OUTER HOUSE, COURT OF SESSION

[2019] CSOH 26

A271/17

OPINION OF LORD ERICHT

In the cause

SUSAN LOUISE SABET OR HUGHES AND ANOTHER

Pursuers

against

FIFE COUNCIL

First Defender

and

NORMAN MILNE

Second Defender

Pursuers: Lindsay QC; Ledingham Chalmers LLP
First Defender: Hanretty QC; BLM
Second Defender: Duthie; DAC Beachcroft Scotland LLP

19 March 2019

Introduction

[1] The pursuers' house was severely damaged by flooding from the Ceres burn in Dura Den in Fife. They raised an action for damages jointly and severally against firstly the local authority in respect of breach of duties under sections 56 and 59 of the Flood Risk Management (Scotland) Act 2009 and secondly a neighbouring landowner in nuisance.

They averred that the flood would not have occurred had a weir across the burn not been blocked with accumulated debris.

[2] A neighbouring house was also severely damaged by the same flood. The neighbours also raised an action against the local authority and landowner on the same grounds (*Edwards* v *Fife Council* 2019 CSOH 27). Both actions called before me at the same time for debate on the preliminary pleas of both the local authority and the landowner. The issues in the current case and the neighbour's case were identical.

The case against the local authority under sections 56 and 59 of the Flood Risk Management (Scotland) Act 2009

Statutory provisions

[3] Section 56 of the Flood Risk Management (Scotland) Act 2009 provides:

> "56 General power to manage flood risk
> (1) A local authority may do anything which it considers—
>
> (a) will contribute to the implementation of current measures described in any relevant local flood risk management plan,
>
> (b) is necessary to reduce the risk of a flood in its area which is likely to—
>
> (i) occur imminently, and
>
> (ii) have serious adverse consequences for human health, the environment, cultural heritage or economic activity, or
>
> (c) will otherwise manage flood risk in its area without affecting the implementation of the measures mentioned in paragraph (a).
>
> (2) Without prejudice to the generality of subsection (1), a local authority may in particular—
>
> (a) carry out any operations to which a flood protection scheme relates (see section 60),
>
> (b) carry out any other flood protection work,

(c) carry out any temporary works required for the purposes of a flood protection scheme or any other flood protection work,

(d) enter into agreements or arrangements with any other person—

(i) for the carrying out by that person or by the authority of any work which could be done by the authority under this Part, or

(ii) relating to the management by that person of land in a way which can assist in the retention of flood water or slowing the flow of such water,

(e) make contributions towards expenditure incurred by any other person doing something which could be done by the authority under this Part,

(f) make payments to any other person in compensation for income lost as a result of entering into agreements or arrangements of the type mentioned in paragraph (d)(ii), and

(g) receive from any other person contributions towards expenditure incurred by the authority in exercising any of its functions under this Part.

(3) Work carried out under this section may be carried out within or outwith the local authority's area."

[4] 59 of the 2009 Act provides:

"Duty to carry out clearance and repair works

A local authority must carry out the works described in a schedule prepared by it under Section 18 if it considers carrying out the works—

(a) will contribute to the implementation of current measures described in any relevant local flood risk management plan, or

(b) will not affect the implementation of the measures mentioned in paragraph (a)."

[5] Section 18 of the 2009 Act provides:

"Local authorities to assess bodies of water

(1) Every local authority must, from time to time (or when directed to do so by the Scottish Ministers)—

(a) assess the relevant bodies of water (other than canals) in its area for the purpose of ascertaining whether the condition of any such body of water gives rise to a risk of flooding of land within or outwith its area, and
(b) where—

(i) a body of water gives rise to such a risk, and
(ii) the authority considers that clearance and repair works would substantially reduce that risk, prepare a schedule of those clearance and repair works.

(2) In subsection (1)(b), clearance and repair works are works that consist of any or all of the following—

(a) removing obstructions from a body of water,
(b) removing things that are at significant risk of becoming such obstructions,
(c) repairing artificial structures which form part of the bed or banks of a body of water.

(3) A schedule prepared under subsection (1)(b) must—

(a) indicate when the local authority next intends to carry out an assessment under subsection (1)(a) of the body of water in question,
(b) contain such other information and be in such form as the Scottish Ministers may specify in regulations.

