SHERIFF APPEAL COURT

[2017] SAC (Civ) 16
AIR-PD63-09

Sheriff Principal D L Murray
Sheriff P J Braid
Sheriff Principal R A Dunlop

Opinion of the Court

Delivered by

SHERIFF P J BRAID

in the appeal

in the conjoined actions at the instance of

(FIRST) HENRY MCKENNA AND (SECOND) CHRISTINE MCKENNA AND (THIRD) PAUL MCKENNA, THEIR SON

Pursuers and Respondents

and

(FIRST) JAMES MCALLISTER AND (SECOND) JULIA MCALLISTER AND (THIRD) JAMES ANTHONY MCALLISTER

Pursuers and Respondents

against

(FIRST) ROBERT O'HARE, AND (SECOND) MAUREEN O'HARE

Defenders and Appellants

Pursuers/Respondent: Counsel: Sheldon, QC; Solicitors: Clyde & Co
Defenders/Appellants: Counsel: Anderson, QC; Solicitors: Ledingham Chalmers LLP

6 April 2017

Introduction

[1] The parties to these conjoined actions were all previously neighbours in Ayr Drive, Airdrie. The defenders and appellants resided at number 34; James and Julia McAllister and their son at number 36; and Henry and Christine McKenna and their son at number 38. Hereinafter, we refer to the McAllisters and the McKennas collectively as the pursuers, unless the context otherwise requires. On or about 10 July 2006 the pursuers became aware of a strong smell at their properties. After investigation it transpired that the smell was due to contamination of their respective properties caused by kerosene (hereinafter, "oil") which had emanated, at some stage, from a tank on the defenders' land. It is common ground that the contamination amounted to a nuisance. Actions for damages were raised in the sheriff court and following a proof, restricted to the issue of liability, the sheriff ruled in the pursuers' favour, sustaining their pleas-in-law that they had suffered loss, injury and damage as a result of the nuisance created by the defenders. The issue in this appeal is whether she was correct to do so. Broadly speaking, there are two challenges to the sheriff's decision. First, the defenders argue that she misapplied the law in relation to nuisance. Second, they argue that her approach to the evidence was flawed and that she made findings in fact which the evidence did not entitle her to make.

The Proof

[2] After sundry procedure, the proof took place on 11 to 13 August and 24 November 2015. Evidence was given by Julia McAllister, Henry McKenna, John Gillies (a neighbour who lived at 32 Ayr Drive), Robert O'Hare, Maureen O'Hare, David O'Hare; and technical, or expert, evidence by a number of witnesses, including Brian Graham, Danny Pointin, who also prepared reports which were lodged in process, Lewis Barlow and others. We find it

unnecessary to go into the technical evidence in detail, since the sheriff's findings in relation thereto are, by and large, not challenged.

Findings in Fact

[3] In so far as relevant to this appeal, the sheriff made the following findings in fact (retaining her numbering):

> "2. On or around 10 July 2006 and subsequent days the pursuers became aware of a strong smell of turpentine or white spirit at their properties. The smell was worse when it rained. The smell increased in intensity until the properties became uninhabitable on account of the contamination. The pursuers dug a pit at the corner of the property at number 36 Ayr Drive and the soil there was found to be heavily contaminated with an oily substance. The pursuers contacted environmental health services of North Lanarkshire Council who investigated the contamination.
>
> 3. The oil contamination which affected the pursuers' properties was kerosene.
>
> …
>
> 7. There was an oil storage tank on the defenders' property which was under their control. It was the only tank in the vicinity.
>
> 8. The chemical composition of the contaminating oil was essentially identical to that found in the oil storage tank in the defenders' garden. The chromatography of the oil indicated that the contamination was recent and that the oil had not come from historic pools of oil.
>
> 9. The oil contamination which affected the pursuers' properties emanated from the oil storage tank on the defenders' property.
>
> 10. In or around 2003 the defenders instructed contractors to convert the central heating system in their property from oil fired to gas. They did not instruct the contractors to decommission the oil tank. The tank was only disconnected by the contractors but a large quantity of oil remained in the tank with the defenders' knowledge. The actings of the contractors did not cause any escape of oil from the defenders' property.

11. In or around 2005 John Gillies borrowed a container holding approximately 10-12 litres of kerosene from the defenders. He used very little. He returned the container to the first defender in or around the late summer of 2006. At the time of its return it contained approximately 10-12 litres of oil.

12. The contents of the container came from the oil tank on the defenders' property.

13 In or around two weeks after the said container was returned to the first defender by John Gillies a smell was detected at the pursuers' properties.

14. In or around July 2006 the first defender demolished a garden shed on his property. This occurred before the smell of oil was first detected on the pursuers' properties.

15. The oil tank was in a good condition. There was no defect with the oil tank, the valve, or associated pipework which could have resulted in a leak.

16. Properly maintained oil storage tanks and associated pipework do not leak.

17. The brickwork on which the oil tank rested had been disturbed at one end and the tank's position altered from being slightly sloping to being horizontal.

18. The oil contamination occurred on account of a spill of oil from a container and from the oil tank on the defenders' property."

[4] The sheriff also made the following findings in fact and law:

"2. The defenders had a duty to maintain and manage the oil tank on their premises. They failed in that duty which resulted in a spill of oil from the container and from the tank.
3. The said nuisance was caused on account of fault on the part of the defenders."

