pursuer, suing as assignee of Croftshore, advances as similar claim for the costs associated with Croftshore's administration (see paras [11], [14] and [15] of my Opinion in the related case).

The defender's arguments

[7] At debate, counsel for the defender sought dismissal of the action on two grounds.

The first argument

[8] The first argument focussed on the fact that the pursuer averred that, at the critical time when it was alleged the defender breached his fiduciary duties, he was acting as a contractor for Croftshore. The defender's point was that, as such, he was not acting in his capacity as a director of Croftshore, let alone in his capacity as a director of Holdings.

[9] This argument was also advanced by the defender in the related case (see paras [29] to [33] of my Opinion in the related case).

[10] During the debate before me in the present case, both counsel simply adopted the submissions that they had each made in the related case (see paras [29] to [35]).

[11] I have set out in my Opinion in the related case why I rejected the defender's argument (see paras [36] to [39]). For the reasons set out there, I consider that the pursuer has averred a relevant case. In short, the flaw in the defender's approach is that simply because, at the material time, the first defender was acting as a contractor rather than directly in his capacity as a director, does not mean that his directorial duties no longer applied to him.

The second argument

[12] In the event that the defender was unsuccessful in his first argument, he argued, in the alternative, that the pursuer had failed to aver a relevant case having regard to sections 6 and 11 of the Prescription and Limitation (Scotland) Act 1973.

[13] The starting point for the pursuer's claim was the entry of Holdings into administration on 26 August 2015. This was the date on which, on the pursuer's case, following the defender's breach of fiduciary duty, losses had been suffered. Accordingly, this was the date on which the obligation relied upon by the pursuer became enforceable (see section 6(3) and 11(1) of the 1973 Act) and from which the 5 year period provided for by section 6(1) began to run.

[14] In the present case, the pursuer did not seek to rely upon the provisions of either section 6(4) or section 11 of the 1973 Act. There was also no issue of a relevant acknowledgement having been made by the defender. As such, the question was whether the pursuer had made a relevant claim within 5 years of 26 August 2015.

[15] Counsel for the defender acknowledged that the summons in the present action had been served on the defender on 7 December 2018. The summons as served set out a claim which focussed on the diversion of the Holidays site away from Holdings and its subsidiary Croftshore. Counsel drew attention to the fact that, as served, the summons referred only to the breach by the defender of his fiduciary duties as follows in Article 9:

> "As a director of the company it was the […] defender's duty in terms of section 172 of the Companies Act 2006 ('the Act') to act in the way he considered in good faith would be most likely to promote the success of the company for the benefit of its members as a whole. In terms of section 175 of the Act it was the […] defender's duty to avoid a situation in which he had, or could have, a direct or indirect interest that conflicted, or possibly might conflict, with the interests of the company. The […] defender was at common law subject to the same duties. *Separatim*, it was the […] defender's duty in terms of section 174(1) of the Act and, alternatively, at common law to exercise in the performance of his duties as a director of the company the care, skill and diligence to be expected of a reasonably skilled person. In particular, it was the duty of the […] defender to take reasonable care not to cause the company to sustain financial loss."

[16] Importantly, there was no reference in the summons as served to Holdings' entry into administration. Averments referring to the administration had only been added, by

way of adjustment on 13 November 2020 - more than 5 years after 26 August 2015. These adjustments both incorporated the averments made in Article 9 and 10 of the pleadings in the related case as well as adding the following passage in Article 9:

> "Insofar as not codified in the Act, it was the […] defender's fiduciary duty at common law to act in the best interests of Holdings, to avoid conflicts of interest and not to accept any secret benefits. In particular, it was the duty of the […] defender not to abandon the Croftshore development site. It was the […] defender's duty to co - operate with the handover of the Croftshore development site to the new contractor and new site supervisor. In failing to do so, the […] defender was responsible for Croftshore being placed in administration and thereafter for Holdings' administration, which inevitably followed."

