

SC20424

G026 UK Workplace Smoking
Claims

General File 02

Box number	EEB-3-0813	
	Date	Initials
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IN THE COURT OF SESSION

NOTE OF ARGUMENTS

for the Defenders

at Procedure Roll

in the cause

MARGARET ANN PACETTA, residing at 104
Belvedere Crescent, Bishopbriggs, Glasgow

PURSUER

against

CLYDESDALE BANK PLC, having their Head Office
at 30 St. Vincent Street, Glasgow

DEFENDERS

1. The pursuer's averments in relation to time bar are inconsistent, irrelevant, or so lacking in specification as to fail to give the defenders fair notice of her position. The Summons was served upon the defenders on 9 August 1996. The pursuer claims to have been aware of an adverse effect upon her health caused by smoking at her workplace since commencement in the employment of the defenders in 1984. She alleges she made repeated complaints about the effect upon her health to the defenders from 1984. In the Closed Record dated 25 March 1998 the pursuer apparently accepted that any exposure to cigarette smoke for which the defenders could be liable ceased upon the introduction of a no-smoking policy at her place of work in 1992. If that was the case the action is *prima facie* time-barred. The defenders have taken a plea of time-bar. By amendment the pursuer introduced averments towards the end of article 2 of condescendence to the effect that the smoking ban was not in fact enforced. These averments are so far as the defenders can determine with a view to arguing that there was a continuing course of negligent conduct by the defenders culminating in 1996, and that the action is therefore not time-barred. The averments are

lacking in specification and fail to give fair notice of the nature and extent of any alleged exposure to cigarette smoke for the four year period between 1992 and 1996. It cannot be determined from the averments whether, taken *pro veritate* the pursuer can maintain that post 1992 exposure did amount to continuing course of conduct sufficient to avoid the operation of time-bar. In any event the pursuer seeks to invoke the provisions of "section 17(2)" [section 17(2)(b)(i)?] of the Prescription and Limitation (Scotland) Act 1973, as amended, in article 8 of condescendence. These averments are inconsistent with the earlier contention that there was a continuing course of conduct up to retirement in 1996. They are in any event inconsistent with the pursuer's earlier averments as to the extent of her health problems, and her longstanding knowledge as to their cause. They are insufficient to form basis for proof, the onus of proof being upon the pursuer to bring herself within the terms of the sub-section. The same point is taken in respect of the alternative invocation of the equitable discretion under section 19A. Reference will be made *inter alia* to : **Carson v. Howard Doris Ltd** 1981 SC278; **Munro v. Anderson-Grice Engineering Limited** 1983 SLT 295; **Craw v. Gallagher** 1987 SC230; **Webb v. BP Petroleum Development Ltd** 1988 SLT 775; **McArthur v. Strathclyde Regional Council** 1995 SLT 1129; **Wilson v. Telling (Northern) Ltd** 1996 SLT 380; **Cowan v. Toffolo Jackson & Co Ltd** 1998 SLT (Note) 1000; **Nimmo v. British Railways Board** 1999 SLT 778.

2. In her common law case the pursuer avers that the defenders could have discharged their duty to her by "issuing and enforcing instructions that the window and door to the pursuer's workplace be [sic] kept open, or providing and maintaining proper and efficient exhaust appliances to extract tobacco smoke from the air". (Similar averments provide the whole basis of the pursuer's statutory case in article 6 of condescendence). If this is the case then there is no apparent basis in the pursuer's pleadings for the *prima facie* more onerous

common law duties the pursuer goes on to claim were additionally incumbent upon the defenders. These more onerous duties should be withheld from probation as irrelevant. It is not apparent from the pursuer's record why she simply did not open her door and her window if this was all that was required to render her workplace safe.

3. In article 7 of condescendence the pursuer does not offer to prove that any of the symptoms or medical conditions averred were in fact caused by exposure to cigarette smoke, or what the mechanism of causal connection might be. In particular she does not offer to prove that her asthma was caused by such exposure. Material disability is claimed consequent upon asthma. There is a substantial dispute between the parties as to the cause, nature and extent of the pursuer's asthma. The pursuer's averments as to her medical condition generally appear less than frank of the defenders' Answer 7. The averments of loss are irrelevant in the absence of any offer to prove that they are causally connected with the alleged fault of the defenders. The defenders are in any event entitled as a matter of fair notice to know whether the pursuer's case is that she developed asthma because of occupational exposure to cigarette smoke, or whether, for example, such exposure merely temporarily exacerbated the symptoms of her condition.