The Pursuers' Case on Record

[5] Although counsel for the appellant directed our attention to the pursuers' averments of fact, some of which are directed towards possible causes of the kerosene migrating from

the tank to the pursuers' property, no point was taken that there was no record for the findings in fact which were made and so we find it unnecessary to refer to those averments. Of more significance, however, is article 5 of condescendence which contains the pursuers' pleadings directed towards nuisance, in the following terms (insofar as material to the appeal):

> "The defenders' said oil tank was within their joint control and management. The escape of heating oil from the defenders' said oil tank amounted to a nuisance. It was caused by the defenders' fault. They knew or ought to have known that it contained significant quantities of heating oil. They knew or ought to have known that if the tank and/or its associated pipework was disturbed, damaged or improperly maintained it would leak oil which would contaminate the surrounding area including the property occupied by the pursuers. It was their duty to take reasonable care properly to manage and maintain the said tank and associated pipework or to engage competent contractors to do so on their behalf. It was their duty to take reasonable care not to disturb or damage the said oil tank or its associated pipework… It was their duty not to empty the contents of the oil tank into the surrounding soil… Had the defenders fulfilled the duties incumbent upon them in respect of the said oil tank and associated pipework the said nuisance would not have occurred".

Sheriff's Decision

[6] After rehearsing the evidence and the parties' submissions, the nub of the sheriff's decision begins at page 160 of the Appeal Print. Stated briefly, she did not believe the evidence given at proof by the first defender. Significantly, she did not accept the defenders' evidence that they had instructed the decommissioning of the tank in 2003. She also preferred evidence given by John Gillies in relation to what we will describe as the oil drum incident, discussed more fully at paragraph 23 below. As far as the law is concerned, she accepted the pursuers' submission that once nuisance (which in this case was admitted) is established, liability proceeds on the proof of *culpa* and that there was an onus of proof on the defenders to show that they were not at fault. She relied heavily on the case of *RHM*

Bakeries (Scotland) Limited v *Strathclyde Regional Council* 1985 SC (HL) 17 and in particular on the following *dictum* of Lord Fraser of Tullybelton at page 45:

> "The local authority have in my opinion succeeded in showing that the case averred against them at common law is irrelevant because it excludes any reference to fault on their part. I wish to add two further comments on this part of the case. The first is that the view that I have just expressed does not by any means imply that, in a case such as this, a pursuer cannot succeed unless he avers the precise nature of the fault committed by the defender which caused the accident. It would be quite unreasonable to place such a burden on a pursuer, who in many cases will have no knowledge, and no means of obtaining knowledge, of the defenders' fault. As a general rule it would, in my opinion, be relevant for a pursuer to make averments to the effect that his property has been damaged by a flood caused by an event on the defenders' land, such as the collapse of a sewer which it was the defenders' duty to maintain, that properly maintained sewers do not collapse, and that the collapse is evidence that the defender had failed in his duty to maintain the sewer. The onus will then be on the defender to explain the event in such way consistent with the absence of fault on his part. As a general rule the defences available will be limited to proving that the event was caused either by the action of a third party for whom he was not responsible… or by a *damnum fatale*".

[7] The sheriff took from this *dictum* that the pursuers did not have to prove precisely how the oil leaked. She went on to say the following at pages 170-172 of the Appeal Print:

> "What the pursuers do have to prove is fault. They have proved by expert evidence that properly maintained oil tanks and associated pipework do not leak and also that there is no defect with the tank or pipework in this case. The defenders had a duty to properly maintain the tank. The leakage of oil from the tank onto the pursuers' premises is evidence that the defenders had failed in their duty to properly manage and maintain the tank. Additionally, they have proved that the defenders had an oil tank on their property which held a substantial amount of oil and that the defender took possession of an oil drum containing approximately 10-12 litres of oil shortly before the smell of oil first became apparent on the pursuers' premises. They have also proved that the oil contamination in this case emanated from the oil tank on the defenders' premises…
>
> The evidence that I do accept puts the defenders in possession of an oil tank on their property containing a significant amount of oil over a period of three years. The fact that the tank has also been altered from slightly sloping to horizontal and the brickwork disturbed has also been proved. The evidence also puts Mr O'Hare in possession of an oil drum containing around 10-12 litres of oil shortly before the smell was first detected. Thereafter Mr O'Hare and his son obtained some oil from the tank but there was no independent evidence before the court of the mechanism

> by which that was obtained. The brickwork around the tank has at some stage been disturbed.
>
> On a balance of probabilities I am satisfied that the leak occurred due to a spill of the contents of the oil drum returned from Mr Gillies and additionally a spill from the oil tank itself when the shed was being demolished and when Mr O'Hare and his son interfered with the tank. The defenders ought to have taken greater care in their actings with regard to the tank and the container of oil. They did not manage or maintain the tank properly and their failure to do so resulted in the nuisance complained of. I am satisfied that fault on the part of the defenders has been proved."

At this stage, we acknowledge that the sheriff's reasoning is not entirely immune from criticism, in that her statement that "properly maintained oil tanks…do not leak" is of dubious relevance given finding in fact 15, that this oil tank was in good condition. Nonetheless, she clearly proceeded upon the basis that the pursuers required to prove *culpa* on the part of the defenders and concluded that they had succeeded in doing so.

