

Proceeding with a Defended Professional Negligence Proof:

***Christies Parks Ltd v Scottish Water* [2016] CSOH 155 –**

a little known timebar noticed and acted upon

1. Introduction

- 1.1. Most professional liability proofs which proceed in the Court of Session concern allegations of clinical negligence. In contrast, *Christies Parks* was a case of alleged professional negligence by construction professionals, in particular by civil engineers employed by Scottish Water and its predecessors i.e. individuals employed and not independent practitioners.
- 1.2. The opinion of Lord Clark which, in substance, upheld the Pursuer's claim is, I suggest a valuable guide as to how best to identify and determine the critical issues of fact, causation, liability and quantification in a claim for damage to heritable property where construction and professional negligence is alleged. That approach has, I suggest, wider application in professional negligence and property claims.
- 1.3. The case has both a significant negative and positive aspect. Very sadly, the proof was heard by the late Lord Jones whose most untimely death prevented him from issuing a judgement requiring the 2nd Division of the Inner House to direct further procedure. The Division could have appointed one of the Court to rehear the proof of new or to remit the case to a Lord Ordinary to carry out the same exercise. Instead, the Opinion of the Court, delivered by the Lord Justice Clerk Lady Dorrian, was to the effect that it was in the interests of justice for a new Lord Ordinary to issue an opinion based on the completed existing evidence and written submissions and with power to require further written and oral submissions; submissions of both types were ordered. Positively, despite a dramatic index event, no personal injury or fatality occurred on the Pursuer's property despite obvious material risks of such outcomes.

2. The Critical Facts as Established

- 2.1. The Pursuers were the heritable proprietors and operators of a substantial caravan park – effectively a self contained holiday/2nd home facility in Fochabers, Moray. The site was bisected by the Fochabers Burn which flows northwards into the River Spey with steep banks gradually reducing in height until the burn enters the river.

- 2.2. In 1976, the Defenders' predecessors installed a high pressure mains water pipe which traversed the burn, broadly at right angles with water flowing west to east. The pipe was and remains an important part of water supply infrastructure in the area.
- 2.3. In order for this paper to be concise, I shall not narrate in full the constructional details of the mains pipe. It is enough, I hope, to note that the mains was installed beneath the bed of the burn and within the banks on both sides of the burn.
- 2.4. Between 1976 and 2000, the Defenders (and I include their predecessors in that term) carried out various works designed to protect the mains from the risk of structural failure, especially due to erosion, including laying a concrete slab over the mains within the burn. Additionally, after a major flood in 1997, the bed of the burn was eroded exposing the pipe and part of the adjacent right bank too had been eroded. At the crossing point of the mains pipe metal baskets filled with rocks (gambions) were installed but no measures were taken downstream from the concrete slab to address erosion or scour risk.
- 2.5. The site of the water mains crossing was under the exclusive legal control of the Defenders. The Pursuers, as heritable proprietors, had no lawful basis for carrying out or instructing works relative to that facility.
- 2.6. After 2000, no further protective measures were taken by the Defenders despite the Pursuers unchallenged written reports of increasing material erosion at the crossing point and failure i.e. cracking of the concrete slab.
- 2.7. On the night/early morning of 4 September 2009 there was heavy rain fall at the locus resulting in the burn flooding. The mains pipe failed and in effect discharged water at high pressure at the crossing point causing significant damages to both banks at that point.

3. The Nature of the Claim

- 3.1. The Pursuer pled 2 separate, parallel but not distinct cases. The first was an alleged breach of Section 10 of the Water (Scotland) Act 1980. This imposes a statutory duty to pay compensation for damage caused by the escape of water arising from the Defenders' operations carried out under and in terms of the Act. Fault has to be pled and proved: see University of Stirling v Central Regional Council 1992 SLT 179; the decision of the Sheriff that the section imposes strict liability in Campbell Construction Group Ltd v Scottish Water 2015 SLT (Sh Ct) 159 is obviously wrong because it ignored a long and well established tract of authority to the contrary. Actionability is the key essential.

- 3.2. A claim under this section has to be made within 2 years i.e. 24 months of the relevant incident which I suggest, on proper construction, means raising and serving an action and not merely a written intimation of a claim. This time limit is not well known and is not referred to David Johnston QC's excellent textbook. There is no judicial discretion to extend the time limit.
- 3.3. The second ground of action was an allegation of professional negligence relying on the well known test laid down in Hunter v Hanley 1955 SC 200.
- 3.4. Both grounds, of course, overlapped to some degree but elements of the claim for damage to the banks were not wholly attributable to water escape but rather failure to protect the banks properly.
- 3.5. The Pursuers' solicitors, Allan Black and McCaskie (of Elgin) were aware of the 24 month time limit and thus instructed me timeously enabling a proper summons to be drafted and served timeously.
- 3.6. Section 10 provides that any question of fact of damage or amount of compensation shall in case of dispute be determined by arbitration now of course in terms of the relatively new Act. The Defenders did not invoke this provision in terms of a plea in law prior to the closing of the Record so the action proceeded in the ordinary fashion. In my opinion, the summons had to be raised within 24 months of the relevant incident which could, but did not lead to an arbitration. From the Pursuers' perspective, an arbitration would have had the distinct disadvantage of very limited ability to appeal from an unsuccessful arbitration hearing. There is a clear tract of case law to the effect that only clear errors of law by an arbitrator will be suitable for review by the Court of Session. In addition, the costs of any arbitration i.e. the arbitrator, and in this case probably an expert Civil Engineer supported by a partner level legal clerk would have had to be met equally between the parties. In contrast, the court fees incurred in this case were likely to have been much less. Post proof, the Defenders submitted in writing that the absence of an arbitration procedure rendered the Pursuers' action incompetent or irrelevant. That submission was not insisted upon – in my opinion quite correctly given that the point was not taken at the correct time. Thus, I suggest that a protective action must be raised within the 24 month time limit and if Scottish Water invoke the arbitration provision then the action should be sisted pending the outcome of the arbitration and any decree arbitral enforced by means of the civil action if necessary.

