SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2021] SC EDIN 56

PIC-PN982-20

JUDGMENT OF SHERIFF JOHN K MUNDY

in the cause

PAUL MADDEN

Pursuer

against

DUNCAN ANDERSON LTD

Defenders

Pursuer: Wilson, Advocate
Defender: Clarke, QC et Rolfe, Advocate

Edinburgh, 23 September 2021

The sheriff, having resumed consideration of the cause, finds as follows:

Findings in Fact

1. The pursuer seeks damages from the defender on the ground that he was exposed to asbestos during the course of his employment by the defender.

2. The pursuer was employed by the defender between 1980 and 1982.

3. The pursuer was diagnosed with pleural plaques by about March 2007 and was aware that he was exposed to asbestos during his employment with the defender and with Hart Builders (Edinburgh) Limited.

4. The defender ceased trading in or about 1986.

5. The defender entered voluntary liquidation in 1993 and was wound up on 21 January 1993, but the company remained on the Companies Register.

6. The defender was dissolved on 24 January 2014.

7. In or about 2007 the pursuer consulted Messrs Thompsons, Solicitors ("Thompsons") who subsequently raised proceedings on behalf of the pursuer in 2010 against the said Hart Builders (Edinburgh) Ltd ("the first action"). The action was served on 4 February 2010.

8. In the first action Thompsons acted for the pursuer and Messrs Clyde & Co (Scotland) LLP acted for Hart Builders (Edinburgh) Ltd.

9. Prior to the raising of the first action Thompsons attempted to identify the pursuer's previous employers and their status. They also attempted to identify whether any potential defenders had employer's liability insurance for the relevant period i.e. the pursuer's employment with them.

10. In furtherance thereof, Thompsons made an enquiry to HMRC in order to obtain an employment history schedule and also with the Association of British Insurers ("ABI") to identify relevant insurance.

11. Thompsons wrote to HMRC on 8 August 2007. HMRC replied by letter of 15 October 2007 listing the pursuer's employees as recorded on the National Insurance Recording System. The list of employers included "Hart Builders Ltd" and the defender in the present action, "Duncan Anderson Ltd", the latter being noted as an employer in "1981/82" and "1982/83".

12. Prior to the raising of the first action Thompsons obtained a statement from the pursuer on 22 December 2009 identifying *inter alia* the defender as his employers at a time when he was exposed to asbestos in the course of his work.

13. The pursuer was advised by Thompsons that they had been unable to trace any relevant insurance for the defender.

14. The pursuer was advised by Thompsons that the defender could not be pursued in the first action as there was no insurance in place for the defender.

15. The said advice was tendered in line with the policy of Thompsons where no insurance for a potential defender was identified.

16. The first action was raised against Hart Builders (Edinburgh) Ltd only in accordance with the instructions of the pursuer.

17. The Employers' Liability Tracing Office ("ELTO") database was subsequently introduced in 2011 with the purpose of tracing employers' liability insurance details.

18. By letter of 29 October 2013 the pursuer was advised by Thompsons *inter alia* that the non-inclusion of the defender in the first action would lead to a deduction in any compensation the pursuer might be awarded.

19. The solicitors acting for the parties in the first action agreed a gross valuation of the pursuer's pleural plaques claim at £11,000 on a full and final basis as per an exchange of emails dated 23 March 2017 and 13 April 2017.

20. The solicitors sought and negotiated a deduction for un-sued for exposure with the defender in terms of *Holtby* v *Brigham and Cowan (Hull) Ltd* [2000] 3 All ER 421.

21. By email from Clyde & Co (Scotland) LLP to Thompsons dated 23 March 2017 making settlement proposals it was argued that "There is un-sued exposure with D Anderson to be discounted which totals 35%. The net offer is therefore £7,150".

22. By email from Thompsons to Clyde & Co (Scotland) LLP in response dated 13 April 2017 it was argued that "we are unable to agree that the discount should be as high as

35%…the discount should be 15% at most." Accordingly Thompsons made a counter proposal of £9,350.

23. That the first action was ultimately settled for £8,250 on a full and final basis following an email exchange between Clyde & Co (Scotland) LLP and Thompsons dated 24 and 27 April 2017.

24. The sum of £8,250 represented 75% of the agreed valuation of £11,000, reflecting the negotiated deduction of 25% for un-sued for exposure with the defender.

