OUTER HOUSE, COURT OF SESSION

[2019] CSOH 78

CA16/18

OPINION OF LORD DOHERTY

In the cause

LORETTO HOUSING ASSOCIATION LIMITED

Pursuer

against

(FIRST) CRUDEN BUILDING & RENEWALS LIMITED

(SECOND) CAMERON & ROSS LIMITED

Defenders

and

(FIRST) The former firm of COOPER CROMAR, having former partners TOM CROMAR; DAVID GORDON DOOL; and ALAN WATSON STARK

(SECOND) SHEILA BUNTON, formerly trading as JOHN ARNOTT ASSOCIATES

(THIRD) BRIAN MICHAEL BROWN

(FOURTH) JAMES SHAW

Third Parties

Pursuer: Thomson QC, Hamilton; Shepherd and Wedderburn LLP
First Defender: Howie QC, Gardiner; TC Young LLP
Second Defender: Walker QC, Broome; Clyde & Co
First Third Parties: Bowen QC; DWF LLP
Second Third Party: Manson; Anderson Strathern LLP

10 October 2019

Introduction

[1] This is yet another case involving a construction project where issues arise whether obligations to make reparation have been extinguished by prescription.

The pleadings and the history of the action

[2] The pursuer, a housing association, wished to redevelop and convert the former Duke Street Hospital, Glasgow (a four storey building built in about 1904) to form 17 residential flats and a day centre. In 1997 it engaged the second defender as the structural engineer, and the first third parties as the architect. The contract with the second defender incorporated the Association of Consulting Engineers Conditions of Engagement ("the ACE Conditions"). In 1999 the pursuer engaged the first defender as the contractors and the second third party as clerk of works. In order to assist intelligibility I will refer for the most part to the first defender as "the contractors", to the second defender as "the engineer", to the first third parties as "the architect", and to the second third party as "the clerk of works". The engineer and the architect designed the works to be carried out by the contractors. Those works involved the retention and refurbishment of the existing facades and roof of the building and the demolition and replacement of its interior.

[3] The contractors began to carry out the contract works on site in 1999, although the pursuer and the contractors did not enter into the formal written building contract until 10 October 2000. The building contract took the form of the SBCC Scottish Building Contract With Quantities (April 1998 Revision). On 25 October 2000 a certificate of practical completion of the contract works was issued to the contractors by the architect. A certificate of making good defects was issued to the contractors by the architect on 23 May 2002.

[4] During the course of the works between 1999 and 2001 the architect issued interim valuation certificates to the contractors certifying the value of work done. In about 2001, after the works had been completed, the architect issued a final certificate certifying the value of the contract work. In terms of the building contract the pursuer was obliged to make payment of sums certified and it did so.

[5] The action was raised against the defenders on 3 December 2015. The pursuer avers that in 2013 and 2014, as a result of obtaining reports on the condition of the building from another firm of engineers ("SBA"), it discovered that the redevelopment and refurbishment which had been carried out had been unsatisfactory, and that the building had serious defects, *viz* it was unrestrained against lateral loads, it had a defectively installed roof, and there was physical damage to stonework caused by the movement of the external walls during and following completion of the works.

[6] The pursuer blames the engineer and the contractors for the defects. It avers that the contractors were in breach of contract (i) in failing to design and install temporary propping works (Cond. 11.2); (ii) in failing to install the lateral restraint straps which had been specified to connect the existing facades to the new timber floor structure (Cond. 11.2); (iii) in failing to install the specified lateral restraint ties (or wall connectors) between the existing façade and the new cross walls at some connections and in failing to install them properly and correctly at other locations (Cond. 11.4); and (iv) for defective workmanship and installation of the structural works to the roof (Cond. 11.6). It avers that the engineer was in breach of contract (i) in failing to provide appropriate guidance to the contractors as to the need to provide temporary lateral stability to the facades, and in failing to ensure that the contractors effected a competent and proper design and installation of temporary propping works (Cond. 12.2); (ii) in omitting to identify that lateral restraints to act as connectors between the existing façade and the new timber floors were required at all floor levels (rather than just at first floor level) (Cond 12.3); (iii) in failing to inspect the works carried out by the contractors (either at all or properly) to check that the lateral restraints had been constructed in accordance with the engineer's design (Cond 12.4).

[7] The contractors' averments seeking contribution from the engineer, the architect and the clerk of works in terms of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 are set out in Answer 14. They aver that each of those parties is jointly and severally liable with the contractors in respect of such failures of workmanship as the contractors may have been guilty of which were subject to the inspection and supervision of that party.

