OUTER HOUSE, COURT OF SESSION

[2019] CSOH 29

CA70/16

OPINION OF LORD DOHERTY

in the cause

MIDLOTHIAN COUNCIL

Pursuer

against

(FIRST) DAVID ANDERSON KEITH, SAMUEL ANTHONY SWEENEY, ALLAN D RENNIE, and STEPHEN BLENNERHASSETT as former partners of the now dissolved partnership of the FIRM OF BRACEWELL STIRLING ARCHITECTS; (SECOND) RAEBURN DRILLING AND GEOTECHNICAL LIMITED; (THIRD) RPS PLANNING AND DEVELOPMENT LTD; (FOURTH) BLYTH & BLYTH CONSULTING ENGINEERS LIMITED

Defenders

Pursuer: Thomson QC, Shepherd & Wedderburn LLP
Fourth Defender: Borland QC, A N McKenzie; BTO

20 March 2019

Introduction

[1] This commercial action arises out of a social housing development at Gorebridge which had to be demolished a few years after it was built. The development site was located above coal strata and former mine workings. The second and fourth defenders advised the pursuer in relation to site investigation and assessment. In reliance on the advice the pursuer built a development of sixty-four houses on the site. It had no ground gas defence system. The houses were occupied by tenants of the pursuer. Following complaints of gas

in some of the houses all of the houses were found to be uninhabitable because of the danger to health caused by gas ingress. The pursuer decanted the tenants. It demolished the houses. It proposes to re-build housing on the site, but with a ground gas defence system.

[2] The present action for damages was formerly against four defenders. The case against the first defender was dismissed on 11 August 2017. The third defender was assoilzied from the conclusions of the summons on 27 June 2018. The action is now directed only against the second and fourth defenders. The pursuer avers that they did not advise it that a ground gas defence system was required to prevent noxious gas seeping up from the coal strata and mine workings into the houses.

[3] The fourth defender maintains that any right the pursuer had to claim damagers from it has been extinguished by the operation of the short negative prescription. It also maintains that the pursuer's averments anent prescription are irrelevant. These issues were the subject of a debate at the fourth defender's insistence. The second defender did not participate in the debate. Counsel for the pursuer and counsel for the fourth defender lodged written notes of argument, which they adopted and supplemented with oral submissions. I provide an outline of each party's submissions below. The fourth defender denies liability and disputes many of the pursuer's averments, but for the purposes of the debate I require to take the pursuer's averments *pro veritate.*

The pursuer's pleadings

[4] The pursuer avers that it appointed the fourth defender in or around early 2004 to provide site investigation advice and services for several sites, and that in 2005 the development site was added to the list of sites covered by the contract. It avers that the second and fourth defenders failed to carry out adequate site investigations and failed

properly to interpret and act upon the results of such site investigations as were carried out. The pursuer further avers that appropriate site investigations and risk assessment would have revealed the risk of ingress from ground gas and would have led to the installation of a ground gas defence system within, or as part of, the foundations to be installed at the site; and that the fourth defender was negligent in failing to advise that such a system should be installed. It avers that had appropriate advice been given it would have accepted it and that a ground gas defence system would have been incorporated in the development. It further avers that, in reliance on the site investigation and assessment, it engaged contractors to construct the development, and its architects issued construction drawings which did not provide for a ground gas defence system; that the development was built between December 2007 and 26 June 2009; and that it incurred expenditure on its construction throughout that period, but that the scheme as designed and constructed did not include the specification or installation of any ground gas defence system. The houses were occupied by tenants without incident until 7 September 2013. On that date residents of one of the houses became ill. On investigation it soon became apparent that dangerous levels of toxic gas were present in the houses. The tenants and their families were all decanted. The pursuer avers (articles 31 and 42) that it was necessary to demolish the development in its entirety, and that that was the only feasible solution. The development was demolished between 6 May 2015 and 24 June 2016.

[5] The pursuer claims damages of £12,077,080 from the second and fourth defenders jointly and severally or severally (the first conclusion and article 42). It avers (article 42.11) that its losses arise from the need to demolish the houses. About two-thirds of the damages claimed represent the costs which it is averred will be incurred to contractors to rebuild the development with a ground gas defence system. Other substantial heads of the damages

claimed include demolition costs and the costs associated with decanting and rehousing tenants and their families. The pursuer does not seek to recover the costs incurred constructing the failed development.