(4) A local authority must make available for public inspection the schedule of clearance and repair works prepared under subsection (1)(b) for the time being applicable to its area."

The Background to the 2009 Act

[6] The preamble to the 2009 Act states:

"An Act of the Scottish Parliament to make provision about the assessment and sustainable management of flood risks, including provision for implementing European Parliament and Council Directive 2007/60/EC; to make provision about local authorities' and the Scottish Environment Protection Agency's functions in relation to flood risk management; to amend the Reservoirs Act 1975; and for connected purposes."

[7] Council Directive 2007/60/EC on the assessment and management of flood risks

establishes a framework for the assessment and management of flood risks. It obliges

member states to undertake preliminary flood risk assessments, prepare flood hazard and flood risk maps, and establish flood risk management plans.

[8] The Cabinet Secretary for Rural Affairs and the Environment made the following statement at stage 1 of the Scottish Parliament's consideration of the Bill which became the 2009 Act:

> "It would be difficult for me to describe in detail all the provisions in the bill, but I will mention some highlights. For the first time in Scotland, the bill will place a duty on specific public bodies — including local authorities, the Scottish Environment Protection Agency and Scottish Water — to act with a view to reducing overall flood risk.
>
> The bill will transpose the European directive on the assessment and management of flood risks in a way that suits Scotland's flood risk management needs. SEPA will be responsible for the directive and for preparing national assessment maps and plans to manage flooding. That work will be undertaken in close collaboration with local authorities, Scottish Water and other stakeholders. Local authorities will also be responsible for preparing local flood risk management plans to accompany the national plans.
>
> To ensure that schemes that are identified in plans are implemented as promptly as possible, the bill repeals the Flood Prevention (Scotland) Act 1961. In its place, the bill creates a new streamlined process for approving flood protection schemes.
>
> Dam failures are extremely infrequent, but they can have major consequences, including loss of life. The bill will transfer enforcement responsibilities under the Reservoirs Act 1975 from local authorities to SEPA. That will ensure that reservoir operators and the public benefit from a new and more consistent approach to reservoir safety enforcement. Reservoir safety will also be strengthened by the introduction of a compulsory post-incident reporting system.
>
> As I am sure we all agree, flood warning is crucial to keeping the public informed of flooding events. The bill updates SEPA's responsibilities for flood warning and places a duty on SEPA to make flood warning information available to all Scotland's citizens." (*Scottish Parliament Official Report*, January 22, 2009 col.14336.)

[9] The Scottish Government's Explanatory Notes for section 59 of the 2009 Act provide:

> "Section 59 imposes a duty on local authorities to undertake the clearance and repair works described in the schedule prepared under section 18, as long as the works contribute to the implementation of measures described in the relevant local flood risk management plan or do not affect the implementation of those measures."

The pursuers' averments

[10] The pursuers averred that the cause of the flood was as follows:

"At the material time, the Weir was blocked by a significant quantity of debris. The presence of debris at the Weir raised upstream water levels. This debris had accumulated over a period of time. The Weir had been blocked with accumulated debris since at least June 2012. The presence of debris significantly restricted the flow of water able to pass over the Weir. As a result, water levels upstream were raised. The torrential rain raised the water levels to a height such that water overtopped the Wall to the east section of the Weir and flowed onto the Adjoining Road. The flood would not have occurred if the Weir had not been blocked with accumulated debris."

[11] The pursuers averred:

"There was a history of flooding at the Weir. These previous incidences of flooding were known to the first and second defenders. On or about March/April 1992 the Adjoining Road was flooded due to water backing up at the Weir. On or about August and September 2008 the first defender removed an accumulation of debris from the Weir. An internal memo of the first defender's dated August 2008 recommended that the Weir should be inspected monthly and any debris cleared at monthly intervals and after prolonged or heavy periods of rain." (Article 8 of Condescendence).

[12] The pursuers further averred:

"On 22nd June, 2012 the first defender reported that the Weir was blocked with debris with water flooding over the Wall and down the Adjoining Road. This was said to be causing carriageway erosion and to be threatening the Property with flooding. The first defender recommended that the "landowners" be required to clear the debris. On 5 July, 2012 the first defender reported that the water flooding over the Wall was eroding footway of the adjoining Road and this erosion would cause the footway to collapse. On 2 October, 2012 the first defender reported that the "landowner cannot be contacted – location to be monitored" Accordingly, the first defender was fully aware that the Weir had become blocked with an accumulation of debris and that this blockage created a risk of flooding to the Property." (Article 9 of Condescendence).