The Law/Submissions

[8] It is not in dispute that, on the authority of *RHM Bakeries*, the pursuers required to establish *culpa* on the part of the defenders, nor that in establishing what is meant by *culpa* in this context one should have regard to the guidance given by Lord Hope in *Kennedy* v *Glenbelle* 1996 SC 95 at 100. Rather, the issue between the parties is whether the sheriff misapplied Lord Fraser's *dictum*. Counsel for the pursuers submitted that the sheriff had misdirected herself and had displayed muddled thinking. He drew our attention to the fact that the appeal in *RHM Bakeries* followed a debate at procedure roll where what was in issue was the relevancy of the pursuers' averments, and what had to be pled in an action of nuisance; whereas what the present case concerned was what had to be proved in order to establish fault. Further, counsel submitted that an essential point of distinction between *RHM Bakeries* and the present case was that in the former it was known that the flood in the

bakery was due to a particular cause, namely the collapse of a sewer. In that context it was sufficient to plead that the flood was due to the collapse which would not have happened had the sewer been properly maintained. The circumstances of the present case were very different in that all that was known was that the pursuers' land had been contaminated, admittedly by the defenders' oil, but that could have been due to a number of possibilities, some of which would be down to the defenders' fault and others not. Accordingly, the sheriff had erred when she stated that the leakage of oil from the tank onto the pursuers' premises was evidence that the defenders had failed in their duty to properly manage and maintain the tank. If that were correct there would be no need for the pursuers to prove fault but that was plainly wrong and the equivalent of holding that liability arose *ex dominio*, which clearly it did not. Counsel further referred to *Rhesa Shipping Co SA* v *Edmunds* 1985 1WLR (HL) 948, an insurance case where the fact at issue was what caused a ship to sink, as authority for the proposition that in some cases a court will be constrained to hold that it simply cannot determine the cause of a particular event, the present case being one such example.

[9] In response, counsel for the pursuers submitted that *RHM Bakeries* must be viewed against the background that in that case it had been asserted that liability was absolute, there having been *dicta* to that effect in the older cases. The old view was that liability was a product of ownership but *RHM Bakeries* decided that it was necessary to show that there was *culpa*. However, it was clear from *RHM Bakeries* that liability could arise from the failure to manage or maintain a potential hazard. It was important to observe from Lord Fraser's speech that, immediately after the *dictum* quoted above, he went on to observe:

> "I do not believe that there is much difference in the practical result between the law as laid down in *Rylands v Fletcher* [1868] LR VHL 330 and the law as laid down according to my understanding of *Kerr v The Earl of Orkney* 1857 20D 298. On that

> matter I accept the majority view expressed in the Thirteenth Report of the Law Reform Committee for Scotland (1964) (Cmd.2348), paragraph 22 where they say this:
>
> > 'We agree that the theory of the common law is at present doubtful, but we are impressed by the argument that it seems to make little, if any, difference in the result whether one adopts what may be called the "absolute liability" theory or adheres rigidly to the principle.'"

[10] The present case was a perfect illustration of Lord Fraser's *dictum*. The oil on the pursuers' land had clearly come from the defenders' tank. The defenders were in control of the tank, which was known not to leak. That was sufficient to raise an inference or presumption of *culpa*. To require the pursuers to prove the specific mechanism of how the tank had leaked, or spilled, would be a denial of justice. The sheriff had accepted, as she was entitled to do, that properly managed tanks do not emit substantial quantities of oil such as to cause the consequences seen here. It was a legitimate inference that there must have been some human intervention. There was no relevant distinction between the collapse of the sewer in the *RHM Bakeries* case and the facts of the present case, given that the oil which contaminated the pursuers' subjects was known to be the defenders' oil. The escape of oil must have been the result of some human agency which was sufficient to take the pursuers over the threshold of the Lord Fraser *dictum*. It was sufficient for the pursuers to prove that their property had been damaged by contamination caused by an event on the defenders' land, namely the escape of oil from an oil tank which it was the defenders' duty to manage and maintain or to control. That then shifted the onus on to the defenders to explain the escape consistent with absence of fault which, per Lord Fraser, must either be third party intervention or *damnum fatale*.

[11] *Rhesa Shipping Co SA* v *Edmunds* was not in point. In the first place, in that case Bingham J had accepted, as the cause of the ship sinking, an event which he himself had described as highly improbable. Secondly, nothing in that case detracted from the general

principle that in a circumstantial case there was nothing to prevent the court from looking at the evidence as a whole and deciding what inferences to draw.

[12] In a brief reply to these submissions counsel for the appellant submitted that *Rylands* v *Fletcher* and *Kerr* v *Earl of Orkney* should be treated with caution since as Lord Hope had recognised in *Kennedy* (at page 98G) there may well be exceptions to the general rule in relation to inference with the course of a natural water stream. While the appellants accepted that the pursuers did not require to prove the precise fault, they nonetheless had to lead evidence from which fault can be inferred and they had not done so.

Discussion

[13] There is no dispute between the parties that, in order to succeed in a claim based on nuisance, the pursuers must aver and prove *culpa* on the part of the defenders. It is also common ground that the law is accurately set out in the *dictum* of Lord Fraser in *RHM Bakeries* v *Strathclyde Regional Council* at page 45. In *Kennedy* v *Glenbelle*, the Inner House provided further guidance as to the meaning of *culpa*, the clearest exposition of that being in the *dictum* of Lord Hope at page 100E to 101A.

[14] In our view, *RHM Bakeries* and *Kennedy* must be read together in that one must understand what is meant by *culpa* in order to form a view as to what precisely must be averred (and, by definition, proved) for the onus to shift to the defenders to explain the event in some way consistent with the absence of fault. *Kennedy* tells us that *culpa* may be established either by demonstrating negligence, or by demonstrating that the defender was at fault in some other respect, which might be a malicious or reckless act. The requirement was succinctly summarised by Lord President Hope as "a deliberate act or negligence *or some other conduct from which* culpa *may be inferred*" (page 101) (emphasis added).