[6] In response to the fourth defender's prescription plea the pursuer admits that it incurred considerable expenditure in relation to the construction of the development throughout the course of those construction works, and that it was aware of the expenditure at the time it was incurred. It avers (article 27):

> "... (i) that expenditure did not constitute loss for the purposes of prescription; (ii) [it] could not with reasonable diligence have been aware, until in or around 7th September 2013, that it had suffered any loss, injury or damage (its loss in fact being the completion of an inherently defective development in 2009); and (iii) accordingly, although loss had been occasioned on completion of the development in 2009, commencement of the prescriptive period was postponed until (no earlier than) 7th September 2013, in terms of s.11(3) of the Prescription and Limitation (Scotland) Act 1973. Knowledge of the expenditure in relation to the design and construction of the development was not knowledge of loss, for the purposes of the 1973 Act, since that expenditure was not loss for those purposes. As hereinafter condescended upon the defective nature of the Works was latent until in or around 7th September 2013 at the earliest...Proceedings against [the fourth defender] commenced on 4th September 2018, prior to the expiry of the quinquennium ..."

The fourth defender's pleadings

[7] The fourth defender avers (answer 27) that the pursuer incurred considerable expenditure in relation to the construction of the development throughout the course of the works, which were completed in June 2009; that it was aware of the expenditure being incurred; and that the expenditure constituted loss for the purposes of prescription. In answer 43 the fourth defender avers:

> "... On the denied hypothesis of the [pursuer's] averments, [the fourth defender] breached its duties to the [pursuer] in 2006, in that there was a failure to recommend the installation of a ground gas defence system, such as a gas membrane. In due course ... construction of the Development proceeded in reliance on the assessment of risk by [the fourth defender], and on the basis that no ground gas defence system needed to be installed. The [pursuer] paid for the construction of the Development.

It incurred considerable expenditure in relation to the construction of the Development throughout the course of the works. Those works were completed in June 2009. The Development was completed without any ground gas defence system (such as a gas membrane) being installed. On the [pursuer's] case, the Development was, in the absence of a gas membrane, inherently defective. The [pursuer] was - obviously - aware of the expenditure which it had incurred in connection with the construction of the Development up to and including 2009. That expenditure was, on the denied hypothesis upon which the [pursuer's] case proceeds, wasted or failed to achieve its purpose – in that it did not achieve the construction of habitable properties ..."

Prescription and Limitation (Scotland) Act 1973

[8] Sections 6 and 11 of the Prescription and Limitation (Scotland) Act 1973 provide:

"**6.— Extinction of obligations by prescriptive periods of five years**

(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—

(a) without any relevant claim having been made in relation to the obligation, and

(b) without the subsistence of the obligation having been relevantly acknowledged,

then as from the expiration of that period the obligation shall be extinguished: ...

...

11.— Obligations to make reparation

(1) Subject to subsections (2) and (3) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.

(2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased.

(3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor

> was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware.
>
> ..."

Counsel for the fourth defender's submissions

[9] Mr Borland moved the court to sustain the fourth defender's first and seventh pleas-in-law (to relevancy and prescription). He submitted that the breach of contract upon which the pursuer founds occurred in 2006. That was the date of *injuria*. *Damnum* had occurred when the pursuer had incurred expenditure constructing the development in reliance upon the fourth defender's advice (*Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287, per Lord Hodge JSC at paragraphs 18-24; *Kennedy* v *Royal Bank of Scotland PLC* 2018 SLT 1261, per Lord President Carloway at paragraphs 19-22). It made no difference that the pursuer's damages claim was based on the costs of demolition and rebuilding rather than recovering the construction costs which ultimately proved to be abortive. That did not alter the fact that the wasted expenditure had been a loss. That expenditure took place between December 2007 and June 2009. It had been of the order of £6 million. It was clear with hindsight that it had been wasted expenditure. Wasted expenditure was plainly a loss (see eg *David McBrayne Limited* v *ATOS IT Services (UK) Limited* [2018] CSOH 32, per Lord Doherty at paragraphs 112 and 113). When the expenditure was incurred the pursuer suffered loss. There had been the concurrence of *injuria* and *damnum* by, at the latest, June 2009. The pursuer had been aware of the expenditure at the time it was incurred. That was sufficient awareness of the occurrence of loss. It did not need to know that it had suffered some detriment or that something had gone awry. With hindsight, and as a matter

of objective fact, the expenditure was a loss. The pursuer's averments in article 27 to the effect that the obligation had not been extinguished were irrelevant. Any obligation upon the fourth defender to make reparation to the pursuer had been extinguished in June 2014, more than four years before the action against the fourth defender was raised on 4 September 2018.