25. The defender was not a party to the first action or to the settlement of the first action.

26. The pursuer was subsequently diagnosed with diffuse pleural thickening on 8 September 2019.

27. The pursuer thereafter consulted Messrs Digby Brown.

28. An ELTO search was carried out by Messrs Digby Brown on 20 December 2019 identifying insurance cover for the defender.

29. Messrs Digby Brown raised proceedings on behalf of the pursuer in the Court of Session to restore the defender to the Register of Companies.

30. The defender was restored to the Register of Companies by interlocutor of Lord Ericht dated 8 June 2020.

31. The present proceedings were served on the defender on or about 22 January 2020.

Finding in Fact and Law

In all In all the circumstances of the case, including the decision of the pursuer's solicitors (which is attributable to the pursuer) not to include the defender in the first action on the ground that no relevant employers liability insurance could be identified at that time, it is not equitable to allow the pursuer to bring this action by virtue of the provisions of

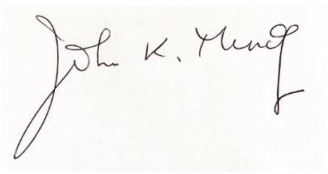
section 19A of the Prescription and Limitation (Scotland) Act 1973, which would otherwise be time barred by virtue of section 17 of the said Act.

Finding in Law

Accordingly the pursuer's application under section 19A of the 1973 Act ought to be refused, the defender being entitled in the circumstances to decree of absolvitor.

Interlocutor

THEREFORE assoilzies the defender from the crave of the writ; reserves all question of expenses and appoints a hearing thereon on a date to be afterwards fixed.



NOTE

Background

[1] This is an action for damages at the instance of the pursuer against a former employer in which the pursuer claims damages for the development of pleural plaques and pleural thickening as a consequence of his occupational exposure to asbestos whilst employed as a joiner by the defender between about 1980 and 1982.

[2] After sundry procedure, the case was appointed to a preliminary proof on the question of time bar and in particular the application of section 19A of the Prescription and Limitation (Scotland) Act 1973. It is accepted that the cause is otherwise time barred in terms of section 17 of the 1973 Act. At the preliminary proof both parties were represented

by counsel. The pursuer was represented by Mr Wilson, Advocate and the defender by Mr Clarke, QC and Mr Rolfe, Advocate.

[3] There was a large measure of agreement on the facts in terms of a joint minute and there was only one witness – Laura Blane of Thompsons, Solicitors. Submissions followed on the second day of the proof.

[4] It is fair to say that the evidence of Miss Blane was necessarily limited as she was not directly involved in the events with which we are concerned, but her evidence was nonetheless helpful in providing background to what was a largely agreed picture.

[5] The essential facts are set out in my findings in fact. In short, the pursuer consulted Thompsons in about 2007. They made certain enquiries as to potential defenders. They identified Hart Builders (Edinburgh) Ltd and the defender in this action as previous employers. They identified with the pursuer that he had been exposed to asbestos while working with those employers. A decision was made, it must be assumed with the instructions of the pursuer (there being no suggestion by the pursuer that this was not so) not to pursue the defender on the basis that no relevant insurance policy could be traced in relation to them. The action was accordingly raised only against Hart Builders (Edinburgh) Ltd and settled on a full and final basis, not a provisional basis, in the sum of £8,250. That settlement allowed a discount for an un-sued for exposure with the defender in this case. The pursuer was subsequently diagnosed with pleural thickening in about September 2019 and following a search with his present solicitors who carried out an ELTO search it was established that the defender did in fact have insurance covering the period of his employment with them and his exposure to asbestos. At this point, the defender had been removed from the Register of Companies and had to be restored by petition to the Court of Session and this was done in June 2020. This action was subsequently raised.

The Pleadings

[6] These essential facts with a little more elaboration are set out in the pleadings in statement of fact 4 for the pursuer and answer 4 for the defender. In answer 6 the defender avers that the action is time barred in terms of section 17 of the Prescription and Limitation (Scotland) Act 1973. That is accepted by the pursuer. The pursuer then avers in statement of fact 6, *inter alia*:

> "Explained and averred that in the circumstances hereinbefore averred it is admitted that the action was raised more than 3 years after the pursuer had been diagnosed with pleural plaques. In the circumstances averred…it is however equitable that the pursuer bring the present action in terms of section 19A of the 1973 Act, notwithstanding the terms of section 17(2) of the 1973 Act. The circumstances in which the defenders were not included in the previous action by the pursuer against Hart Builders (Edinburgh) Ltd are as averred in Statement of Claim 3 *supra*. There was no point in raising proceedings against a party which had ceased to trade been wound up, and in respect of which no relevant insurance could be traced. In those circumstances, the pursuer was not in a position to obtain compensation for his exposure to asbestos whilst in the employment of the defenders and has not done so. He has been prejudiced as a consequence."

