30 July 2014

PRESS SUMMARY

David T Morrison & Co Limited t/a Gael Home Interiors (Respondent) v ICL Plastics Limited and Others (Appellants) (Scotland)

On appeal from the Inner House of the Court of Session, [2013] CSIH 19
[2014] UKSC 48

JUSTICES: Lord Neuberger (President), Lord Sumption, Lord Reed, Lord Toulson, Lord Hodge

BACKGROUND TO THE APPEAL

On 11 May 2004 an explosion occurred at ICL's factory in Glasgow. Nine people were killed and many others injured, but the present case has no bearing on the claims made by or on behalf of those persons. Morrison's shop was among a number of properties damaged. On 13 August 2009 Morrison began the present proceedings, seeking damages against ICL on the basis that the damage to its shop was caused by ICL's negligence, nuisance and breach of duty **[1]**.

Under section 6(1) of the Prescription and Limitation (Scotland) 1973 Act, an obligation to make reparation is extinguished through the operation of prescription if a claim has not been made or the subsistence of the obligation not acknowledged within five years of the relevant obligation having become enforceable **[6-7]**. Section 11(1) provides that an obligation "*to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6… as having become enforceable on the date when the loss injury or damage occurred.*" ICL accept that they had an obligation to make reparation to Morrison, but argue that it prescribed long before the action was raised **[63]**.

Morrison dispute this, relying on section 11(3). It postpones the date from which the prescriptive period begins to run where "*the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred*" until a later date **[2; 8]**. Morrison argue that it was unlikely that, having ascertained that ICL's premises had been released, they could have investigated the cause of the explosion so as to be able to commence legal proceedings before 13 August 2004 **[60]**.

In line with a number of authorities, the case proceeded in the courts below on the footing that under section 11(3) the commencement of the prescriptive period was postponed where the creditor was not aware, and could not with reasonable diligence have been aware, (1) that loss, injury or damage had occurred, *and* (2) that it had been caused by the breach of a duty owed to him. There was no doubt that Morrison knew damage had occurred on the date of the explosion. In order to establish that they also knew, or could with reasonable diligence have known, at that date or soon after that the explosion had been caused by a breach of duty, ICL relied on the principle expressed in the maxim *res ipsa loquitur* ("the thing speaks for itself") **[3]**. ICL was successful before the Lord Ordinary, but the Inner House overturned his decision, holding that *res ipsa loquitur* did not apply. In its appeal to this Court, ICL has been permitted to raise the more fundamental issue of the interpretation of section 11(3) **[5]**.

JUDGMENTS

Lord Neuberger, Lord Sumption and Lord Reed agree that the appeal should be allowed. Lord Hodge and Lord Toulson dissent and would not have allowed the appeal.

REASONS FOR THE JUDGMENTS

Lord Reed, with whom Lord Neuberger and Lord Sumption agree, considers that the words "*caused as aforesaid*" in section 11(3) are adjectival: they describe the loss with which the provision is concerned, but they do not have the effect of postponing the running of time until the creditor was aware that the loss had been caused by a breach of duty. Properly construed, section 11(3) is concerned with latent damage **[15-17]**. This is consistent with a natural reading of the provision in its context **[19; 47]**. If the draftsman had intended to require awareness that the loss had been caused by an actionable breach of duty, before the prescriptive period began to run, then he would have made this clearer **[19]**, as he had done elsewhere in the Act in relation to the limitation period **[20-22]**.

Lord Reed identifies a number of problems which would arise if the creditor had to be aware that there had been a breach of a legal duty owed to him. Prescription would run more or less quickly according to creditors' awareness of the law **[27].** In what sense could a creditor be "*aware*" of a breach of duty in advance of a judicial determination? **[28]** Describing "awareness" by reference to the creditor's ability to advance a stateable *prima facie* case, as some recent Scottish decisions had done, would undermine legal certainty and go well beyond the language of the statute **[29]**. Lord Neuberger concurs, considering that the legislature could reasonably have assumed that in almost every case, five years from the date of loss, would be plenty of time for the creditor to discover all he needs to know to bring proceedings **[55]**.

While careful consideration has to be given to the overturning of an approach followed for many years, Lord Reed points out counsel's agreement that parties were unlikely to have been advised to delay initiating proceedings in reliance on the existing authorities. The approach previously followed rests on slender foundations for a matter of such importance, and has not gone unquestioned. The Justices agree that is not settled law **[37]**.

Lord Hodge, with whom Lord Toulson agrees, also disagrees with the interpretation previously followed by the Scottish courts, but considers that section 11(3) should be construed as meaning that for time to begin to run there needs to be actual or constructive awareness of (i) more than minimal loss and (ii) its factual cause through an act or omission, but not (iii) that it is due to a breach of duty **[87; 95]**. He notes the Scottish Law Commission's 1989 recommendation (not implemented) that the legislation should be amended to require knowledge (a) that the loss, injury and damage was attributable in whole or in part to an act or omission and (b) of the identity of the defender **[68]**.

All members of the Court agree that *res ipsa loquitur* has no application on a proper interpretation of section 11(3), and the majority agrees with Lord Hodge's observations on that subject **[37; 97-99]**. In the light of the decision in this case, Lord Hodge urges that fresh consideration be given to the 1989 recommendations of the Scottish Law Commission.

References in square brackets are to paragraphs in the judgment