[17] The following was also added to Article 10:

> "As a consequence of the [defender's] breaches of duty, Croftshore was placed into administration on 24th August 2015. The loans from [AIB], for the development of the Croftshore site, were in the name of Holdings. As a consequence of Croftshore going into administration, these loans were called up by [AIB]. Holdings was unable to repay these loans and was placed into administration, by [AIB], on 26th August 2015."

[18] Counsel for the defender submitted that, against this background, two issues arose: first, whether the fact that the addition of the averments to Articles 9 and 10 (identified above) had been made by way of adjustment represented, in itself, a complete answer to the issue of prescription; and, secondly, whether, in any event, the averments added by adjustment could be properly characterised as being merely a development of the claim against the defender which had originally been made in the summons.

[19] Counsel for the defender urged me to answer both issues in the negative.

Addition by adjustment

[20] In respect of the first issue, counsel for the defender submitted that it was capable of a short answer. Although it was clear from a number of authorities that the court had only a limited discretion to regulate the adjustment of the pleadings, this did not affect the

operation of the law of prescription. The relevant date for those purposes was the date on which the adjustments were made and intimated.

[21] Counsel for the defender cited two authorities in support of that proposition. First, David Johnston KC in *Prescription and Limitation* (2nd Edition) said the following at paragraph 22.21:

> "If the averments added at adjustment relate to an obligation which prescribed before they were added, it must be open to a defender to argue that they should be excluded from probation as being founded on a non-existent obligation or else to seek absolvitor so far as that obligation is concerned. For these purposes, it seems likely that the date of the claim will be the date on which the adjustments were made to the open record and intimated to the defender." [citing Rule of Court 22.2(3)]

[22] Second, that approach had been adopted by Lord Doherty in *Huntaven Properties Limited* v *Hunter Construction (Aberdeen) Limited and others* [2017] CSOH 57 at paragraphs 113, 115 and 116.

Different obligations or different aspects of the same obligation

[23] On the second issue, counsel for the defender emphasised that it was critical to identify the particular obligation to make reparation that was founded upon (see *Huntaven* (above) at paragraph 65). In this regard, it was important to appreciate that, in this case, it was not the underlying obligation that was in issue. It was the obligation to make reparation for breach of that underlying obligation which was founded upon by the pursuer which required to be focussed on.

[24] Counsel referred to *JG Martin Plant Hire Ltd* v *Bannatyne, Kirkwood and France & Co* 1996 SC 105 as an illustration of this distinction. In that case, a solicitor had been sued for damages on the basis of breach of contract and, separately, negligence for having loosed an arrestment without instructions. It subsequently transpired that the arrestment had been

invalid as it was in the name of a non-existent company. After sundry procedure, the pursuer had sought to amend to add new grounds of fault which alleged that the solicitors ought to have verified the name of the arrestee prior to arresting. The minute of amendment was intimated more than 5 years after the arrestment was served. The Inner House refused to allow the amendment on the grounds that the claim contained within it was time-barred saying the following (at page 111 A to C):

> "We accept that in the present case, if the amendment were allowed, the action would still remain one based on negligence and breach of contract. However, we are satisfied that the proposed amendment in the present case would have the effect of changing the basis of the pursuers' action. As counsel for the pursuers conceded it introduced a different ground of fault, and the pursuers are thus seeking to rely upon different grounds of action. Liability to make reparation is, in the minute of amendment, averred to arise for a different reason. We accordingly held that the claim contained in the minute of amendment was time-barred."

[25] Counsel submitted that in determining whether two obligations to make reparation are truly different or are merely different aspects of the same one, some guidance could be gained from *res judicata* (see Johnston (above) at paragraph 2.26).

[26] Applying this approach to the present case supported the defender's contention that two distinct obligations were involved. One was the obligation to make reparation for the alleged diversion of the business opportunity represented by the Holidays site. The second was the obligation to make reparation for having walked off site in August 2015. These obligations were distinct. Proceedings could have been raised in respect of the defender's actions in walking off site immediately before the alleged diversion had been discovered.