[7] In answer 6 the defender avers:

> "Explained and further averred that the Court ought not to exercise its equitable discretion in terms of section 19A of the Prescription and Limitation (Scotland) Act 1973. The pursuer offers to prove that his failure to include the defender in the Original Action, which was raised timeously, was on the basis of the incorrect information he had been passed by his original agents Thompsons, Solicitors. That incorrect information was the absence of insurance for the defender for the period of his employment. Absence of insurance of a defender is irrelevant when considering the liability of the defender or the operation of the triennium. Furthermore, there was insurance in place for the defender at the material time. The pursuer accordingly has a potential alternative remedy to recover damages via a claim directed towards his previous agents for (i) advising the pursuer that there was no insurance for the defender for the relevant period; (ii) that such was a material consideration in the decision to litigate against the defender and (iii) their failure to raise a claim against the defender timeously…commencement of proceedings against the defender in the Original Action (or otherwise timeously) would have preserved the pursuer's right to recover damages."

The Evidence

[8] Against that background evidence was led from Miss Blane as previously indicated. She is a solicitor advocate and a partner in Thompsons. She has been a solicitor for around 18 years all with Thompsons and specialising in asbestos related claims for that period. Miss Blane spoke to the practice of the firm both then and now in relation to the investigating and pursuing of such claims. As I understand it Miss Blane was not involved in the events leading up to the raising of the original action and the decision not to pursue the present defender. She explained the process that would be involved at the time such as signing of mandates to obtain information including medical records and information from HMRC. That enquiry with HMRC would disclose the identity of clients employers derived from the National Insurance Recording System. The client would be asked about the nature of his work with those employers and whether he or she worked with asbestos. In relation to the potential defenders enquiries would be made as to the status of those employers including enquiries with Companies House in relation to corporate entities. In relation to companies it would be ascertained for example whether they were dormant or dissolved or whether they were still carrying on business. Enquiries would also be made as to whether or not such entities had employer's liability insurance for the relevant employment period. Up to 2011 such enquiries would be made with the Association of British Insurers ("ABI"). In 2011 another entity the Employers Liability Tracing Office ("ELTO") was established and that, as I understand it, became the body to which enquiries were made thereafter in that regard.

[9] It was the policy of Thompsons, and remains the policy, to sue only such employers that had insurance. However the ABI database and the subsequent ELTO database was a "constantly changing beast". It relied on insurers to disclose the existence of insurance

policies from a "vast number of archives". In her experience, even today, in 20 to 30 per cent of cases no insurer being identified. In certain instances, directors could be written to if they could be traced so that they may offer assistance in identifying insurance arrangements. This procedure however was rarely successful. Ultimately if there was no prospect of payment following the raising of an action the firm's policy was not to do so. The documents such as they were, from the period prior to the raising of the action were referred to and the witness confirmed that these were the sort of documents that she would expect to see. She presumed that because there was no insurance located for the defender, that that was the reason no action was raised against them. A letter would have been sent to the pursuer in similar terms to that sent subsequently on 20 October 2013 indicating such. Given her lack of involvement in the original action she was of course not able to say what steps were actually taken in relation to the identification of an insurance for the defender beyond the initial enquiry with the ABI.

[10] Miss Blane did not agree with the suggestion that an action ought to in any event have been raised against the defender prior to the expiry of the triennium. It was suggested that an action could be raised and effectively "parked" pending any insurance coming to light. She said that that was not practical nor sensible, and might raise unrealistic expectations on the part of a client. In cross-examination, she accepted that, in hindsight, perhaps the defender could have been included in the original action in the hope of insurers being subsequently identified but qualified that by asking the question – "at what point do you to stop?" The requirement to review and investigate would be unduly burdensome on the solicitor and impractical. She confirmed in cross-examination that she did not know whether any enquiry had been made for example with surviving directors but that would have been the practice (presumably if such were known and could be traced).

