**W M Morrison Supermarkets PLC v (1) LEM Estates Ltd (In Liquidation) and Keith Anderson, the**

**liquidator thereof; (2) Struer Consulting Engineers Ltd; (3) Muir Construction Ltd**

Court of Session, Outer House (Lord Doherty):

11 March 2020

[2020] CSOH 31

*Supermarket development – building contract – collateral warranties - pooling of water in car park – pursuer’s agent suggested use of inappropriate material - breach of contract – interpretation – personal bar – adjustments - prescription*

The pursuer (Morrison) is a supermarket operator, and tenant of a supermarket. Under an Agreement for Lease the first defender (LEM) agreed to develop a supermarket and Morrison agreed that it would lease it once it had been completed. The second defender (Struer) are consulting civil and structural engineers, and the third defender (Muir) are building contractors.

LEM and Muir entered into a Building Contract to design and construct the supermarket. Struer contracted to provide civil and structural engineering services to LEM under an Appointment Agreement.

Through a Novation Agreement between the defenders the rights, obligations, and liabilities of LEM under the Appointment Agreement were transferred to Muir, and Struer obliged itself to perform the services under the Appointment Agreement to and in favour of Muir. Via collateral warranties Struer undertook obligations to Morrison in respect of the services provided under the Appointment Agreement, (“the Struer Collateral Warranty”), and Muir undertook obligations to Morrison in respect of the works carried out under the Building Contract, (“the Muir Collateral Warranty”).

After completion of the works Morrison entered into a lease of the premises. Subsequently significant ponding of water in the car park of the premises occurred, and damaged areas of the car park surface became apparent. Morrison maintained that these were caused by LEM’s breach of the Agreement for Lease; by Struer’s breach of the Struer Collateral Warranty; and by Muir’s breach of the Muir Collateral Warranty. Morrison sought redress for loss and damage. The pursuer’s pleadings were subsequently adjusted to include a failure to warn that TarmacDry was unsuitable, and further that the problems were materially contributed to by poor workmanship during installation.

Before Lord Doherty, sitting in the Court of Session, Outer House, Struer and Muir advanced that they were not contractually responsible for the pooling of water and damage, and that Morrison were subject to a personal bar. Morrison had employed an agent Stuart McTaggart Ltd (SM) who represented that the selection of TarmacDry was suitable for use, and this led to TarmacDry being included within the Employer’s Requirements. The defenders alleged that Morrison was barred from founding upon its inclusion in the Employer’s Requirements breaches of either the Collateral Warranties or the Building Contract, or that the material’s cleaning criteria were not in accordance with the Building Contract or Collateral Warranties. Further that the defenders were absolved of responsibility for any defects arising from its use.

Morrison submitted that on a proper construction of the obligations Struer and Muir had contractual responsibility for the selection and use of TarmacDry. Further, that a personal bar was irrelevant since it requires a person to have an existing right and to act inconsistently with enforcement of that right. Any representation by SM pre-dated the contracts, and given the contractual scheme any such representation could not be relied upon. The defenders also alleged that any new obligation advanced in Morrison’s adjustments would have been extinguished by prescription under the Prescription and Limitation (Scotland) Act 1973, section 6. Morrison advanced that no element of the adjustments included any substantially different complaint, and therefore no claim was extinguished.

**Held:** Holding for the Pursuer, save on one prescription ground. Caseput out by order: (i) to discuss an appropriate interlocutor to give effect to the decision; (ii) to discuss further procedure; and (iii) to consider motions for expenses.