[8] In Cond. 13 the pursuer avers:

> "As a result of the failures of the [engineer], in respect of its failure to specify lateral restraints on each of the second and third floors, a situation was created which gave rise to a material risk of such restraints not in fact being installed on each floor, as in the event happened. In respect of the [engineer's] inspection failures, defective works carried out by the contractor were not identified, as they should have been, with the results that, first, the Pursuer paid for such defective works ... on the mistaken view that they had been properly carried out, and thus properly certified, and, secondly, that the Building following completion of the refurbishment works, was in a defective condition.... In such circumstances, the separate breaches of the Defenders combined to produce a single common result, namely, the defective completion of the refurbishment works, in consequence of which the Building was left in a condition which has necessitated the carrying out of substantial remedial works. The front (south) façade of the Building has moved considerably, and the rear external wall to a lesser extent. Indeed, that movement, and the movement to the rear elevation of the Building, are outwith acceptable tolerances....(T)hat movement is demonstrative of the fact that, as a result of the [contractor's] defective workmanship and the [engineer's] failures to inspect those works, the Building, following completion of the permanent refurbishment works, was left unrestrained against lateral loads. The movement which has taken place during and following completion of the refurbishment works as a result of the Building being in an unrestrained state has caused significant damage to the stonework. It is likely that such movement in the area of the oriel window is so significant as to require the dismantling and replacement of that part of the Building. Beyond that, specific physical damage which was caused to the Building as a result of movement during and following completion of the refurbishment works, very substantial works will have to be carried out to the Building in order to address the various defects which exist in the Building. Remedial works will be required to connect the internal structure of the Building (at floor and roof levels, and at the cross-wall /external facade intersections) to the external walls, in order that the internal structure can provide sufficient lateral restraint to the Building's external walls. As part of the lateral restraint provisions, horizontal diaphragms will be created to increase the rigidity of the floor and roof structures of the Building. The stonework at the front façade Oriel Window will be locally dismantled and re-constructed. Various works will be carried out to address significant individual defects identified in the roof of the Building. As a consequence

> of the works required to investigate the nature and extent of the extensive defects in the Building, and thereafter to design and implement a scheme to remediate these issues, significant works will require to be carried out to reinstate internal finishes including wall finishes, associated joinery work, kitchens, bathrooms, plumbing and electrical installations...the remedial works are necessary to stabilize the Building and incorporate the necessary lateral restraints into its construction."

[9] The pursuer sues for damages of £3,000,000. It avers that the likely cost of repairs will be at least £2,000,000; and that it has and will continue to suffer loss of rental income, additional costs associated with decanting residents, inconvenience and abortive management time dealing with the defects. It avers (Cond 13):

> "Those losses were caused by the combined effects of the Defender's breaches of their respective contracts with the Pursuer, for which they are thus jointly and severally liable to the Pursuer."

The pursuer further avers (Cond 10.6):

> "The Works included the provision of mechanical and electrical installations, including matters such as central heating, domestic hot water, gas, electrical power distribution, lighting, fire alarm systems and the like. The mechanical and electrical installation will require to be substantially replaced (in accordance with current statutory and regulatory requirements) as a result of the carrying out of the necessary works in respect of the substantial defects herein condescended upon."

It is common ground that that work and work involving internal finishes (including wall finishes, associated joinery work, kitchens, and bathrooms) was abortive work which requires to be redone.

[10] The contractors, the engineer, the architect and the clerk of works aver that material physical damage to the building's stonework was evident in 2008 and that any obligations which they had to make reparation to the pursuer for breach of their contracts were extinguished before the action was raised. For its part the pursuer avers that it was not aware and could not with reasonable diligence have been aware more than five years before the raising of the action that it had suffered loss, injury or damage as a result of the

defenders' breaches. It is agreed that if it is necessary to resolve this aspect of the dispute probation will be required.

[11] The case was set down for a 16 day proof before answer which was to commence on 7 May 2019. However, in light of the decision in *Midlothian Council* v *Raeburn Drilling and Geotechnical Limited and another* [2019] CSOH 29 the second defender and the first and second third parties sought to amend their pleadings to make a further prescription argument along the same lines as the argument which had succeeded in *Midlothian*. In response the pursuer and the first defender introduced averments founding upon section 6(4) of the Prescription and Limitation (Scotland) Act 1973. In those circumstances none of those parties considered that the proof should proceed, and it was discharged on 1 May 2019. All indicated that their preference was that the court should adjudicate upon the new prescription issues raised in the minute of amendment and answers. The pursuer, the first defender, and the first and second third parties asked for a debate to be fixed. Counsel for the second defender was content with that, but he expressed some reservations as to whether a preliminary proof on prescription might be a more appropriate way forward. The amendment procedure was concluded on 17 May 2019, and I heard the debate on the new issues on 29 and 30 May 2019.