Counsel for the pursuer's submissions

[10] Mr Thomson submitted that the pursuer's averments set out a relevant case that the obligation it seeks to enforce has not been extinguished by prescription. While he did not dispute the principle that wasted expenditure could be loss, injury or damage, the pursuer did not maintain that the expenditure which had been incurred to contractors had been wasted. Rather, it maintained that the pursuer's loss here had been that it had been left with a development which was uninhabitable because it had no ground gas defence system. There had been loss as a result of the fourth defender's breach but it had not occurred until June 2009 - when practical completion of the development had been achieved. However, the pursuer had not become aware of having suffered loss, and could not with reasonable diligence have become so aware, until 7 September 2013 at the earliest when the first complaint was made by a tenant.

[11] Read properly, *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* did not support the fourth defender's argument. In that case the court had found that the pursuers suffered loss on 10 November 2005 when they did not obtain vacant possession of a 40 acre field and a 50 acre field. Since they were aware then that they had not obtained vacant possession, the commencement of the prescriptive period was not postponed by virtue of the operation of section 11(3). Legal expenses incurred after that date seeking to assert a

right to vacant possession had been wasted expenditure, and a head of loss, but they were not what triggered the start of the quinquennium. Moreover, in *Dunlop* v *McGowans* 1980 SC (HL) 73 and in *Gordon's Trustees* the pursuers had incurred the legal expense of the defective notices to quit before the date when each pursuer ought to have obtained vacant possession; but in each case the date of *damnum* was that date and not the earlier date when expenditure by them on the notices had been incurred. If the fourth defender's argument was correct the conclusion in each case ought to have been that *damnum* occurred at the time of the earlier expenditure. The consequences of the argument being right would be far reaching. It would mean that in any contract for work or services where a creditor did not get what he bargained for, the payment (or part payment) of the price by the creditor would be *damnum*; and since the creditor would be aware of the expenditure when it was incurred he could not rely on section 11(3) to postpone the start of the prescriptive period. If the fourth defender's argument was correct it would effectively render section 11(3) redundant.

Decision and reasons

The law at present

[12] When section 5 of the Prescription (Scotland) Act 2018 is brought into force it will effect substantial amendment to section 11 of the 1973 Act. However, this case has to be decided on the basis of the current law.

The fourth defender's breach of contract

[13] The alleged failures by the fourth defender, which the pursuer maintains were a breach of contract, occurred in about 2006. I understand it to be common ground that that

was the date of *injuria*. The pursuer does not aver that there was a continuing breach after that date. It does not seek to rely upon section 11(2).

When did damnum occur?

[14] The pursuer's claim against the fourth defender is not one for physical damage to property. It is a claim for financial loss. In *Gordon's Trustees* Lord Hodge JSC observed:

> "19. ... In s.11(1) the phrase "loss, injury or damage"... is a reference to the existence of physical damage or financial loss as an objective fact...No question arises under subs.(1) as to the creditor's knowledge of that objective fact ...
>
> Thus if, as a result of a breach of contract, a person purchases defective goods, incurs expenditure or fails to regain possession of his property when he or she wished to do so, the s.11(1) clock starts when the person acquires the goods, when the expenditure is incurred or when the person fails to obtain vacant possession of the property."

I understand both parties to accept that, as a matter of objective fact, loss, injury or damage had occurred by June 2009. However they arrive at that conclusion by different routes. The rival contentions are (for the fourth defender) that there was *damnum* when the pursuer incurred expenditure constructing the development in reliance on the fourth defender's negligent advice; and (for the pursuer) that *damnum* did not occur until June 2009 when practical completion of the development was achieved. It seems to me that on a proper analysis both contentions proceed on the basis (a) that the pursuer funded and carried out the construction work in reliance on the fourth defender's advice; and (b) that, with hindsight, the construction expenditure was wasted and did not achieve its purpose.

