Michaelmas Term
[2017] UKSC 75
On appeal from: [2016] CSIH 16

JUDGMENT

Gordon and others, as the Trustees of the Inter Vivos Trust of the late William Strathdee Gordon (Appellants) *v* Campbell Riddell Breeze Paterson LLP (Respondent) (Scotland)

before

Lord Neuberger
Lord Mance
Lord Sumption
Lord Reed
Lord Hodge

JUDGMENT GIVEN ON

15 November 2017

Heard on 19 July 2017

Appellants	*Respondent*
Robert Howie QC Robert Sutherland (Instructed by Drummond Miller LLP)	David Johnston QC Adam McKinlay (Instructed by Brodies LLP)

LORD HODGE: (with whom Lord Neuberger, Lord Mance, Lord Sumption and Lord Reed agree)

1. When the law extinguishes obligations as a result of the effluxion of time it is important that there is certainty as to when the clock is started. Yet many within the legal profession in Scotland have been unsure about this important matter. This is another appeal about the meaning of the provisions of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") concerning the short negative prescription. Counsel for the appellants informed the court that several cases have been sisted in the Court of Session to await the outcome of this appeal.

2. This appeal proceeds on facts which the parties have agreed solely for the purpose of determining the question of prescription and which may be summarised briefly. The appellants ("the trustees") are the trustees of the inter vivos trust of the late William Strathdee Gordon ("the trust"). The trust owns farmland, comprising three fields near the village of Killearn, which the trustees acquired because of its long-term potential for residential development. The three fields are a grazing field, a field of about 40 acres and a field of about 50 acres.

3. The grazing field was originally let out by the trust by a series of seasonal grazing lets to a farming partnership of Messrs A & J C Craig ("the farming partnership") which had two partners. This lease continued by tacit relocation from about 1983. The 40-acre and 50-acre fields were let out to the farming partnership under separate leases in 1981 and 1983 respectively. After the expiry of the original terms of let of those fields the trust entered into various minutes of agreement, which were prepared by their solicitors, who were the predecessor firm to the respondents in this appeal. Those minutes of agreement purported to continue the original leases of those fields. In about August 1992 the solicitors became aware that Mr Andrew Craig, one of the two partners, had retired from the farming partnership. Notwithstanding that knowledge, the minutes of agreement in 1992 and 1998 described the tenant as the farming partnership and John Campbell Craig the sole proprietor and trustee for the firm. Under the 1998 agreements the ish (expiry date) of the lease of each of the two fields was 10 November 2003.

4. It is a matter of agreement that by 2003 the leases for all three fields were agricultural holdings for the purposes of the Agricultural Holdings (Scotland) Act 1991 ("the 1991 Act").

5. In 2003 the trustees instructed Mr McGill, who was both a trustee of the trust and a partner in the firm of solicitors, to serve on the tenant notices to quit the three

fields at the term of 10 November 2003. The tenant served counter notices under the 1991 Act. After receiving advice from counsel that the notices to quit the 40-acre field and 50-acre field were ineffective as they did not give the period of notice which the 1991 Act required, the solicitors served further notices to quit in respect of the three fields dated 8 November 2004 requiring the tenant to remove on 10 November 2005. In each of those notices to quit the tenant was identified as "the firm of Messrs A & J C Craig and John C Craig, sole proprietor of and trustee for said firm". The notice to quit the 40-acre field described it as being subject to a lease dated 22 September and 7 and 8 October 1981 as amended by subsequent agreements. Similarly the notice to quit the 50-acre field described it as being subject to a lease dated 5 January and 14 February 1983 as so amended.

6. On 1 December 2004 Mr Richard Leggett, a partner of the solicitors, wrote a long letter to Mr William Gordon, one of the trustees, in which he explained that the solicitors had to withdraw from acting for the trust because of a conflict of interest caused by difficulties which might result from a failure to terminate the leases of the fields before their expiry dates which had allowed the tenant to continue to occupy the fields by tacit relocation. The solicitors suggested that those difficulties might require the payment of money to Mr John Craig to get him to cede possession of the fields. In response, the trustees did not require the solicitors to cease acting for them and continued to instruct them. But, after the tenant did not cede possession of the fields on 10 November 2005, the solicitors wrote to the trustees on the same day to withdraw from acting for the trust in relation to the leases at Killearn, again citing the difficulties which they foresaw would arise from their earlier failure to prevent tacit relocation. Thereafter Mr McGill resigned as a trustee.

7. The trustees then instructed Anderson Strathern LLP, who on 9 February 2006 applied to the Scottish Land Court seeking the removal of the tenant from each of the three fields. It is an agreed fact that by 17 February 2006, at the latest, the trustees had incurred material expense in instructing Anderson Strathern to pursue those applications. The tenant defended the applications. In a decision dated 24 July 2008 the Scottish Land Court gave effect to the notice to quit in relation to the grazing field but refused to give effect to the notices to quit relating to the other two fields, because the notices were inaccurate in their description of both the tenant and the relevant lease. As a result, the 40-acre field and the 50-acre field remain subject to leases that are agricultural holdings, thus preventing the trustees from developing them.