[15] Reading that with Lord Fraser's *dictum*, therefore, what the court is seeking to do in a case such as the present is to establish whether the pursuer has proved sufficient facts to give rise to an inference of *culpa* on the part of the defenders which it is then for the defenders to negate, if they can, by establishing an explanation consistent with the absence of *culpa* on their part. It was accepted by counsel for the pursuers that proof of some event on the defenders' land, resulting in the contamination of the pursuers' land, is required, but counsel submitted that, provided that is done and the event relates to something, in this case a tank, which the defenders have a duty to manage and maintain, that was sufficient.

[16] The difference between the parties comes down to the degree of precision to which a pursuer must go in establishing what it was that happened so as to cause the nuisance. It is true that the pursuers in this case have not been able to show the precise event which led to the escape of oil whereas in *RHM Bakeries* the pursuers were able to aver that it was the collapse of a sewer which had caused, in that case, flooding. However, that is a distinction without any real substance. We do not read Lord Fraser as laying down that in every action of damages based on nuisance, it is incumbent on a pursuer to aver and prove the precise cause of the event on his land which caused the nuisance. What matters is not whether the pursuers can aver and prove the precise event which occurred, but whether they can aver and prove facts which may properly lead to an inference of *culpa* on the part of the defenders. All Lord Fraser was doing, against a background of a complete absence of averments of *culpa* in that case, was setting out the sort of averments which would suffice to make a relevant case by raising an inference of *culpa.* It so happened that in *RHM Bakeries* the pursuers were able to aver that the cause of the nuisance was a collapsed sewer. Had they not been able to do that, it is likely that in that case there would have been no sufficient causal link between the damage they had suffered and the defenders' land since without

being able to identify why the flooding had occurred it would have been impossible to show any causal link with the defenders' property. Here that particular problem does not arise, as it is accepted by the defenders that the oil which contaminated the pursuers' land emanated from their tank. As soon as that is established and as soon as it is established that the tank is under the defenders' control, and that it was, as the sheriff found, in good condition then, given that oil does not escape such a tank of its own accord, an inference may be drawn that the oil escaped due to some human intervention on the part of the defenders from which *culpa* may, in turn, be inferred. As the pursuers have averred, it was the defenders' duty to take reasonable care to manage the tank, which is broad enough to subsume a duty not to interfere with it in such a way as to allow oil to escape from it. So, the pursuers have pled a relevant case; and the question for us now is whether they have proved sufficient for the inference legitimately to be drawn that some human intervention on the part of the defenders in their management of the tank was probably the cause of the escape of oil (it having been proved in evidence that the tank was in good condition and therefore properly maintained).

[17] The collapse of the sewer in *RHM Bakeries* can be equiparated with the human intervention which led to the escape of oil from the tank in the present case since in both cases there was an event on the defenders' land which resulted in damage to the pursuers' land. In the one case, it was the collapse of the sewer; in the other, it was the human intervention which led to the escape. In *RHM Bakeries*, there was, in Lord Fraser's opinion, no requirement for the pursuers to aver precisely what was the fault which led to the sewer collapsing. In the present case, in our view, there was no requirement on the pursuers to aver, and therefore no requirement on them to prove, the precise intervention which led to the escape of the oil.

[18] We are fortified in our view that this is the correct approach by the fact that it is equally unreasonable to expect the pursuers to know precisely what was the human intervention which caused the oil to leave the tank in this case, as it was to expect the pursuers to know in *RHM Bakeries* precisely how the sewer had collapsed. However, in each case since properly maintained sewers do not collapse, and properly managed tanks do not lose substantial quantities of oil into the ground, an inference of fault can be drawn. It is equally reasonable in this case, as in the *RHM Bakeries* case, to expect the defenders, as the persons responsible for the tank, to explain what happened in a manner consistent with absence of fault on their part, noting that the only relevant defences would be either the intervention of a third party for whom the defenders are not responsible, or *damnum fatale*, neither of which is an issue here. This result is, in our view, entirely consistent with what Lord Fraser said, with approval, in *RHM Bakeries* about the same practical results arrived at in Scots law through the requirement of *culpa*, and in English law through the application of *Rylands* v *Fletcher*, imposing strict liability. To impose liability on the defenders in the present case does not in fact impose strict liability upon them, since it was open to them to avoid liability by showing either *damnum fatale* or third party intervention. That they were unable to (or did not) do so may result in an outcome which resembles strict liability but neither Lord Fraser nor the Law Reform Committee for Scotland saw any harm in such an outcome. Before leaving *RHM Bakeries* we would observe, finally, that the statements of principle and of the approach to be adopted are none the less valid for being made in the context of an appeal which arose from a Procedure Roll debate rather than a proof.

[19] Accordingly, reverting to the sheriff's reasoning as we have set it out at paragraph 7 above, she correctly proceeded on the basis that *culpa* had to be established. Arguably, her statement that leakage of oil was evidence of *culpa* is not entirely correct, but that may just

be a shorthand way of saying that evidence of leakage may be one adminicle of evidence which points towards *culpa*, and we take no real issue with that sentence provided that it is clearly understood that there must also be other facts and circumstances pointing towards *culpa* before liability can be established. The sheriff was also correct to proceed on the basis that *culpa* might be proved despite the pursuers being unable to prove the precise event which led to the leak, provided it could be inferred that the cause must have been human intervention of some sort on the part of the defenders. It is clear from reading the remaining parts of the sheriff's reasoning that she did in fact look at the whole evidence, and that she did in fact draw the inference that there had been human intervention by the defenders from which *culpa* could be inferred. Accordingly, we reach the view that although her reasoning could perhaps have been expressed more tightly, there was no substantive error in the sheriff's approach to the law. The remaining issue in the present appeal is whether the evidence did enable the inferences of human intervention and *culpa* legitimately to be drawn. This leads us to consider the sheriff's approach to the evidence.