[11] In re-examination the witness confirmed some background as to the length of time the first action took. The case had been sisted for around 6 to 7 years pending a determination of whether pursuers with pleural plaques could be compensated. The background to that was the decision in *Rothwell* v *Chemical Insulating Co Ltd* [2008] 1AC 281 and the subsequent legal challenge to the Damages (Asbestos Related Conditions) (Scotland) Act 2009, the issue being resolved on 12 October 2011 by the Supreme Court decision in *Axa General Insurance Co Ltd* v *Lord Advocate* 2012 SC (UKSC)122. In short, it was ultimately decided that compensation could be obtained in Scotland by virtue of the said Act of the Scottish Parliament. The legal uncertainty had resulted in the backup of cases in the Court of Session, Thompsons having around 700 to process.

Submissions

[12] Mr Wilson on behalf of the pursuer moved the court to exercise its equitable discretion in terms of section 19A of the 1973 Act and to allow the present action against the defender to proceed notwithstanding that the action is time barred. He submitted that it could be taken from the evidence of Miss Blane that the fact that the defender had ceased to trade, being would up, in respect of which no relevant insurance could be traced, were issues which were highly relevant in deciding as to whether to include a potential defender in an action such as this. He referred to her evidence as to the procedure that the firm would have gone through to try and establish the insurance position and that if no paymaster for a particular employer could be located that employer would not be included as a defender in an action such as the original action in this case. Accordingly the defender was not included. Mr Wilson mentioned the background against which the original action was

litigated (*Rothwell, etc. supra*) as a result of which the original action was sisted for a lengthy period.

[13] Given the background in this case it was contended that it would be equitable to permit the action to be brought in terms of section 19A of the 1973 Act. He submitted that the following points were relevant in considering the matter:

(a) It is accepted that it is for the pursuer to satisfy the court that it is in the view of the court and in the circumstances of the case and of the legitimate rights and interests of the parties, equitable to do so

(b) In circumstances where section 19A is relied upon by a pursuer the court has an unfettered discretion to prevent a time-barred action to proceed but must necessarily be exercised within certain limits, which limits are as said by the circumstances of each particular case

(c) The relaxation of the statutory bar depends solely upon equitable considerations relevant to the exercise of a discretionary jurisdiction in a particular case

(d) The relative weight to be given to any particular circumstance is for the court to determine

(e) An equitable decision is one which proceeds on a fair balancing of the interests and conduct of the parties and their advisers, as well as the nature and circumstances and prospects of success in pursuit of the time-barred claim itself.

[14] In support of those propositions counsel referred to *Donald* v *Rutherford* 1984 SLT 70, per Lord Cameron at pages 74 to 75 and page 77; *Forsyth* v *A F Stoddard & Co Ltd* 1985 SLT 51 per Lord Justice Clerk Wheatley at page 53; and *B v Murray* (No.2) 2005 SLT 982 per Lord Drummond Young at paragraph [29]. In the last case Lord Drummond Young pointed to

five matters which "have been clearly established" when considering a section 19A claim as follows:

(i) The court has a general discretion under section 19A; the crucial question that must be considered has been stated to be "where did the equities lie?"

(ii) The onus is on the pursuer to satisfy the court that it would be equitable to allow his claim to proceed.

(iii) The conduct of a pursuer's solicitor may be relevant to the exercise of the courts discretion, and the pursuer must take the consequences of his solicitor's actings.

(iv) Relevant factors that the court may take into account include but are not restricted to three matters identified by Lord Ross in *Carson* v *Howard Doris Ltd* 1981 SC282; 1981 SLT275 namely (1) the conduct of the pursuer since the accident and up to the time of his seeking the courts authority to bring the action out of time, including any explanation for his not having brought the action timeously (2) any likely prejudice to the pursuer if authority to bring the action out of time were not granted and (3) any likely prejudice to the other party from granting authority to bring the action out of time.

(v) Each case ultimately turns on its own facts.