4. The methodology of the Lord Ordinary

4.1. In essence, Lord Clark took full account of the competing submissions and refined them into what he thought and determined were the essential issues. These were fivefold:

4.1.1. Have the Pursuers proved breach of duty of care owed to them by the Defenders?

4.1.2. What was the damage which the Pursuers claim was caused by the Defender's breach of their duty of care?

4.1.3. Was this damage caused by a breach of duty of care owed by the Defenders to the Pursuers?

4.1.4. Was further damage, for which the Defenders are liable, caused or brought about after the flood of September 2009?

4.1.5. What are the recoverable losses if the answers to the above favour the Pursuers?

4.2. The first issue was divided into 3 elements namely:

4.2.1. Was the Pursuers' expert witness, Professor Fleming, properly qualified to give evidence on the alleged breach of the Defenders' duty of care?

4.2.2. Does the extent of any duty of care owed by the Defenders to the Pursuers extend to the avoidance of the damage claimed for?

4.2.3. Should Professor Fleming's evidence be accepted resulting in a finding of proved fault?

All three elements were answered in the Pursuers' favour. Firstly, applying perhaps for the first time at a proof, the UK Supreme Court decision in Kennedy v Concordia Services Ltd [2016] UKSC 6, his Lordship held that the Professor had ample academic and practical experience as a chartered civil engineer to opine on flood risk brought about by the pipe crossing's features and to be of value to the Court. Given his long, distinguished career, the challenge to him perhaps was surprising. Secondly, the scope of the duty of care was held to extend to prevention of damage to the Pursuers' property brought about by the pipe crossing's characteristics. Thirdly, after a careful assessment of the competing bodies of expert evidence his Lordship concluded that the weight of that evidence clearly favoured the Pursuers and that it was wholly and reasonably foreseeable that breach of duty would be likely to cause physical damage to the Pursuers' property. Overall, based on Professor Fleming's evidence breach of the duty of care owed by the Defenders to the Pursuers was proved.

- 4.2.3. In essence there was a finding of fact to the effect that, after the September 2009 flood, there was crater like erosion on both banks extending to 10-15 metres at the mains crossing and caused by that event.
- 4.2.4. In determining whether the damage found to have been caused by a breach of duty owed by the Defenders to the Pursuers 4 matters were considered namely (1) the consequence of the breach of duty; (2) the natural effect of the flood; (3) the washing away of a vehicular bridge which traversed the site upstream from the pipe crossing and (4) the failure of the water mains pipe. On (1) Lord Clark held that had the Defenders implemented the 4 steps identified by Professor Fleming then the damage at the pipe crossing would not have occurred and that the actual design of the pipe crossing created a choke point which brought about a build up of flood water and debris. On issue (2) there was a sharp conflict between the parties expert witnesses on the scale of the flood – essentially concerned with water volume through the burn during the flood. Essentially Professor Fleming was preferred again because of his detailed convincing calculations which were persuasive to the effect this was not an exceptional flood whereas the Defenders’ experts had not provided reasoning as to their calculations and why the flood would have caused the actual damage and the pipe crossing had the Professor’s 4 steps or measures been in place. Turning to the washed away road bridge (3), although its being washed away by the flood might have provided compelling evidence that the scale of the flood was indeed exceptional but the Lord Ordinary elected to find that that event was not relevant to the findings he had already made as outlined above. Lastly, turning to the failure of mains water pipe, the critical finding, reliant again on Professor Fleming was that the immediate release of water under high pressure due to the pipe’s complete failure made a material contribution to the damage and was not caused by the natural effects of the flood or other unrelated factors – e.g. the bridge.
- 4.2.5. The Pursuers’ claim that further damage was caused by the Defenders removal of material post September 2009 (of circa 1500 tonnes) failed because of the lack of evidence on this alleged activity and the Defenders being liable vicariously for their contractors.
- 4.2.6. The damages award of circa £74,000 was made up of fencing/electrical costs, reinstatement works, management time, bank fees and a professional fee. Legally speaking, only the claim for management time is, I suggest, of interest. The Defenders argued that in line with Standard Chartered Bank v

Pakistan National Shipping Corporation (No 3) [2001] 3 All ER (Comm) 822
the Pursuer had to prove (but failed to do so) significant business disruption, loss of profit or expenditure. That submission was rejected because the evidence from the Pursuers' sole director, Gordon Christie, that the index incident resulted in his being diverted from other projects justified the claim being upheld in part. The claim for time spent preparing to give evidence was rejected because of the absence of supportive authority and policy reasons pointing to this part of the claim being unsound. Essentially to allow this part of the claim would result in an unjustifiable new form of damages or head of claim.

5. Conclusions

I suggest three conclusions can be drawn from this case:-

- (1) Early solicitor investigation and instruction by Allan, Black & McCaskie (of Elgin) resulting in an action being raised timeously (there is no discretion to extend the time limit).
- (2) Clearly reported and presented expert evidence from a source of real distinction and demonstrable impartiality; and
- (3) Damages focussed on obviously recoverable heads of claim.

Although Terra Firma Chambers' name signifies a focus on land and property, sometimes there occurs a significant connection between land use and intervention and the natural elements e.g. climate and weather. That can result in complex situations requiring detailed investigation and advice based on a team effort between solicitor and counsel.

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