[13] The pursuers further averred:

"The first defender inspected the Weir in the months prior to October 2012. Following these inspections, the first defender prepared reports dated 22nd June and 2nd October, 2012. The first defender was aware of the accumulation of debris. The first defender was aware of the flood risk posed by said accumulation of debris. The first defender failed to take any steps to remove the debris from the Weir. The first defender was obliged in terms of Section 56 to remove the accumulated debris as

> there was an imminent risk of flooding with serious adverse consequences. The first defender failed to do so and thereby failed to fulfil the duties imposed upon it by Section 56. If the first defender had fulfilled the duties imposed upon it by Section 56 and had removed the accumulated debris from the Weir the flooding would not have occurred and the late Mrs Cuthill would not have sustained any loss and damage." (Article 11 of Condescendence).

First defender's submissions

[14] Counsel for the first defender submitted that the action in so far as directed against them was fundamentally irrelevant. Section 56 was designed to provide a general power in relation to the management of flood risks, was wholly permissive and was directed to the management of risks which, but for the provision concerned, would not exist. There was no class of beneficiaries which might be attended to obtain statutory benefit under the Act. The pursuers' case under section 59 was likewise erroneous. Further, the pursuers did not offer to prove that any schedule had ever been prepared in terms of section 18 of the Act and could not as no schedule had been issued by the Scottish Government at the relevant time.

Pursuers' submissions

[15] Counsel for the pursuers submitted that sections 56 and 59 of the 2009 Act imposed duties upon the first defender which were owed to the pursuers in the circumstances averred on record. A breach of these duties gave rise to a private law right of action in favour of the pursuers to recover damages. Sections 56 and 59 impose civil liability upon the first defender.

[16] Counsel submitted that a private law right of action for breach of a statutory duty can arise if the statutory duty was imposed for the protection of a limited class of the public and Parliament intended to confer on members of that class such a right *X (Minors)* v *Bedfordshire CC* [1995] 2 AC 633 at 731. Where, as with the 2009 Act, the statute is silent,

regard must be paid to the object and scope of the provisions, the class intended to be protected by them, and the means of redress *Oloto* v *Home Office* [1997] 1 WLR 328.

[17] The statutory duties under sections 56 and 59 were limited and specific and could not be characterised as conferring general administrative functions. The duty contended for by the pursuers was limited and specific: having become aware of the debris and recognised the risk of flooding the first defender was obliged to remove the debris after its attempts to contact the proprietors of the weir were unsuccessful. The duty was for the benefit of a defined and limited class of persons, being those owning or occupying land at risk of flooding

[18] Counsel further submitted that the 2009 Act provides no mechanism for the enforcement of the duties imposed upon a local authority by sections 56 and 59. The lack of an alternative remedy was a factor in favour of there being a private law of action (*Pullar* v *Window Clean Ltd* 1956 SC 13). Counsel further submitted that the absence of penalties or any statutory mechanism was not determinative and the fundamental test was whether or not Parliament intended to create a private law right of action *R* v *Deputy Governor of Parkhurst Prison ex p Hague* [1992] 1 SC 58.

[19] He submitted that the ministerial statement made by the Cabinet Secretary for Rural Affairs and Environment at stage 1 of the Scottish Parliament's consideration of the Bill for the 2009 Act and the Scottish Government's explanatory notes for section 59 were supportive of the view that it was the Parliament's intention to create a private law right of action, as was the preamble to the 2009 Act and the intention to implement EU Directive 2007/60/EC.

[20] He further submitted that support for his approach was to be found in *McArthur* v *Strathclyde Regional Council* 1995 SLT 1129, *Morrison Sports Ltd* v *Scottish Power Plc* 2011 SC (UKSC) 1 and *Campbell* v *Peter Gordon Joiners Ltd* 2016 SLT 887.

Circumstances in which a breach of statutory duty gives rise to a private law cause of action

[21] In *X (Minors)* v *Bedfordshire CC* Lord Browne-Wilkinson set out the law as follows:

> "The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398: Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No.2) [1982] A.C. 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see Groves v. Lord Wimborne [1898] 2 Q.B. 40" (p731)

He went on to say:

> "The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions" (p732)

The application of these principles to particular statutory provisions can be seen in various cases.