[15] Against that background counsel submitted that the pursuer had instructed a very well-known and respected firm of solicitors who are very experienced in asbestos related litigation. In the circumstances, where the defender had ceased to trade, he would up in respect of which no relevant insurance could be traced, there was no point in including the defender as a defender in the original action. Reference was made to the evidence of Miss Blane in support of that proposition. It was submitted that her position and that of her

firm was appropriate and correct. The defenders position appeared to be that notwithstanding that the company had ceased to trade and was in liquidation and in respect of which no insurance had been located it could still have been sued. The reasoning for the argument appeared to be that in such circumstances a decree in absence could be obtained against such a company which would ensure that if at some point in the future a policy of insurance was located a pursuer could recover damages. It was submitted that this was an extraordinary submission. As Miss Blane explained when it was put to her – at what point would it stop? Does a solicitor carry out an insurance check every week, a check which takes 6 to 8 weeks to come back? That was impractical, overly onerous and potentially misleading to the pursuer. It was also submitted, that no files such as that held by Thompsons for the pursuer could potentially ever be closed. It would impose a wholly unreasonable burden and professional obligation on solicitors. No evidence had been led by the defender to support such a duty on solicitors acting for a pursuer in these circumstances and no support of authority produced or referred to. The fact that the question of insurance was a relevant consideration was supported by the case of *Ferguson* v *J & A Lawson (Joiners) Ltd* [2013] CSOH 146 per Lord Uist at paras [13] and [14], and on appeal at 2015 SC 243, per Lady Paton at paragraphs [43] to [45]. It was submitted that matters required to be considered at the time, not with the benefit of hindsight. The date on which the relevant defenders insurance policy was entered onto the ABI or ELTO database was not known. Only the insurers could answer that question and they had made no averments nor led any evidence in relation to that. The original action was settled on terms which discounted the pursuer's exposure to asbestos with the defender. The pursuer had accordingly been prejudiced by not having received compensation in the particular circumstances of his situation for the consequences of his having been exposed to asbestos while employed by

the defender. The defender having ceased trading in 1986 and having been wound up in 1993, was in an essentially no different position now than if it had been included the defender in the original action. The defender had not proved any prejudice to it in their pleadings and led no evidence to support such a finding. Further, no evidence had been led to support the defenders averments in answer 6 that the pursuer had an alternative remedy against his former solicitors. In summary, it was submitted that in the present circumstances that the pursuer had met the appropriate test and standard set out in the authorities to let the case to proceed in terms of section 19A of the 1973 Act.

[16] On behalf of the defender, Mr Clarke moved the court that in the exercise of its discretion in terms of section 19A of 1973 Act, this should not be exercised in favour of the pursuer. In his written note Mr Clarke submitted that the action should be dismissed but acknowledged that if I was with him then the appropriate disposal might be decree of absolvitor.

[17] It was submitted that it was clear from the evidence of Miss Blane (who gave her evidence in a careful and obviously candid and honest manner as one would expect of a practitioner in her position) that the reason her firm did not seek to get decree in absence against the now defender against the hope that insurance would be discovered by ELTO or further investigation was that they had a policy whereby they would not expend funds to do that. Thus, when the insurance position was checked via the ABI database in 2007 and they did not find insurance they took the decision not to pursue the defender. In the context of a firm primarily acting speculatively it was not difficult to understand the logic of following such a course. In this case the pursuer stood to gain the majority of his damages from a defender whose was both insured and still trading. They could not commit to the pursuer to such a decision without his instructions. Miss Blane advised that now pursuers would be

written to in similar terms to the letter of 29 October 2013 before the action was raised. She did not know whether that would have been done in 2007 or 2010 when the action was raised but thought (and hoped) it would have been. It was submitted that the actions and decisions of the solicitor acting for the pursuer and his own decisions and actions are taken as one and the same (*Carson* v *Howard Doris; Donald* v *Rutherford*; and *Forsyth* v *A F Stoddard & Co Ltd, supra).* If the pursuer was not consulted he might have a claim against Thompsons. He might also have a claim against them on the basis that they applied their policy blind to the fact that in this case it would have been very easy and inexpensive to include the present defender as a second defender in the original action. The ELTO could then be monitored and perhaps other investigations could have been carried out. The pursuer may further have a claim in that even if he was told that an action against the present defender would not be pursued, he was not told the likely consequences of this i.e. the potential reduction in his ultimate damages. The court could not know these things because the pursuer himself did not give evidence. However, counsel accepted that insofar as Miss Blane sought to infer that he had been informed of these matters at the outset, based no doubt on her own practice and her knowledge of her firm's procedures and practice, then that should be treated as probably correct. The importance of this, it was submitted was that this was not a situation where the pursuer could not raise proceedings against the present defender before the triennium expired. He and his agents simply chose not to go on a perfectly rational assessment of prospects. It was submitted that when the decision was made the pursuer gave up his claim and his right to claim against the present defender.