The legislation

8. As is well known, section 6 of the 1973 Act, when read with sections 9 and 10 of that Act, creates the short negative prescription by providing that if an obligation has subsisted for a continuous period of five years after "the appropriate

date" without the creditor or someone on his behalf having made a relevant claim or the debtor or someone on his behalf having relevantly acknowledged the subsistence of the obligation, the obligation is extinguished at the expiration of that period. Section 6(3) provides that the appropriate date in relation to an obligation arising from a breach of contract is a reference to the date when the obligation became enforceable.

9. This appeal is concerned with section 11 of the 1973 Act, which defines when an obligation to make reparation becomes enforceable. It provides:

> "(1) Subject to subsections (2) and (3) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred."
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> (2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased.
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> (3) In relation to a case where on the date referred to in subsection (1) above (or as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware."
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> (Emphasis added)

The court proceedings

10. On 17 May 2012 the trustees commenced a legal action against the respondents by serving on them a summons seeking damages for breach of an implied term of the contract between the trustees and the solicitors, that the latter

would exercise the degree of knowledge, skill and care expected of a reasonably competent solicitor. The breach which the trustees allege is that the solicitors failed to identify correctly both the tenant and the applicable lease in the notices to quit dated 8 November 2004 relating to the 40-acre field and the 50-acre field. Among the sums claimed by the trustees in this action are the fees and outlays paid to the solicitors and to Anderson Strathern relating to the attempt to obtain vacant possession of the two fields and damages for the enhanced value of the land and the opportunity for the trust to exploit the fields' potential for development both of which were lost through the failure to recover possession of them.

11. The respondents pleaded that any obligation on them to make reparation had prescribed because the trustees had not raised the action within five years of the date when they had suffered loss, which, the respondents submitted, was when the solicitors served the defective notice to quit in November 2004 or in any event when the tenant failed to remove from the fields on 10 November 2005. They submitted that the trustees had had knowledge of having suffered loss when they learned that the tenant would not voluntarily cede possession of the fields. After hearing evidence in a preliminary proof on prescription at which the parties had agreed that the averments of breach of contract and loss were to be treated as proven, Lord Jones upheld the plea of prescription in an opinion dated 25 March 2015 ([2015] CSOH 31). In so doing, he rejected the trustees' argument that the prescriptive period did not begin until the Scottish Land Court issued its decision (ie 24 July 2008), which, according to the trustees, was the date on which they first knew that they had suffered loss. He held that the prescriptive period began when the trustees knowingly became liable for legal fees and outlays in pursuit of vacant possession of the fields. As it was agreed that the trustees had incurred material expense in relation to the Scottish Land Court application by 17 February 2006, the five-year prescriptive period had run its course before they commenced the legal proceedings against the respondents (on 17 May 2012). Lord Jones therefore absolved the respondents from the trustees' claims.

12. On 8 March 2016 an Extra Division of the Inner House (Lady Paton, Lord Bracadale and Lord Malcolm) refused the trustees' appeal. Lord Malcolm wrote the leading opinion and the other judges wrote concurring opinions ([2016] CSIH 16; 2016 SC 548). In his opinion, Lord Malcolm analysed the judgment of the Supreme Court in *David T Morrison & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd* 2014 SC (UKSC) 222; [2014] UKSC 48 ("*Morrison v ICL*") which I discuss below. He concluded that section 11(3) of the 1973 Act postponed the start of the prescriptive period only when the damage was latent by requiring that the creditor should have actual or constructive knowledge of the occurrence of damage or expenditure, which was viewed as an objective fact. He held that the prescriptive period ran from the time the trustees incurred liability for legal fees notwithstanding that they did not then know that their application to the Scottish Land Court would fail. In a short judgment with which Lord Bracadale agreed, Lady Paton added that

the trustees had gained sufficient knowledge that they had suffered loss when they received the solicitors' letter of 10 November 2005.

13. The trustees appeal to this court with the permission of the Inner House, which it granted on 1 June 2016.

Discussion

(i) The legislation

14. It is clear from the opening phrase of section 11(1) - ("Subject to subsections (2) and (3) below") - that that subsection sets out the general rule that an obligation to make reparation becomes enforceable when the loss, injury or damage occurred. Subsections (2) and (3) modify the general rule in the circumstances in which they apply. It is also clear that in each of the subsections Parliament has chosen to use the same words - "loss, injury or damage" - to describe the detriment suffered by the creditor.