[15] The pursuer characterises its loss as getting a development which was uninhabitable, which it says did not happen until practical completion. While it has opted to frame its damages claim in terms of the costs associated with demolishing and reconstructing the development, it accepts that loss was caused by the *injuria* long before the demolition. *Ex*

hypothesi of its pleadings, it ended up with an uninhabitable development; and since the development required to be demolished, in my opinion it may reasonably be inferred that the construction expenditure was wasted. It is difficult to see why that expenditure was not a loss until practical completion. The date of practical completion of a construction contract may often be significant where the contractor is obliged to perform an obligation (or obligations) by that date (see eg *Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Ltd* [2017] CSOH 57, per Lord Doherty at paragraphs 55, 64; *Agro Invest Overseas Ltd* v *Stewart Milne Group Ltd* [2018] CSOH 120, per Lord Clark at paragraphs 101-102). If the relevant obligation is not duly performed by then the contractor will be in breach, and the date of practical completion will be the date of *injuria*. If the breach causes immediate loss, injury or damage, there will be the concurrence of *injuria* and *damnum* at that time. The obligation to make reparation will become enforceable from that point unless the appropriate date is deemed to be a later date because of the operation of section 11(3).

[16] Here, the fourth defender was not the contractor under the construction contract for the development. Its contract with the pursuer was an earlier agreement relating to site investigation and assessment. The breach of the relevant obligations under that contract, the *injuria*, occurred in 2006, three years before practical completion. The development had a fundamental defect of which the pursuer was unaware at practical completion; but that defect was present in the design of the development, and its construction proceeded in accordance with that design.

[17] In my opinion the pursuer suffered loss, injury or damage before practical completion. As soon as the pursuer accepted the fourth defender's advice and acted upon it there was *damnum*. The pursuer (and the construction professionals and contractors it engaged) relied upon the advice in determining the development's design and in carrying

out its construction. The pursuer entered into contractual obligations, and it incurred expenditure, upon the basis of the advice. Unfortunately, the design and construction of the development were destined to fail from the start because they were based on the advice which the fourth defender had given. Even if, through the intervention of an extraneous factor, the problem had been discovered before construction began, in order to put matters right the site investigation and assessment would have had to be revisited and varied, as would the design of the development and the content and terms of the construction contract. Inevitably, that would have been productive of additional costs. In any case, in my opinion it is not appropriate to approach the matter on the basis that an extraneous factor might have intervened (*Jackson* v *Clydesdale Bank Plc*, 2003 SLT 273, per Lord Eassie at paragraph 28; *Kusz* v *Buchanan Burton* 2010 SCLR 27, per Lord President Hamilton at paragraph 20; *Heather Capital Ltd (In Liquidation)* v *Levy & McRae* 2017 SLT 376, per Lady Paton at paragraph 56). Rather, in my view the correct approach is to proceed on the basis that the development was fated to be defective because of the fourth defender's breach, and that the expenditure involved in constructing it would be wasted (as proved to be the case).

[18] In my opinion the expenditure which the pursuer incurred constructing the development between December 2007 and June 2009 was loss, injury or damage caused by the fourth defender's breach. The expenditure was wasted. It did not achieve its purpose. The whole development required to be, and was, demolished.

Section 11(3)

[19] The pursuer avers that it was not aware before 7 September 2013 (at the earliest) that it had suffered loss, injury or damage. It maintains that before then it had no actual or constructive knowledge of having suffered any loss, injury or damage.

[20] I agree that on the pursuer's averments it was unaware before that date that anything had gone wrong, or that it had suffered a detriment. However, I do not agree that it follows from that that it was not aware that it had suffered loss.

[21] In *Gordon's Trustees* Lord Hodge JSC reasoned:

> "[20] Section 11(3), which postpones the start of the prescriptive period, is concerned with the awareness of the creditor. But that which the creditor must actually or constructively be aware of before the prescriptive period begins is the same "loss, injury or damage" of which s.11(1) speaks, because subs.(3) uses the same language and also refers back to subs.(1) when it speaks of "loss, injury or damage caused as aforesaid". The phrase "loss, injury or damage" must have the same meaning in each of the subsections of s.11. There is therefore no scope for reading any additional meaning into those words in subs.(3).
>
> [21] It follows that s.11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure.
>
> [22] This approach is harsh on the creditor of the obligation, where the creditor has incurred expenditure which turns out to be wasted or fails to achieve its purpose, because the circumstances when the prescriptive period begins may not prompt an enquiry into the existence or likelihood of such loss. Thus a person may begin a legal action and incur expenditure on legal fees on the basis of negligent legal advice or he or she may purchase a house at an over value as a result of the negligent advice of a surveyor. In each case the person may be aware of the expenditure but not that it entails the loss. But it offers certainty, at least with the benefit of hindsight. The trustees' formulation by contrast would create uncertainty. If it were necessary in order for the prescriptive period to begin that the creditor be aware that something had gone awry and that he or she has suffered a detriment in the form of wasted expenditure, would an adverse judgment at first instance be sufficient to establish such an awareness of detriment if there were strong grounds for an appeal? The result might be prolonged uncertainty. Further, a requirement that there be an