[22] In *Pullar* v *Window Clean Ltd* 1956 SC 13 the First Division considered an Edinburgh Corporation Order which provided that buildings should be constructed so as to admit the window being cleaned from the inside of the room. A window cleaner who averred that he had been injured while cleaning a window from the outside sued the occupiers of the building on the basis that they were in breach of the order as they had not complied with a Dean of Guild Court warrant requiring alteration of the windows to comply with the order. The court held that the Order did not give rise to a civil claim for damages. The Lord President took the view that the general underlying purpose of the relevant part of the Order was the maintenance and improvement of the safety and healthiness of buildings in the city, and its primary purpose was to facilitate the cleaning of upper storey windows for reasons of health (p22). Dean of Guild considerations, and not window cleaner safety, was the main outlook of the enactment. There was nothing to indicate whether the class of persons for whom the provision was enacted was intended to be confined to window cleaners or any householder who cleaned the windows. All of these factors pointed to the conclusion that the section was just one link in the general building code of the city, where the duty of compliance was to the Dean of Guild Court and a party injured by breach of that duty would have no right to found upon the breach as a basis for a civil claim (p23).

[23] In *McArthur* v *Strathclyde Regional Council* a driver who claimed to have struck roadworks with his car raised an action for damages against the local authority as roads authority and the contractor who was undertaking the roadworks. The pursuers did not insist on his case against the local authority, and accordingly although the local authority's name remained in the name of the case, the case proceeded only against the contractor. The

pursuers sued for breach of duty by the contractor under Section 60(1) of the *Roads (Scotland) Act 1984,* which provided that where a person undertakes works on a road he must make them visible to oncoming traffic, provide lighting and erect fencing. Section 60(2) provided that a failure to fulfil a requirement under section 60(2) constitutes a criminal offence. Lord Abernethy sitting in the Outer House decided the case on the basis of prescription but observed *obiter* that while one aim of the section was to confer powers of control on the roads authority, another aim, of at least equal importance, was for the benefit and protection of road users, and that he would have allowed a proof before answer on the breach of duty.

[24] In *Olutu* v *Home Office* the English court of appeal held in relation to a statutory instrument limiting the length of pre-trial detention that there was no indication that Parliament had intended to empower the Secretary of State to create new private law rights of action sounding in damages. Lord Bingham stressed that "In seeking to understand the intention of Parliament regard must be had to the object and scope of the provisions, the class (if any) intended to be protected by them, and the means of redress open to a member of such a class if the statutory duty is not performed" (p336E).

[25] In *Morrison Sports Ltd* v *Scottish Power UK Limited* tenants of a shop which had been destroyed by fire, the seat of which had been an electricity meter cupboard, sued the electricity company for breach of statutory duty under the Electricity Supply Regulations. The regulations were made under sec 29(3) of the *Electricity Act 1989*. That section gave the Secretary of State power to make regulations for the purpose of inter alia protecting the public from the dangers arising from the use of electricity, and the power to make contravention of the regulations a criminal offence. Lord Rodger, delivering the judgment of the Supreme Court held that section 29(3) could not be construed as introducing a private right of action (para [17]). The provisions of the act pointed strongly to the conclusion that

the regulations were to be enforced by the Secretary of State rather than by individuals raising private actions (para [10], [37]). Lord Rodger emphasised that one of the preconditions of a private law cause of action is that the statutory duty was imposed for the protection of a limited class of the public. (para [40]). He stated:

> "41. As support for their view that the Regulations gave rise to a private right of action, the Extra Division attached some weight to the fact that the aim of some of the 1988 Regulations is to reduce the risk of personal injury or damage to property (para 47). Even if that is a consideration which can, in an appropriate case, point to an intention on the part of the legislator to create a private right of action, the mixed aims of the 1988 Regulations weaken any argument of that kind in respect of them. In any event, the fact that legislation is designed to reduce the risk of personal injury or damage to property is by no means an infallible indication that Parliament intended to give individuals a private right of action for breach of its provisions. It is simply one factor to be taken into account. See, for example, *Weir v East of Scotland Water Authority*, para 10, where Lord McCluskey considered that, although the water authority was under a statutory duty to supply wholesome water, it was not a duty that was owed to a defined limited class of the public. The duty was accordingly enforceable in various ways, but not by a private right of action." (para [41])