[18] The pursuer's position had to be viewed, it was submitted, in the following context. The defender was identified at the time of the commencement of the original action as an employer that had exposed the pursuer to asbestos. The entity identified at the time of the

commencement of the original action was correct (cf. *Ferguson and others* v *J & A Lawson (Joiners) Ltd, supra).* Inclusion of the defender as a defender in the original action would not have involved the expense of restoring the company to the register of companies in 2010. Insurance was traced for the defender for the relevant period of his employment at a date between 2007 and 2019. Employers' liability insurance was mandatory during the period of the pursuer's employment, albeit not all employers took it out. The experience of Miss Blane was that there was 20 to 30% failure rate or to put it another way in 70 to 80% of searches in policy insurance would have been traced. Against this background a decision seemed to have been made not to proceed because there was a clear action against an insured live company. That raised the question whether the court's discretion under section 19A would be appropriately exercised now to effectively undo that decision more than a decade later because at some point cover for the period was found. While counsel was not aware this precise question had been considered previously in the context of section 19A, some guidance could be obtained from the authorities. Mr Clarke referred to the observations of Lord Drummond Young *B* v *Murray (No 2), supra* quoting a passage from that case at paragraph [29], the 5 bullet points therein already having been noted. Reference was also made to *Bates v George and others* [2012] CSOH 102 in which Lady Smith came to the conclusion that there was an onus on the pursuer to provide a full and frank explanation of how it came to be that the time bar was missed in a situation where the fault lay at the door of the pursuer's solicitor. Reference was also made to the decision of Lord Uist in *Irving* v *Advocate General for Scotland* [2012] CSOH 103 who concluded in that case that it would not be equitable to allow the action to proceed based given the conduct of the pursuer since the accident up to the time she sought to exercise the power under section 19A. Further,

reference was made to *Leith* v *Grampian University Hospital NHS Trust* [2005] CSOH 20 where Lord Brodie said at paragraph [13]

> "…I consider that the issue in the present case must be determined against the pursuer. He has simply failed to bring to the court's attention sufficient (or, indeed, anything) by way of particular circumstances as to permit the court to be satisfied that it would be equitable to allow him to bring the action. His undoubted prejudice in losing his right of action against the defender has to be balanced, as Lord Nimmo Smith explained in Cowan [*Cowan* v *Toffolo Jackson & Co Ltd* 1998 SLT 1000, at 1003I] against the countervailing prejudice to the defender if the action was allowed to go ahead. In the absence of speciality, they cancel each other out. That is the case here. Once the pursuer's prejudice in losing his chance to sue the defender is removed from consideration there is simply nothing here upon the basis of which I can conclude that the pursuer had satisfied me (it being for him to do so) that it would be equitable to allow the action to proceed. [Counsel for the pursuer] advanced four points with a view to persuading me to contrary effect. That the claim is not particularly stale and that the defender does not assert the experience with particular difficulty in defending it are, in my opinion, essentially neutral matters. They do not weigh against the pursuer. Equally, they do not weigh in his favour. That the pursuer is personally blameless is hardly to the point once it is accepted that his agents are far from blameless. The fault of the agent is the equivalent of the fault of the principal. That the fault of the agent is not particularly egregious, which is how [counsel] encourage me to see it, is again not to the point once it is accepted that they were nevertheless in error as to the relevant law and, in consequence, almost certainly negligent. [Counsel's] fourth point was to remind me of the prejudice to the pursuer. I have dealt with that."

[19] In this case it was submitted that the pursuer's conduct was a deliberate abandonment of the pursuit of the present defender in a period before the action was raised (and possibly as early as 2007 when the search was made) with no further attempt to investigate insurance until that was done for him when he instructed his present agents Messrs Digby Brown in around 2019 and they checked the ELTO database on his behalf. It was submitted that this was not what section 19A of the 1973 Act was for. It had to be contrasted in the circumstances in the case of *Ferguson* v *J and A Lawson (Joiners) Ltd* founded upon by the pursuer.