1. On proper construction of the Appointment Agreement Struer remained fully responsible for all of the works necessary for completion of the project (including the design). SM’s suggestion of the use of TarmacDry, and that it should be included in the Employer’s Requirements did not curtail or vary Struer’s design responsibility. On a proper construction of the Building Contract Muir was responsible to Morrison for the design of the car park surface course (Paras. [32]-[38]).
2. That SM suggested the use of TarmacDry and that it should be included in the Employer’s Requirements does not assist Muir. Muir warranted that it had carefully checked the Employer’s Requirements and accepted full responsibility for the design (Para. [39]).
3. Even assuming that SM had authority to make representations on Morrison’s behalf a personal bar should not be imposed. Bars ought not readily be imposed. The representation was one of opinion, and a plea of personal bar cannot be founded upon a mere statement of opinion (*Maclaine and Others v Gatty and Another* [1921] 1 A.C. 376, per Lord Birkenhead L.C., applied) (Paras. [41]-[42]).
4. *Nairn v South-East Lancashire Insurance Co Ltd* 1930 S.C. 606 is clear authority for the proposition that personal bar is irrelevant unless there is inconsistency with a pre-existing right. At the time of the alleged representation the contract and collateral warranty had not been executed, and the rights were not yet in existence. The representation was not and could not be a representation inconsistent with antecedent rights, (Para. 43).
5. It would have been unreasonable in the circumstances to rely upon SM’s representation. SM represented Morrison’s interests, but the ultimate decision as to what was included within the Employer’s Requirements was LEM’s. In terms of the Appointment Agreement Struer had design responsibility to LEM for TarmacDry’s inclusion in the Employer’s Requirements. In terms of the Building Contract Muir had design responsibility to LEM for that matter. Neither Struer nor Muir were required to follow SM’s suggestion. Given their design responsibilities they would not be expected to have done so without satisfying themselves as to the appropriateness of the suggested design. Further, a person in Muir’s position would not reasonably have believed that the relevant rights under the Muir Collateral Warranty would not be exercised (Paras. [43]-[45]).
6. Where issues of prescription may arise a pursuer should take care that some reference is made in his pleadings to each obligation to make reparation which he seeks to enforce. That can be done by incorporating a report brevitatis causa in his pleadings. It is not necessary in order to satisfy the requirements of the Prescription and Limitation (Scotland) Act 1973, section 9(1)(a), that claims are stated at length in the pleadings (Para. [68]). Morrison’s adjustments to include a warning case did not involve it seeking to enforce obligations to make reparation which were different from those in the summons (design breach). The essence of both is that TarmacDry was unsuitable and ought not to have been used, and that the problems with it ought to have been pointed out. However, adjustments averring that the problems were materially contributed to by poor workmanship during installation were substantially different. Unlike the warning case the poor workmanship adjustment was an attempt to advance a new and different case after the expiry of the prescriptive period, (Para. [65]).

**Cases referred to in the opinion:**

*A M Gillespie & Co v James Howden & Co* (1885) 12 R. 800

*Assuranceforeningen Skuld v International Oil Pollution Compensation Fund* (No. 2) 2000 S.L.T. 1348

*Ben Cleuch Estates Ltd v Scottish Enterprise* [2006] CSOH 35

*Ben Cleuch Estates Ltd v Scottish Enterprise* [2008] CSIH 1; 2008 S.C. 252

*British Overseas Bank Nominees Ltd & Others v Stewart Milne Group Ltd* [2019] CSIH 47; 2019 S.L.T. 1253; [2020] P.N.L.R. 2

*Cantors Properties (Scotland) Ltd v Swears & Wells Ltd* 1978 S.C. 310

*Classic House Developments Ltd v GD Lodge & Partners and Others*, Unreported, 30 January 1998

*Cole v Lonie* 2001 S.C. 610

*David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd* [2014] UKSC 48; 2014 S.C. (U.K.S.C.) 222

*Dunlop v McGowans* 1980 S.C. (H.L.) 73

*Eadie Cairns v Programmed Maintenance Painting Ltd* 1987 S.L.T. 777

*Electricity Supply (Nominees) (Scotland) Ltd v Combined Capital Ltd* 1987 S.C. 303

*Huntaven Properties Ltd v Hunter Construction (Aberdeen) Ltd & Ors* [2017] CSOH 57; 2017 G.W.D. 14-229

*J G Martin Plant Hire Ltd v Bannatyne Kirkwood France & Co* 1996 S.C. 105

*Macleod v Sinclair* 1981 S.L.T. (Notes) 38

*Maclaine and Others v Gatty and Another* [1921] 1 A.C. 376

*McClure Naismith v Harley Haddow Partnership* [2017] CSOH 125; 2018 S.C.L.R. 257

*MT Højgaard A/S v E.ON Climate & Anor* [2017] UKSC 59; [2018] 2 All E.R. 22

*Musselburgh & Fisherrow Co-operative Society Ltd v Mowlem Scotland Ltd* 2004 S.C.L.R. 412

*Nairn v South-East Lancashire Insurance Co Ltd* 1930 S.C. 606

*NV Devos Gebroeder v Sunderland Sportswear Ltd (No 2)* 1990 S.C. 291

*Safdar v Devlin* 1995 S.L.T. 530

*The Royal Bank of Scotland PLC v Holmes* 1999 S.L.T. 563

*William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd* (No 3) 2001 S.C. 901

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