The *Weir* case to which Lord Rodger referred concerned section 8 of the *Water (Scotland) Act 1980*, which provided that every water authority shall provide a supply of wholesome water sufficient for the domestic purposes of all entitled owners and occupiers within their limits of supply. Contractors laid water mains to a housing development. A family living in the development sought damages from the water authority for injury sustained from using unwholesome water contaminated by a dead fox in the mains. Lord McCluskey stated:

> "I have come to be of the view, though the matter is not free from difficulty, that Section 8 of the Water (Scotland) Act 1980 does not entitle a person to sue for damages simply upon the basis that he, as an owner or occupier of premises within the limits of supply of a particular water authority, has been injured by using unwholesome water provided by that water authority in their mains and pipes. The duty in respect of the supply of wholesome water is not a duty for the protection of a defined limited class of the public; it is owed to every domestic consumer within the authority's area. The owner or occupier has other remedies, namely to sue at common law or to claim compensation under Section 10. The duty is enforceable by the Secretary of State (or, now, the Scottish Executive)." (para [10])

Discussion and decision on section 56

[26] In my opinion in enacting section 56 of the 2009 Act the Parliament did not intend to create a duty enforceable by a private individual against a local authority.

[27] It is clear from the wording of section 56 that the Parliament intended to create a general administrative power, not a duty. The section is headed "General power to manage flood risk". However, section 56 does not use the word "shall". Instead, it provides that the authority "may" do anything which it considers will contribute to implementation of a management plan or is necessary to reduce risk of an imminent flood. The section does not oblige the local authority to do these things. It does not use the word "shall". It does not impose on the local authority a duty to do those things. It merely gives the local authority the power to do these things if it wishes to do so.

[28] Accordingly in my view the pursuers' case on breach of duty under section 56 is irrelevant and falls to be dismissed.

Discussion and decision on section 59

[29] By contrast, section 59 is clearly expressed to be a duty. The heading states "Duty to carry out clearance and repair works". The section provides that the local authority "must" carry out the certain works if it considers that in doing so the works will contribute to implementation of measures in any local flood risk management plan, or will not affect the implementation of such measures.

[30] It is important to note that the works to which section 59 applies are "the works described in a schedule prepared by it under section 18". The basis of the pursuers' case against the first defender is that the first defender had failed to carry out the following works:

(1) monthly removal of debris which had been recognised as necessary in a report in August 2006, and

(2) removal of accumulated debris in June 2012.

[31] Accordingly, the first question which arises is whether these works "are described in a schedule prepared by [the local authority] under section 18".

[32] A schedule under section 18 must comply with the following formalities:

(1) the local authority must prepare a map which shows local bodies of water ("relevant bodies of water") (sec 17);

(2) the local authority must assess relevant bodies of water for the purposes of ascertaining whether the condition of any such body of water gives rise to a risk of flooding (sec 18(1));

(3) where a body of water gives rise to such risk and the authority considers that clearance and repair works would substantially reduce that risk, it must prepare a schedule of these works (sec 18(2));

(4) the schedule must indicate when the local authority next intends to carry out an assessment under sec 18(1) of the body of water in question (sec 18(3)(a));

(5) the schedule must contain such other information and be in such form as the Scottish Ministers may specify in regulations (sec 18(3));

(6) the local authority must make the schedule available for public inspection (sec 18(4)).

[33] The Scottish Ministers have made no regulations specifying the other content or form of the schedule. In my opinion that does not mean that a local authority is unable to prepare a schedule. It just means that the local authority can prepare a schedule in whatever form it

wishes and the schedule need not contain any other information other than that specified in section 18.

[34] Counsel for the pursuers' position was that the function of the schedule was fulfilled by a particular document which had been lodged in process.

[35] The document was headed:

> "Ad hoc Inspection
> Ad hoc Safety Inspection
> Safety Inspection."

[36] After the heading there was a box including the following:

> "Street: C45 Pitscottie B940 to Dairsie…
> Section No: 2.00
> Road Number – Location C45 – Cw Pitscottie 30's to Dairsie 30's incl Dura Den
> C/way Type: Carriageway."