[20] Counsel also made reference to *Anderson* v *British Coal Corporation* 1992 SLT 398 and in particular a passage of Lord Justice Clerk Ross at page 401 D-E in dealing with the dispensing power of the Court of Session:

> "We are clearly of opinion that these are not cases where we would be justified in exercising our discretionary power under para (4) of the preamble to Act of Sederunt. It has been observed that the courts dispensing power is normally exercised where there has been some excusable mistake on the part of the parties advisers. In *Dalgety's Trustees* v *Drummond* [1938 SC 709] (at p 715) Lord President Normand said: 'I think that the dispensing power was meant to enable the Court to do justice where a member of the legal profession had acted in ignorance of the Rules of Court and of the provisions which they contained'. In the present case it was not suggested that the defenders' solicitors had been unaware of the provisions of the rules; on the contrary they took a deliberate decision to agree the allowance of proof. Moreover, in the present cases exercising the discretionary power might well prejudice the pursuers who have lodged lists of documents and witnesses. We are accordingly satisfied that these are not cases where the court would be justified in exercising the discretionary power."

[21] Counsel accepted that the dispensing power in terms of the rules of court is not the same as section 19A of the 1973 Act where the courts discretion is unfettered. However, like the dispensing power, section 19A is concerned with a balancing of equities and excusing the missing of time-bar. It was submitted that the logic of *Anderson* was instructive. In any event, it was submitted that, logically, a decision in 2007 not to pursue an action or investigate insurance further, far from justifying the idea that an action should be allowed to proceed now, actually militates against it. Counsel renewed the motion he made at the outset.

Discussion

[22] There is no dispute about the law which is applicable. It is I think sufficient to say that the law is summarised in the passage of Lord Drummond Young in *B* v *Murray* (No.2) at paragraph [29]

> "Section 19A has been the subject of considerable discussion. The same is true of its English equivalent, section 33 of the Limitation Act 1980; section 33 is framed differently from section 19A, but it fulfils the same essential function and the authorities on its interpretation are accordingly of assistance in Scotland: *Donald* v *Rutherford*. A number of matters have clearly been established. First, the court having general discretion under section 19A; the crucial question that must be considered has been stated to be "where do the equities lie?": *Forsyth* v *A F Stoddard and Co Ltd*, at 1985 SLT, p55, per Lord Justice Clerk Wheatley; *Elliott* v *J & C Finney* at 1989 SLT, p608F per Lord Justice Clerk Ross. Secondly, the onus is on the pursuer to satisfy the court that it would be equitable to allow the claim to proceed: *Thompson* v *Brown*, at [1981] 1WLR, p753, per Lord Diplock. Thirdly, the conduct of a pursuer's solicitor may be relevant to the exercise of the court's discretion, and the pursuer must take the consequences of his solicitor's actings: *Forsyth, supra* at p54. Fourthly, relevant factors that the court may take into account include, but are not restricted to, three matters identified by Lord Ross in *Carson* v *Howard Doris Ltd*, 1981 SC 282; 1981 SLT, p275, these are '(1) the conduct of the pursuer since the accident and up to the time of seeking the court's authority to bring the action out of time, including any explanation for his not having brought the action timeously; (2) any likely prejudice to the pursuer if authority to bring the action out of time were not granted; and (3) any likely prejudice to the other party from granting authority to bring the action out of time'. Fifthly, each case turns on its own facts, a principal which applies even if a number of claimants present similar claims against the same person…"

[23] It almost goes without saying that this case turns on its own facts. Of course the focus in this case is very much on the conduct of the pursuer's solicitor for which the pursuer must take the consequences. The conduct here lies in the decision made prior to the raising of the original action not to include the present defender. The reason for that is succinctly explained in the pursuer's averments in the statement of fact 4:

> "The defenders were not called as defenders in the previous action because the pursuer's then solicitors located no insurance for them. The defenders had ceased trading in or about 1986. The defenders had been wound up on or about 21 January 1993. In such circumstances there was no point in calling the defenders as defenders in the previous action."

[24] This is reiterated in statement of claim 6 when responding to the defenders averments about time-bar where it is averred

> "The circumstances in which the defenders were not included in the previous action by the pursuer against Hart Builders (Edinburgh) Ltd are as averred in statement of claim 3 *supra*. There was no point in raising proceedings against a party which had ceased to trade, being wound up, and in respect of which no relevant insurance

> could be traced. In so circumstances, the pursuer was not in a position to obtain compensation for his exposure to asbestos while in the employment of the defenders and has not done so. He has been prejudiced as a consequence".