The Sheriff's Approach to the Evidence

[20] Although not quite formulated in this way in the grounds of appeal, three distinct questions as to the sheriff's approach to the evidence emerged at the appeal. First, was she entitled to make the findings in fact (or at least, certain of the findings in fact) that she did; second, was she entitled to infer *culpa* from the findings in fact, and make findings in fact and law 2 and 3; and third, did she give sufficient reasons for rejecting certain passages of evidence? To some extent, these issues overlap. Before looking at the material evidence, it is worth repeating what was common ground between the parties: the defenders moved into their house at no 34 in the summer of 2003, at which time their house had oil central heating,

the oil coming from a tank in the garden, adjacent to a shed. They soon decided to change to gas central heating, the necessary work being done by a company called CHAS. The oil tank was not in fact removed, and some oil remained in the tank until 2006. It was that oil which (somehow) escaped, causing the contamination of the pursuer's property in the summer of 2006. It was also accepted by the first defender that in the summer of 2006 he demolished the shed. Against that agreed background, the main factual issues for the sheriff to resolve were as follows: whether the defenders had instructed the decommissioning of the tank in 2003; whether Mr Gillies, at no 32, had borrowed kerosene or preservative, and when it was returned (and how much was returned); whether the defenders knew that the tank still contained a large quantity of oil and whether the oil in the drum came from the tank; and whether there was a defect with the tank or the pipework which could have caused a leak. Having resolved those issues, the remaining question for the sheriff was whether *culpa* could be inferred.

[21] Before turning to consider those issues, it is worth reminding ourselves of the limited circumstances in which an appellate court is entitled to reverse the findings of fact of a court at first instance. The leading authority on this issue is now *Henderson* v *Foxworth Investments Ltd* 2104 SC (UKSC) 203 which makes clear that the appellate court should take such a step only where it is satisfied that the judge at first instance is plainly wrong, guidance on what is meant by "plainly wrong" being given by Lord Reed at paragraphs 62 and 67. Counsel for the Appellants accepted that this was a significant hurdle for him to overcome.

The Decommissioning of the Oil Tank

The Evidence

[22] The second defender said in her evidence-in-chief that CHAS had been employed, among other things, to decommission the old boiler and oil tank (page 258). She had been present in the house when the installation of the new boiler took place (page 259). In cross-examination (page 279) she accepted that she had not been aware of the CHAS workmen doing anything to the tank or removing oil from the tank. On the same issue, the first defender was asked, at page 538, "what was it that CHAS were contracted to do?", in response to which he said: "They took out the oil boiler, took away the old oil tank; they took all that away, put in a gas boiler in the house and things and various pipes for the radiators had to be changed." At page 545, the first defender gave evidence that on the day of the work, the foreman told him "that is your tank. That has been emptied". Later on that page, he confirmed that the tank had not been taken away but the explanation that he proffered was that the foreman couldn't get it in his van and had said that he would come back for it at a later date. In cross-examination the first defender accepted (at page 596) that CHAS had not taken the tank away and that he had not chased them up for some time. He did not do so even when he had to contact them about an internal problem relating to the work which they had carried out (page 597). He had not paid any attention, on the day of the work, to what had been done to the tank. He was unaware of any big pipe running from the house to the tank and confirmed that there had not been a tank in the house. At the foot of page 598 he was asked whether he had some cause for concern about CHAS when they did not come back for the tank, his reply to which was "It certainly did, yes. I had later cause for concern when Mr and Mrs McAllister's house was getting extended when it was getting rebuilt, and I had to engage another plumber, and they came in and said 'Your last plumber

put that in the wrong place' – that was CHAS – because he had put the flue facing Mr and Mrs McAllister's drive which was not really our property, so it should never have been still there in the first place, so it cost me yet another £800 to get it removed. If you find an address for them I would be very pleased to hear it".

Discussion

[23] On the printed page, the first defender does not appear to have given a direct answer to the question asked of him as to what CHAS were contracted to do, since he instead narrated what they did. However, contrary to what the first defender said, CHAS did not in fact take the old oil tank away, a fact which on any view was known to the first defender by the time of the proof. The first defender's evidence was therefore, on any view, curious. However, even construing his evidence as meaning that CHAS had been contracted to take the old oil tank away, his evidence on that particular matter was somewhat vague and he was unable to provide any documentation, the only documentation which was referred to being a finance agreement with Blackhorse. The second defender's evidence too was somewhat vague, and also unvouched. There was abundant other undisputed evidence in the case that the tank was not in fact decommissioned, in the sense of being emptied of oil and self-evidently it had not been taken away. When being pressed on the matter in cross-examination, the first defender gave evidence which might be seen as trying to deflect attention onto a different and totally unrelated issue, namely the positioning of the flue. The defenders on their own admission had not chased CHAS in relation to the tank although on their evidence, that was a service which they had paid for. Notwithstanding that the first defender was not cross-examined in relation to his evidence about the statement allegedly made by the foreman, the sheriff was entitled to draw an inference that the best indication of

what had been instructed was what had in fact been done and therefore to find that the defenders did not instruct CHAS to decommission the tank. In reaching that conclusion she was also entitled to disbelieve the defenders' evidence to the extent that their evidence was that they had instructed the decommissioning of the tank. As we have pointed out the evidence of the first defender, even just read from the printed page, is less than satisfactory, and the sheriff's rejection of his evidence cannot be viewed as surprising.