[37] The document noted inspections and defect details. The document listed a safety inspection on 6 June 2012 which recorded a defect described as "six eroded areas in total not marked yellow rainning [sic] infill only with tar" at a specific part of the road and also noted "standing water" for its full length.

[38] The document listed an *ad hoc* safety inspection on 19 June 2012 at which the following defect was noted: "1. Eroded area not marked yellow" at a specific location on the road.

[39] The document listed an *ad hoc* safety inspection on 22 June 2012 at which the following defect was noted:

> "Dam blocked with debris and water flooding out of wall down road causing c/way erosion and threatening cottages with flooding as water was running down f/way near air vents of cottages. Requires landowner to clear debris. See pictures."

The location of that defect was listed as "at dam at the back of house called the Grove".

[40] In my opinion this document is not a schedule which was prepared by the first defender under section 18. The entries in the document record inspections of a particular

road for a wide range of defects including yellow road markings. There is no indication in the document that it arises from an assessment of bodies of water listed on the map of relevant bodies of water. There is no reference in the document to it being a schedule under the *Flood Risk Management (Scotland) Act 2009*, and indeed no reference to that Act. There is no indication in the document of when the local authority next intends to carry out an assessment of the body of water. The document was not made available for public inspection: indeed it was made available to the pursuers only in response to an environmental freedom of information request by the pursuers. The document proceeds on the basis that works will be carried out by the landowner, not the local authority.

[41] Section 59 begins "A local authority must carry out the works described in a schedule prepared by it under section 18." In my view this means that the duty on the local authority to carry out works under section 59 applies only to works described in a schedule prepared by it under section 18. There was no such schedule in respect of works on the Ceres Burn. Accordingly the first defender is not in breach of any duty under section 59.

[42] As the first defender is not in breach of any section 59 duty, it is not necessary for me to consider whether such a breach would give rise to a private law cause of action for damages against a local authority. I reserve my opinion on that issue, but make the following observations. Section 59 sets out two preconditions for a duty to arise. The first is that the works must be described in a schedule prepared by the local authority under section 18. The second is that the local authority must have made a decision that carrying out of the works will contribute to the implementation of current measures in any local flood risk management plan, or will not affect these measures. For these pre-conditions to be fulfilled there would have to be specification of a particular set of works in a particular location. If both of these preconditions were met in relation to such a particular set of works

then it seems to me that there would be protection for a limited class, namely the persons who would be protected from flooding if that particular set of works was completed. I also note that the heading to section 59 uses the word "duty" and the section itself uses the word "shall", and that there is no other remedy set out in the Act for enforcement of the duty. Accordingly it seems to me that there would be considerable force in the argument that the Parliament intended to create a new private law right of action sounding in damages. However, for any such action to be successful both pre-conditions would require to be fulfilled and that is far from the circumstances of the current case.

Nuisance

The pursuers' case

[43] The pursuers pled the following case in nuisance against the second defender:

> "The accumulation of debris in the Weir amounted to nuisance. This nuisance was caused by the second defender's fault. It was the duty of the second defender in the use of his property, including the Weir, to avoid causing damage to neighbouring property such as the Property. The second defender is responsible for maintaining and repairing the Weir. The damage to the Property was caused by the second defender's failure to remove the accumulated debris at the Weir. The Weir was blocked with accumulated debris since at least June 2012. The debris had not been removed immediately prior to the flooding occurring on 12th October, 2012. It was the duty of the second defender to properly maintain the Weir. It was the duty of the second defender to take reasonable care to ensure that water was able to flow freely over the Weir. It was a reasonably foreseeable consequence that a failure to clear the accumulated debris would result in flooding. It was also reasonably foreseeable that a consequence of this flooding would be material damage to the Property. The failure to properly maintain the Weir by keeping it free from debris denied the pursuers the comfortable enjoyment of their home, their Property. The flooding caused material damage to the Property. That material damage has resulted in a need for substantial works to be carried out to reinstate the Property to the condition it was in prior to the collapse. In the whole circumstances, the intrusion upon the pursuers' interest in the Property was more than reasonably tolerable. As a result of the nuisance caused by the second defender, the pursuers suffered loss and damage as hereinafter condescended upon. If the second defender had removed the accumulation of debris, as he was obliged to do, the pursuers would not have sustained this loss and damage." (Article 8 of Condescendence).