15. The House of Lords and this court have considered those words in their statutory context in ascertaining the appropriate date for the commencement of the five-year prescription in two cases.

16. First, in *Dunlop v McGowans* 1980 SC (HL) 73, which concerned the failure by solicitors timeously to serve a notice to quit on a tenant, Lord Keith of Kinkel in the leading speech (p 81) explained that the obligation to make reparation for loss, injury or damage is a single and indivisible obligation and that that obligation arose as soon as there was the concurrence of a legal wrong and loss resulting from that wrong. In that case the obligation to make reparation became enforceable on the date when, but for the solicitor's omission, the client landlord would have obtained vacant possession of his premises. The prescriptive period under section 11(1) of the 1973 Act began to run then although the landlord's losses, which resulted from the failure to get vacant possession, could only be estimated at that date.

17. Secondly, in *Morrison v ICL*, which concerned observable physical damage to Morrison's shop caused by an explosion in the neighbouring business premises of ICL, this court held that, for the prescriptive period to begin under section 11(3) of the 1973 Act, the creditor needed to be aware (actually or constructively, if the creditor could with reasonable diligence have been aware) only of the occurrence of the loss or damage and not of its cause. In other words, section 11(3) applies in the case of latent damage, by postponing the start of the prescriptive period until the creditor is aware of the physical damage to his property. The focus of the court's

judgment in that case was on the words "caused as aforesaid" in subsection (3). They are a reference back to subsection (1) which speaks of loss, injury or damage "caused by an act, neglect or default". The phrase "caused as aforesaid" thus connects the loss to the cause of action. But the phrase is adjectival; it does not require additional knowledge on the part of the creditor. The subsection falls to be read as if it said: "the creditor was not aware … that loss, injury and damage, which had been caused as aforesaid, had occurred"; thus it, like subsections (1) and (2), focuses on the occurrence and timing of loss (viz Lord Reed paras 16 and 25, Lord Neuberger para 47).

18. In *Morrison v ICL* this court did not have to address the question which this appeal raises, namely whether in section 11(3) the creditor must be able to recognise that he has suffered some form of detriment before the prescriptive period begins. In *Morrison v ICL* the property damage was manifest on the date of the explosion. But where a client of a professional adviser suffers financial loss by incurring expenditure in reliance on negligent professional advice, the client, when spending the money, will often be unaware that that expenditure amounts to loss or damage because of circumstances, existing at the date he or she spends the money, of which the client has no knowledge. A question which the current appeal raises is whether section 11(3) starts the prescriptive clock when the creditor of the obligation is aware that he or she has spent money but does not know that that expenditure will be ineffective.

19. The answer to that question lies in interpreting the words "loss, injury or damage" in subsection (3) in the context of section 11 as a whole. In section 11(1) the phrase "loss, injury or damage", which I have emphasised in para 9 above, is a reference to the existence of physical damage or financial loss as an objective fact. Thus if a person's building is damaged in an explosion, or a garden wall is damaged as a result of subsidence, there is physical damage which is enough to start the clock under that subsection, unless either or both of subsections (2) or (3) apply. No question arises under subsection (1) as to the creditor's knowledge of that objective fact. As Lord Keith stated in *Dunlop v McGowans* (p 81):

> "The words 'loss, injury or damage' in the last line of the subsection refer back to the same words in the earlier part and indicate nothing more than the subject-matter of the single and indivisible obligation to make reparation."

Thus if, as a result of a breach of contract, a person purchases defective goods, incurs expenditure or fails to regain possession of his property when he or she wished to do so, the section 11(1) clock starts when the person acquires the goods, the expenditure is incurred or when the person fails to obtain vacant possession of the property.

20. Section 11(3), which postpones the start of the prescriptive period, is concerned with the awareness of the creditor. But that which the creditor must actually or constructively be aware of before the prescriptive period begins is the same "loss, injury or damage" of which section 11(1) speaks, because subsection (3) uses the same language and also refers back to subsection (1) when it speaks of "loss, injury or damage caused as aforesaid". The phrase "loss, injury or damage" must have the same meaning in each of the subsections of section 11. There is therefore no scope for reading any additional meaning into those words in subsection (3).

21. It follows that section 11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure.

22. This approach is harsh on the creditor of the obligation, where the creditor has incurred expenditure which turns out to be wasted or fails to achieve its purpose, because the circumstances when the prescriptive period begins may not prompt an enquiry into the existence or likelihood of such loss. Thus a person may begin a legal action and incur expenditure on legal fees on the basis of negligent legal advice or he or she may purchase a house at an over-value as a result of the negligent advice of a surveyor. In each case the person may be aware of the expenditure but not that it entails the loss. But it offers certainty, at least with the benefit of hindsight. The trustees' formulation by contrast would create uncertainty. If it were necessary in order for the prescriptive period to begin that the creditor be aware that something had gone awry and that he or she has suffered a detriment in the form of wasted expenditure, would an adverse judgment at first instance be sufficient to establish such an awareness of detriment if there were strong grounds for an appeal? The result might be prolonged uncertainty. Further, a requirement that there be an awareness of a head of loss would involve knowledge of the factual cause of the loss, which is an interpretation that this court has rejected in *Morrison v ICL*.