The Substance Borrowed by Mr Gillies (the "Oil Drum Incident")

The Evidence

[24] We turn next to consider the passage of evidence relating to Mr Gillies borrowing a substance from the first defender in 2005 (since it also has a bearing on the state of, at least, the first defender's knowledge regarding the oil in the tank). Mr Gillies' evidence on this issue was, first, that he had borrowed oil from the first defender in the summer of 2005, in a 20 or 25 litre drum which was about half full which the first defender handed to him one day at the garden wall (page 318). He used a small amount in which to steep decking posts and then forgot about the oil until 2006 when he returned it to the first defender. Mr Gillies' evidence as to precisely when he returned it fluctuated from time to time at different passages of his evidence, perhaps not surprisingly given, as he pointed out, he was speaking to events from 10 years previously. He first said (at page 321) that he returned it in "June, maybe late June" 2006 and he was reasonably sure about that because it was about three weeks later that he heard about "the situation with the properties at 36 and 38". By "situation", he said that he meant "the oil contamination" which he further clarified as being the oil leak which had affected the two properties at 36 and 38. He then said at page 322 that he had smelled oil in his garden round about that time about a week or two before Mr

McAllister had mentioned to his wife about what had happened. This strong smell of oil in his garden was the smell of the oil that he had used, and that smell occurred "maybe a couple of weeks" after he had returned the oil drum. He went on to say "I remember standing there with my wife kinda smelling it, and I just assumed it had come from the drum of oil, I thought maybe it had just been poured out or something". He then reiterated that he had heard about the situation in numbers 36 and 38 probably a week or two after that. The smell had only lasted a day, maybe 24 hours or so. In cross-examination, Mr Gillies, after saying he was vague about the timelines, accepted that he couldn't be sure when he returned the container but in re-examination said that he was sure that he had returned the container in or about June or July.

[25] By contrast, the first defender's evidence was that he had given Mr Gillies wood preservative. There was only one big container of the type spoken to by Mr Gillies and that was under the tank, and unavailable until the shed came down in 2006 (p 580). Only a small tub of preservative had been handed over, and it was returned, empty, immediately (p 581). Mr Gillies was therefore, according to the first defender, mistaken on two counts. He was mistaken as to what was borrowed, and as to when he returned whatever it was that he had borrowed.

Discussion

[26] There were therefore two diametrically opposed versions from Mr Gillies and the first defender, giving rise to a discrepancy which it was for the sheriff to resolve. She did that by preferring the version given by Mr Gillies. Her reasoning appears at page 162 of the Appeal Print and is admittedly on the skeletal side. She found the first defender's suggestion that Mr Gillies had made up his evidence on account of a later dispute to be

"ludicrous" and said that she much preferred the evidence of Mr Gillies, without otherwise stating why. We will come back to the adequacy of the sheriff's reasoning below, but it cannot be said that she was not entitled to prefer Mr Gillies' evidence to that of the first defender. Whether or not the defender's suggestion that Mr Gillies was lying on account of a later dispute was ludicrous, it could certainly be regarded as unlikely; as, for that matter, might the first defender's suggestion that Mr Gillies would have returned an empty tub. The sheriff was therefore entitled to make finding in fact 11 (which the defenders do not dispute).

[27] Counsel for the appellants submitted that there were two further problems with Mr Gillies' evidence (apart from the vagueness of the dates). First, it did not tie in with the evidence given by the pursuers. The smell was first noticed in the house (but not the garden) in July 2006. The fact of contamination from the oil was not known until 3 September 2006. That being so it simply made no sense for Mr Gillies to have smelt oil in his garden in June or early July 2006. The second problem was that even accepting Mr Gillies' evidence, only 10-12 litres of oil had been returned to the defenders, which was extremely unlikely to have been a sufficient quantity to have caused the contamination.

[28] For our part, we do not see anything inherently inconsistent in this passage of the evidence. Given that Mr Gillies' property is on the other side of the defenders' property from Mr and Mrs McAllister, it is not at all inconceivable or implausible that he should have smelt oil, if it had been spilled, before the smell was apparent to the pursuers, given that the oil is known to have migrated in their direction, not in Mr Gillies' direction. In any event, finding in fact 13 is simply a finding that in or around two weeks after the container was returned to the first defender by Mr Gillies a smell was detected at the pursuers' properties and given that the sheriff found Mr Gillies credible and reliable as she was entitled to do and

given the evidence to which we have referred that is a finding in fact which plainly she was entitled to make. As to when that happened, one has again to go to finding in fact 11 (which is not challenged) where the sheriff finds that the container was returned in or around the late summer of 2006. Again, on the evidence, that is a finding which she was entitled to make. As for whether the oil was sufficient to have caused the damage, the sheriff did not in fact find that it was the sole cause of the damage, simply a contributing factor. It may also be that the main significance of this incident is that it gives rise to an inference that the first defender had taken oil from the tank.