[25] It appears from the evidence of Miss Blane that such a course of action was the practice of her firm then and it remains so. Her evidence was that such an approach was appropriate and correct. There was no contrary evidence, and Miss Blane did not agree with the suggestion that the defender could have been included in the original action as a protective measure in the hope that the policy of insurance might subsequently be identified. While she did indicate that, with hindsight, perhaps the defender could have been included, with a view to subsequently identifying insurance, this came with a caveat – at what point do you stop? Her view was that such an approach would be impractical and overly burdensome, potentially giving the pursuer an unrealistic hope. There was no other evidence before the court in support of an alternative position. Accordingly, I must proceed on the basis that it is not established that the approach adopted by Thompsons at the relevant time was inappropriate. While the defender has averments about an alternative remedy being available to the pursuer against his solicitors, there is no evidence to support them.

[26] Ultimately, notwithstanding the defender's averment on the matter, it was accepted by counsel on both sides that the issue of insurance was relevant for the court's consideration at least in explanation of the factual background (*Ferguson* v *J A Lawson (Joiners) Ltd*, per Lady Paton in the Inner House decision at para. 45) It was part of the evidential picture in *Ferguson* v *J A Lawson (Joiners) Ltd supra* but the facts in that case are clearly distinguishable from the instant case. In that case there had *inter alia* been a difficulty in identifying the correct defender. In the instant case, the defender was correctly identified and a deliberate decision made not to include that defender in the original action on

reasoned and rational grounds. The decision was made against the background of there being a defender which had an insurance policy which was still trading. How much that circumstance was a factor in the decision not to pursue the defender in this action is not known but it would not be surprising if it played a part.

[27] The main issue in this case is whether the equitable power should be exercised in favour of the pursuer where that pursuer through his solicitor, made a deliberate, reasoned and rational decision not to pursue the defender around a decade previously, and where the pursuer subsequently recovered damages which reflected 75% of the full valuation (£11,000) of his claim, there being a discount of 25% to reflect the un-sued for portion attributable to his exposure while working with the defender.

[28] Adopting the approach of Lord Brodie in *Leith* and Lord Nimmo Smith in *Cowan*, the prejudice naturally arising from the loss of the pursuer's right of action on the one hand and the countervailing prejudice to the defender in allowing the action to proceed cancel each other out in the absence of speciality. What are the specialities here? Firstly, the pursuer's prejudice is limited to the loss of the right to pursue the un-sued for 25% of damages, he having recovered 75% (in terms of *Holtby* v *Brigham and Cowan (Hull) Ltd, supra*). So he has obtained the major portion of recoverable damages. Accordingly, his prejudice is substantially diminished. More importantly in my view was the decision at the outset not to include the present defender in the first action, leading to an action being taken solely against Hart Builders (Edinburgh) Ltd. This was a rational and reasoned decision based on the prospects of recovery in the absence of relevant insurance cover. It was, in effect, in the absence of a protective action, an abandonment of any claim against the defender. So when one considers the specialities here, they militate against an exercise of discretion in favour of the pursuer.

[29] That is sufficient for decision in this case in favour of the defender. I would add, however, that while there can be no direct comparison between the exercise of the courts dispensing power in relation to its rules of procedure and the exercise of the courts equitable jurisdiction in terms of section 19A of the 1973 Act, I have come to a view in this case, as the court did in *Anderson* v *British Coal Corporation supra* in relation to the dispensing power, that in the context of section 19A, accepting that the discretion is unfettered, it is not intended for a situation such as this, where a pursuer makes a deliberate decision not to pursue a particular defender. In any event, there are limits to the exercise of discretion. As was observed by Lord Cameron in *Donald* v *Rutherford supra* at page 75.

> "But while the discretion is, in my opinion unfettered, it must necessarily be exercised within certain limits and those limits must be set as by the circumstances of a particular case."

[30] In my view, in the circumstances of this case, to exercise a discretion to permit the action to be brought by virtue of section 19A of the 1973 Act would be extending that discretion beyond allowable limits. In the particular circumstances of this case I have therefore come to the view that it would not be equitable to allow the action to proceed. The appropriate disposal is decree of absolvitor (*Donald* v *Rutherford, per* Lord Dunpark at page78). I have pronounced an interlocutor accordingly.

[31] As I was invited to do by counsel I have reserved all questions of expenses including the expenses of the minute of amendment procedure which was finalised on the first day of the proof. I have appointed a hearing on a date to be fixed.