> awareness of a head of loss would involve knowledge of the factual cause of the loss, which is an interpretation that this court has rejected in *Morrison* v *ICL*."

[22] Here, the pursuer did not know that it had not obtained what it had sought from the fourth defender (ie competent site investigation and assessment). However, it knew between December 2007 and June 2009 that it was incurring expenditure on construction of the development in reliance on the fourth defender's advice. It did not know at the time it was being incurred that the expenditure was wasted or would fail to achieve its purpose. Nevertheless, as a matter of objective fact, and with the benefit of hindsight, the expenditure was wasted and it did fail to achieve its purpose. As a matter of objective fact it was "loss, injury or damage".

[23] I do not accept that the interpretation of section 11(3) in *Gordon's Trustees* - which I have followed - renders section 11(3) redundant. The subsection undoubtedly has a narrower ambit than was thought to be the case before *David T Morrison & Co Ltd (t/a Gael Home Interiors)* v *ICL Plastics Ltd* 2014 SC (UKSC) 222 and *Gordon's Trustees* were decided. However it is not redundant. There are circumstances where it does postpone the commencement of the prescriptive period.

[24] In my opinion, for the foregoing reasons, it follows that the pursuer was aware of having suffered loss, injury or damage more than five years before the action was raised on 4 September 2018; and that, accordingly, the obligation of the fourth defender to make reparation has been extinguished by the short negative prescription. That is sufficient to decide the case. However, I think it is also appropriate to add some observations.

[25] First, in my view it is not necessary in this case to express views on scenarios different from the one before me. I think it preferable that guidance in relation to each such scenario is given in a case where it forms a necessary part of the court's decision, and where

the court has heard full submissions in relation to it. For present purposes I confine myself to the following remarks on a scenario which Mr Thomson prayed in aid, ie a construction contract between employer and contractor. Mr Thomson suggested that if knowledge of the incurring of expenditure could be awareness of loss for the purposes of section 11(3), then an employer who paid sums to a contractor as work proceeded would thereby have knowledge of loss, injury or damage if the expenditure ultimately turned out to be wasted because of the contractor's breach of contract. At first blush that scenario appears to be materially different from the present case. Here, the relevant expenditure was not payment for the fourth defender's advice. It was further expenditure incurred in reliance on the advice. In the posited scenario the expenditure was the consideration for the services being provided, not further expenditure incurred by the employer in reliance on advice given by the contractor. Besides, *injuria* must either precede or be contemporaneous with *damnum* (Johnston, *Prescription and Limitation (2nd ed)*, paragraph 4.21); and the *damnum* must be caused by the *injuria*. It is not clear that those requirements are satisfied in the posited scenario.

[26] Second, I am not persuaded that there is anything to be taken from the fact that in *Dunlop* v *McGowans* and *Gordon's Trustees* the date of *damnum* was the date when vacant possession ought to have been obtained, rather than the earlier dates when the pursuers incurred the legal expense of the defective notices to quit. In those cases no-one suggested that *damnum* occurred at the earlier date. The expenditure on the notices was the consideration for the solicitors' services, not further expenditure incurred in reliance on their advice. It seems doubtful that the *injuria* preceded or was contemporaneous with the expenditure, or that the expenditure was caused by the *injuria*.

Disposal

[27] Mr Borland asked me to sustain both his relevancy plea and his plea of prescription. The relevancy plea seeks dismissal and the prescription plea seeks absolvitor. Plainly, I cannot grant both dismissal and absolvitor. Having regard to that, and to the fact that the hearing was a debate on the pleadings, I think the appropriate course is to sustain both pleas but to grant decree of dismissal rather than decree of absolvitor. I shall reserve all questions of expenses.