Whether the Defenders Knew That There Was a Large Quantity of Oil in the Tank and Whether the Contents of the Container Given to Mr Gillies Came From the Tank

The Evidence

[29] These two issues can usefully be taken together. There was no direct evidence on either point. As regards the quantity of oil in the tank when the defenders moved in to their property in 2003, the second defender said that it would then be about a third full (p 112), with less in the tank by September (p 117). We know from Mr Pointon's report that the tank had a capacity of 1300 litres, which puts in the region of 400 litres in the tank at September 2003, on the second defender's evidence. The first defender's evidence was that he believed there was about 200 litres in the tank when they moved in, although he accepted that could be wrong (p 541). There was also evidence from Mr Pointon that at some stage between 2000 (when an earlier photograph of the tank was taken) and 2006, the position of the tank had changed from being slightly sloping towards the valve end, to being horizontal (pp 392-3). Mr Pointon also concluded that there had been a significant leak from the tank, not merely a residual spill (p 403). He went on to give evidence that the fact that the first

defender and his son had been able to get a litre or two of oil out of the tank, by tipping it, in September 2006 signified that there was a greater quantity of oil in the tank at that time; and yet that oil had gone by the spring of 2007 when he carried out an inspection of the tank, despite the defender having said that nothing had been done to the tank in the meantime. He also observed that the condition of the brick work on which the tank rested suggested to him that it had been taken down in order to assist with emptying the tank, which must then have been put back into a horizontal position (pp 440-1). He also gave evidence that the spill was likely to have been recent (and the sheriff's finding in fact 8 to that effect was not challenged by the defenders).

Discussion

[30] Counsel for the appellants, on several occasions, submitted that various facts did not give rise to an inevitable inference; but that is not the test. Whether or not to draw an inference, which must be logical and based on reason, is essentially a matter for the fact-finder at first instance. The question for us is whether the sheriff was entitled to draw the inferences that she drew. The evidence which the sheriff accepted showed that the defenders knew that the tank contained a significant quantity of oil at September 2003; that they did not instruct the tank to be emptied; that the level of the tank had been interfered with; that the first defender and his son tipped the tank up in September 2006 to try to empty it of oil; that someone thereafter completely emptied the tank of oil; and that the first defender gave his neighbour a drum containing up to 25 litres of oil in the summer of 2005. Those facts are eminently capable of giving rise to both the inferences under discussion. They may not be inevitable inferences; but the evidence strongly suggests that they should be drawn, in the absence of any competing explanation. The defenders were the persons in

control of the tank. The first defender admittedly tipped the tank in September 2006 and, inferentially, at some point thereafter. The change in the angle of the tank suggests that it had previously been tipped, as did the evidence which the sheriff accepted about the oil drum incident. We agree with counsel for the defenders that it *could* have been tipped by CHAS but considering that the sheriff has found in fact that they did not decommission, ie empty, the tank, that is unlikely and it is considerably more likely that the tank had been interfered with by the first defender. Those facts, coupled with the fact that the oil in the drum was the same as the oil in the tank all point, very strongly, to the conclusion that the first defender, at least, knew that there was still a significant quantity of oil in the tank. We therefore find that the sheriff was entitled to make findings in fact 10 and 12. (Whether the quantity was "large" or not is perhaps a moot point, although given the widely ranging estimates in evidence as to the quantity of oil which would have been required to cause the contamination, we do not consider that anything ultimately turns on that particular issue, and in any event the evidence justifies the use of the adjective "large").

Whether There Was a Defect With the Pipework Which Could Have Resulted in a Leak

The Evidence

[31] This issue was not explored in depth at the proof. However, evidence was given by Mr Pointon at page 403, where he said that he did not think that the incident was from an incompletely drained pipe (between the house and the tank) because that would have contained something like a litre of oil, maybe two and at page 404 he said: "I do not think that a litre or two litres of kerosene poured into the ground would have generated this issue so I would take that out of the equation".

Discussion

[32] Accordingly, there was evidence before the sheriff which entitled her to hold that there was no defect with the pipework which could have resulted in a leak, at least if that finding carries with it the implication that what is being talked about is a leak sufficient to cause or materially contribute to the contamination. The sheriff was therefore entitled to make finding in fact 15.

Was the Sheriff Entitled to Infer *Culpa?*

Discussion

[33] We go back to the point that the critical question is whether the facts proved are such as to give rise to an inference of human intervention on the part of the defenders from which *culpa* can legitimately be inferred. For the reasons we have given, the sheriff was entitled to make the findings in fact which she made. It can safely be concluded that oil which is within a tank cannot escape from that tank unless either the tank (or associated pipework) leaks, or it is allowed to escape through some form of human intervention, such as being deliberately emptied out of the tank, or being spilled while some operation with the tank is ongoing. In the present case, the former explanation was ruled out by the evidence and by finding in fact 15. The first defender is known to have interfered with the tank previously and (from findings in fact 11, 12 and 17) it can be inferred that he had previously emptied oil from the tank, at the very least into the drum which he loaned to Mr Gillies. He was also known to have been demolishing his garden shed around the time that the contamination first became noticeable. The escape of oil is also known to have occurred shortly before the contamination became noticeable. From these facts, in our view an inference can be drawn not only that the oil escaped through some form of human intervention in the summer of

2006, but also that it was intervention by the defenders. Furthermore the defenders as the persons with control of the tank, and the first defender in particular as the person who was doing work in the vicinity of the tank, ought to have been able to provide an explanation as to how the oil came to escape. No explanation of any sort having been forthcoming, the sheriff was entitled to hold that *culpa* had been proved. Counsel for the appellant submitted that there was not a shred of evidence to support any finding that the demolition of the shed (which occurred in the summer of 2006) had any causal significance in relation to the spill from the tank. The only evidence on that matter was given by Mr Barlow, who had described it as very unlikely. That is true, but the real significance of the work on the shed is not so much whether it is likely to have caused the spill but that the first defender, who was working in the very close vicinity of a tank, on his land, which contained oil, undertaking an unusual activity, ought to be in a position to explain why the oil escaped at or around that time. Absent the defenders' providing an alternative explanation, there is nothing to disturb the inference which, as we have said, could legitimately be drawn that the defenders must have intervened.