Second defender's submissions

[44] Counsel for the second defender submitted that the action against the second defender should be dismissed. Under reference to *RHM Bakeries* v *Strathclyde Regional Council* 1985 SC(HL) 17, he submitted the pursuers made no relevant averments of fault. The pursuers' case concerned flooding caused by an overflow of water from a burn during a period of torrential rainfall. There were no relevant averments of any omission on behalf of the second defender from which negligence might be inferred. The second defender owed the pursuers no duty to take positive steps to maintain the Weir, nor remove debris therefrom. There was no basis in law for a positive duty to maintain an artificial structure so as to alter and mitigate against the otherwise natural flow of water.

Pursuer's submission

[45] Counsel for the pursuers invited me to allow a proof before answer on all averments relating to nuisance. The fault had been averred and the case was a simple one. The weir was a special risk as if it failed a large volume of water could suddenly be released. With ownership comes the obligation of maintenance and removal of debris.

[46] The pursuers had pled *culpa* within the meaning of *Kennedy* v *Glenbelle* 1996 SC 95, *RHM Bakeries* v *Strathclyde Regional Council* 1985 SC (HL) 17 and *GB and AM Anderson* v *White* 2000 SLT 37. This case was an example of the duty to protect a neighbouring proprietor against abnormal risk of harm by flooding (*Caledonian Railway* v *Greenock Corporation* 1917 SC HL 56, *Sedleigh Denfield* v *O'Callaghan* 1940 AC 880). There was a positive duty on the second defender to remove obstructions *Kennedy* v *Glenbelle*, *Nobles Trustees* v *Economic Forestry (Scotland) Ltd* 1988 SLT 662.

Discussion and decision on nuisance

[47] In *Kennedy* v *Glenbelle* Lord President Hope stated:

> "There is now no doubt that, with the possible exception of a case involving interference with the course of a natural stream, which was the subject of certain *dicta* in *Caledonian Railway Co* v *Greenock Corporation*, the essential basis for liability and reparation for nuisance is *culpa*" (p98G).

[48] In this case the pursuers aver *culpa*. The pursuers aver in article 3 that the second defender is the heritable proprietor of the land to the west of the weir and that ownership of this land includes a half share of the weir. If the pursuers' averments had stopped at that there would have been some force in the defender's submission that mere ownership does not give rise to a liability in nuisance (*Campbell* v *Kennedy*). However the pursuers go on to plead *culpa* in failing to maintain the weir, and in particular failure to remove accumulated debris at the weir. Failure to remove debris is a relevant case in nuisance (*Sedleigh-Denfield* v *O'Callaghan*). The pursuers aver in article 9 of condescendence that the second defender ought reasonably to be aware that the weir was prone to becoming blocked with debris and that such blockages would result in flooding which would damage the pursuer's property. The pursuers aver that the second defenders were aware of a history of flooding at the weir in 1992 and 2008. The pursuers aver that the weir had been blocked with debris since at least June 2012, some four months before the flood. In my view the pursuers do not require to go further and aver what a reasonable system of inspection would have been. I was referred to no authority which imposes such a requirement in a case of nuisance. Whether the weir was prone to being blocked and whether the second defender ought to have known about the history of flooding and a blockage which had existed for four months are matters for proof before answer.

[49] It is clear from the authorities that very little may be needed by way of pleading to support an assertion of *culpa* (*RHM Bakeries (Scotland) Limited* v *Strathclyde Regional Council* at p219; *Logan* v *Wang UK Ltd* at p 584J). In my opinion, the pursuers' averments on *culpa* are sufficient for a proof before answer to be allowed. In any event, the pursuers also found on the *Caledonian Railway Co* case, which Lord Hope identified as a possible exception to the requirement for *culpa*. It seems to me that the issue of whether *culpa* is required to establish nuisance in the circumstances of this particular case is best dealt with after evidence has been heard. I shall allow proof before answer on the case against the second defender.

Order

[50] I shall sustain the first defender's second plea-in-law, repel the pursuers' first and fourth pleas-in-law and dismiss the action against the first defender.

[51] I shall allow a proof before answer in respect of the case in nuisance against the second defender, and shall put the cause out by order for discussion of further procedure in respect of that case.

[52] I reserve all questions of expenses in the meantime.