The pursuer's response

[27] Senior counsel for the pursuer began by conceding the first issue. In other words, he did not seek to argue that the fact that the averments in question had been added by

adjustment represented an answer to the defender's prescription argument. Standing what is said by Johnston (above at [20]) and the approach of Lord Doherty in *Huntaven* (above at [21]), I consider that this concession was properly made.

[28] However, senior counsel argued that the averments added by adjustment in November 2020 were simply adding an additional head of loss which arose from the obligations already timeously pled in the summons. Senior counsel highlighted that, as a matter of fact, the adjustments represented a significant narrowing of the dispute. He entirely rejected the suggestion that these adjustments somehow represented a broadening of the claim.

[29] Testing the issue in a different way, senior counsel submitted that even if the averments added by adjustment to Article 9 particularising the duties of the defender (see [15] above) were deleted, the pursuer had still averred a relevant case based on the pre-existing averments of duty in respect of the defender causing the administration of Holdings (see [14] above). Accordingly, even although new factual averments had been added by adjustment to set up the basis for that claim, it did not represent a new claim precisely because they were based upon the pre-existing averments of duty.

Decision

[30] In light of the pursuer's concession on the first issue (see [26] above), there is essentially only one issue which I require to decide: namely, whether the averments added by the pursuer by adjustment on 13 November 2020 represent, as the pursuer contends, merely different aspects of the obligations already pled or, as the defender contends, whether they proceed on the basis of a new obligation which has, therefore, prescribed.

[31] The key to resolving this issue is correctly identifying the particular obligation to make reparation which the case articulated by those averments seeks to enforce (see Lord Doherty at paragraph 65 in *Huntaven* (above)). In this case, the relevant obligation is one of reparation for the alleged breach by the defender of his fiduciary duties arising from his position as director of both Holdings and Croftshore.

[32] I consider that the situation in this case is analogous to that arising under a building contract addressed by Lord Eassie in *Musselburgh & Fisherrow Co-operative Society Limited* v *Mowlem Scotland Limited* 2004 SCLR 412 at paragraph 50:

> "In my judgment, although a contractual relationship will often contain general provisions such as a general duty of care or a general duty to construct in a workmanlike manner, for the purposes of the running of the five-year prescription it is necessary to identify the particular respect in which the general duty is breached and which leads to the causing of the particular defect in question. […] Accordingly, in my opinion, in a contract such as the building contract where there may be a multiplicity of defects each caused by a different specific failure in a general duty such as a duty of care or workmanlike construction the proper approach for the purposes of the quinquennial prescription is to examine each distinct defect and its correlative failure, in construction or design separately."

[33] In other words, in this case, as in the building contract situation, although the pursuer makes averments about the general duties which arise from the defender's position as a director of Holdings, the relevant obligation to make reparation now claimed by the pursuer arises from the specific alleged breaches by the defender in abandoning the Croftshore Development site and in not co-operating in the handover. I do not consider that it is relevant that, prior to the adjustments in question, the pursuer's case contained averments about other alleged breaches by the defender of the general duties which related to the diversion of the Holidays site opportunity. The critical point is that the obligation to make reparation which the pursuer now seeks to enforce only arises from the specific

alleged breaches and not from either the general duties themselves or the other alleged breaches thereof.

[34] It follows from this analysis that I consider that the obligation to make reparation founded upon in the pursuer's adjustments made on 13 November 2020 is not one which had previously been founded upon by the pursuer. Accordingly, as no relevant claim had been made in respect of that obligation for more than 5 years from the date upon which it first became enforceable, on 26 August 2015, it has prescribed in terms of section 6(1) of the 1973 Act.

Disposal

[35] In light of my opinion, I will sustain the defender's first plea in law and dismiss the action. As I was not addressed on the issue, I will reserve all questions of expenses meantime.