[34] Insofar as *Rhesa Shipping Co SA* v *Edmunds* is concerned, we can dispose of it briefly. The main problem with the decision of the judge at first instance in that case was that by applying the reasoning of Sherlock Holmes and eliminating the impossible, he found that the cause of the sinking of the ship which was the subject of that case was an event which he had already found to be highly improbable. Although a decision by an eminent judge, the illogicality of such an outcome need hardly be pointed out. That case is not in point with the present, where there is ample positive evidence, to which we have referred, justifying the

conclusion on a balance of probabilities that the cause of the escape *was* human intervention of some sort.

[35] We must finally say something about the sheriff's reasoning, albeit this was not a ground of appeal but was raised at the appeal hearing by counsel for the defenders. The main criticism was that she rejected virtually wholesale the first defender's evidence without giving adequate reasons therefor. Counsel also complained that in relation to a number of points, the defenders had not been cross-examined, the suggestion being that, in relation to those matters, at least, the sheriff ought to have accepted the unchallenged evidence as both credible and reliable. Dealing with that latter proposition first, in our view that is not an accurate statement of the law. We accept that there may be some situations where a party's case is plainly conducted on the footing that the other party's witnesses are both credible and reliable, where it is not open to that party to argue otherwise. However, such cases must be seen as exceptional and in the normal case, assessment of credibility and reliability is a matter left to the assessment of the sheriff, or jury, as the case may be, irrespective of whether the witness has been challenged on every point with which the other party takes issue. (On this point generally, see *Macphail, Sheriff Court Practice (3rd Edition)* para. 16.76 and the cases therein cited). In any event, reading the cross-examination of the first defender as a whole, it is evident that he was not accepted as credible and reliable by the pursuers, in matters as crucial as the decommissioning of the tank and whether or not the tank had previously been interfered with, to give but two examples. Accordingly, the sheriff was entitled to reject the whole of the first defender's evidence, if she found all of it to be incredible or unreliable.

[36] However, we do recognise that if adopting that course, it was incumbent upon her to give her reasons therefor and it is true that the sheriff's reasoning is not as full or as detailed

as one might have wished. However, she does give some reasons for her rejection of most of the first defender's evidence. In her assessment of his evidence, which begins at page 161 of the Appeal Print, she begins by recording that he did not impress her as a witness. It is unclear whether that comment was derived from her observation of him in the witness box or from the content of the evidence which he gave. She states that she did not accept the description of him by his wife and son as a cautious man who weighed up his actions before embarking on any task as a description which was supported by the evidence. We interject at this point that what was firstly in issue was whether, *culpa* could be attributed to the defenders, and secondly whether the defenders were able to negate that inference by explanation consistent with the absence of culpa and evidence about their nature or character was either irrelevant, or related to a collateral issue. Accordingly we find it unhelpful to consider whether the sheriff was entitled to disregard the evidence about the first defender's nature. Be that as it may, the sheriff then goes on to describe the first defender's assertion that he instructed CHAS to take away the tank as not credible for a number of reasons. The first of these is that the sheriff found it to be a ridiculous proposition that the workmen told him that they had no room in their van to take the tank, although they had been commissioned to do so and simply didn't come back. The second reason is that the sheriff found it incredible, as the shed which was right against the tank was still in place and no arrangements were spoken to about how the tank could be removed either through the garden or through the house, in that context the defenders also said in evidence that family matters prevented them from chasing this up and they thought the tank was empty but never actually checked it which the sheriff found to be "a very surprising suggestion". A further reason for the sheriff's rejection of the first defender's

evidence, of course, was that she preferred that of Mr Gillies which directly contradicted the first defender's evidence in relation to the drum.

[37] In conclusion on this issue, while the sheriff could have given a fuller explanation for her views on credibility and reliability, she has given some explanation, and in any event we have in the course of our judgment made plain that there was ample material before her justifying both her rejection of the first defender's evidence, and the inferences which she drew, none of which can be viewed in any way as surprising or contrary to the evidence. We need say no more, given that there was no distinct ground of appeal directed to it.

[38] As regards the remainder of the sheriff's reasoning, it is at times imperfect. We have already referred to the contradiction between her findings in fact that properly maintained tanks do not leak; and that this tank did not leak, and so the reference to what properly maintained tanks do is not relevant. The essential feature of the present case is that properly managed tanks do not leak. The sheriff has however made clear that she recognises that the pursuers had to establish *culpa* and for the reasons we have given she was entitled to conclude that the defenders had not properly managed the tank, thus allowing oil to escape and cause the nuisance. The findings in fact can be brought into line with the pleadings, and the sheriff's own reasoning elsewhere by slightly amending finding in fact 16 by inserting the words "and managed" after the words "Properly maintained".

Decision

[39] Having regard to the evidence, and the sheriff's primary findings in fact, and applying *RHM Bakeries Limited* thereto, we consider that the pursuer did prove sufficient for the onus of proof to switch to the defenders to show that the spillage occurred in a manner consistent with their lack of *culpa*. This they failed to do. The sheriff accordingly was

entitled to find that *culpa* had been proved, and to make findings in fact and law 2 and 3. After making the slight amendment to finding in fact 16 referred to above, we shall otherwise adhere to the sheriff's interlocutor and refuse the appeal. There was some procedural confusion in the court below following the issuing of the sheriff's decision on liability, which resulted in a cross-appeal. We shall refuse that as unnecessary and send the case back to the sheriff for a proof on quantum.