23. It is not clear that the interpretation set out in para 21 above is what the Scottish Law Commission envisaged in its Report on the Reform of the Law Relating to Prescription and Limitation of Actions (1970) (Scot Law Com No 15), which led to the 1973 Act and in which it recommended (para 97) that:

> "the [prescriptive] period should commence … (c) if the fact that pecuniary loss or damage to property has been caused by the delict or quasi-delict is not immediately ascertainable, from

> the date when the fact that the aggrieved party has suffered pecuniary loss or damage is, or could with reasonable diligence have been, ascertained by him."

In its Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues) (1989) (Scot Law Com No 122) the Commission at para 2.7 described its policy in the 1970 Report as being that "the starting point for the running of prescription should be the date when that damage is or could with reasonable diligence have been discovered by the claimant". This court's decision in *Morrison v ICL* is consistent with that policy because the physical damage to property was manifest but it is questionable whether section 11(3) is so consistent in circumstances where the claimant suffers financial loss rather than observable damage to his physical property. As I state in para 25 below, the Commission has revisited the topic since this court decided *Morrison v ICL* and has made further recommendations for reform.

(ii) Application to the facts

24. I am not able to accept the submission of Mr Howie QC, who appears for the trustees, that time did not begin to run against the trustees until they received the decision of the Scottish Land Court which demonstrated both that the sums which they had spent on pursuing the application to gain vacant possession of the 40-acre field and the 50-acre field could not be recovered from the tenant and that they had lost the opportunity to develop those fields. Before they received that decision, the trustees may have regarded the tenant's refusal to remove from those fields on 10 November 2005 as unjustified and may have pursued the application to the Scottish Land Court to remove him in the belief that it was likely to succeed. They may, as a result, have believed that the expenditure on legal fees and outlays, which they incurred in so doing, would ultimately be recovered from the tenant in large measure when their application succeeded. But any such understanding on their part is irrelevant. On an objective assessment, the trustees suffered loss on 10 November 2005 when they did not obtain vacant possession of those fields and therefore could not realise their development value. It does not matter whether the loss resulted from the tenant's intransigence, as the trustees may have believed, or from someone else's acts or omissions. It was also possible that the defects in the notices to quit would not have caused loss if the tenant had later waived his right to challenge them or had otherwise surrendered possession of the fields. But he did neither, and with the benefit of hindsight the failure to obtain vacant possession on 10 November 2005 can be seen as having caused loss to the trustees. At that moment, as in *Dunlop v McGowans*, the prescriptive period began to run under section 11(1), unless it was postponed by subsection (3). But there was no postponement under the latter subsection: the trustees were aware on 10 November 2005 that they had not obtained vacant possession of those fields. That was a detriment. They were in any event actually or constructively aware by 17 February 2006 that they had incurred expense

in legal proceedings to obtain such possession. As the trustees did not commence legal proceedings against the respondents until 17 May 2012, it follows that the respondents' obligation to make reparation to them has prescribed.

(iii) The future

25. This conclusion, as Lord Malcolm recognised in the concluding paragraph of his opinion, may suggest that hard cases may be more common than it was previously thought. But there are live proposals for law reform. The Scottish Law Commission has published its Report on Prescription (Scot Law Com No 247) in July 2017, following its Discussion Paper (No 160) in which it invited views on, among other things, the discoverability test in section 11(3) of the 1973 Act in the light of *Morrison v ICL* decision. In its report the Commission recommends (para 3.21) that in relation to the obligation to pay damages section 11(3) should be amended so that, before the five-year prescriptive period begins to run, the creditor must be aware, as a matter of fact, (i) that loss, injury or damage has occurred, (ii) that the loss, injury or damage was caused by a person's act or omission, and (iii) of the identity of that person. Whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law should be irrelevant. This formula is included in the draft Bill annexed to the Report in section 5(1), (4) and (5). As the Commission has observed, it is an approach which is well represented in both civil law and common law jurisdictions (Discussion Paper No 160, para 4.8). The First Minister has announced on 5 September 2017 that the Scottish Government intends to bring forward a Bill to reform the law of prescription as part of its legislative programme. It will be the task of the Members of the Scottish Parliament to decide whether they agree with the Scottish Law Commission's recommendation for the reform of the discoverability test achieves a fair balance between the interests of the creditor and the debtor in the obligation to make reparation.

Conclusion

26. I would dismiss the appeal.