[12] For completeness I should explain that the second third party avers that the third and fourth third parties are obliged to indemnify her from any liabilities constituted against her in these proceedings. The third and fourth third parties dispute that. However, since that dispute was not one of the issues for discussion at the debate, neither of the third and fourth third parties chose to take part in the hearing.

The pleadings as amended

[13] The engineer, the architect and the clerk of works aver that if the pursuer did not suffer loss (as a result of the breaches of contract upon which the pursuer and/or the contractors found) when the contractors carried out the works defectively, it suffered loss by reason of those breaches when it paid the contractors for those defective works. The engineer avers (Ans 14):

> " ... *Esto*, the Pursuer did not suffer loss upon the [contractors] carrying out [their] works defectively, it suffered loss by at least the time it paid sums for the cost of the [contractors'] abortive works. That date was before practical completion. Such costs form part of the Pursuer's loss. The Pursuer paid the [contractors] to execute its defective works which, on both the Pursuer's and the [contractors'] cases, required (or require) to be re-executed at further cost to the Pursuer. By way of example of the [contractors'] work being abortive, on the Pursuer's own case, internal walls constructed by the [contractor], for which the Pursuer has paid, require to be demolished and removed in order to facilitate the installation of a diaphragm in order to address the issues with the structure that have given rise to this dispute. The same is true of bathrooms and kitchens. Reference is made to Art. 13 of Condescendence and to the principal signed Witness Statement of Mr Calum Boag (paragraphs 31 to 34). In any event, on the hypothesis of fact on which the Pursuer's case proceeds, the [contractors] works were doomed, or destined to fail, from the time they were carried out. In terms of awareness of loss, the Pursuer had awareness of loss from at least the time that it paid the [contractors] for its abortive work. The Pursuer plainly knew it had paid those sums to the [contractors] at the time that it paid them. On the Pursuer's own case it has suffered loss in the form of the cost of abortive work which requires to be dismantled and replaced and had awareness of that loss..."

The architect avers (Ans 14):

> "On the [contractors'] denied averments the Pursuer suffered loss when it made payments in reliance on the [architect's] advice which loss was caused by the [architect's] breach of contract. The Pursuer incurred expense in the form of payment to the [contractors] in reliance inter alia on the [architect's] defective performance including certification and was aware prior to 23 May 2002 that it had suffered loss in the form of the wasted expenditure and cost of the necessary remedial work."

The clerk of works avers (Ans 14):

> "...(T)he pursuer was aware of the expenditure it incurred for the purposes of the project as the project continued and up until the point of its completion on 23 May 2002. It was aware of the sums it paid on those certificates which the [contractors] [contend] should have been made the subject of deduction by the [clerk of works] in

> respect of supposedly defective work manifest prior to completion. On the [contractors'] denied hypothesis, the pursuer incurred expenditure in reliance, in part, upon defective inspections and reporting attended to and provided by the [clerk of works]. On this hypothesis, all of this expenditure was wasted and represents a loss to the pursuer..."

[14] In short, the position of the engineer, architect and clerk of works is that since the pursuer was aware of the relevant expenditure at the time it was incurred it was aware of having suffered loss, injury and damage more than five years before the action was raised. *Ex hypothese* of the pursuer's averments that loss had been caused by the breaches of contract of the engineer. *Ex hypothese* of the contractors' averments that loss had been caused by the breaches of contract of the engineer and the architect and the clerk of works (upon which breaches the contractors found in their claims for contribution).

[15] The pursuer denies that the relevant payments were loss caused by the engineer's breaches of contract. It avers that the making of the payments was caused by the architect's certification, not by the engineer's breaches. If that is not correct and the relevant payments were loss caused by the engineer's breaches, the pursuer avers that in making the payments it acted in error induced by the engineer which caused it to refrain from making a relevant claim in relation to the engineer's obligation to make reparation, and that the error persisted until 2013/2014. The relevant payments were made by the pursuer because the certificates caused it to understand that the contractors were entitled to be paid for work which had been properly performed. It avers that in terms of its contract the engineer was obliged to carry out regular inspections of the works and to notify the architect of any problems encountered, and that the engineer was also obliged (in terms of clause 6.5 (f) of the ACE Conditions) to advise the architect on certificates for payment to be issued. The pursuer avers (Ans 14):

> "Accordingly, in certifying works, the [architect] necessarily relied upon the [engineer's] advice regarding the structural elements of the works. Had the

> [engineer] properly carried out its contractual obligations in that regard, the [architect] would have been made aware of the structural defects in the works and would not have certified the sums that related to the defective workmanship. In turn, the Pursuer would not have made payment of the sums which were in fact certified. Consequently, but for those failures on the part of the [engineer], the monies paid to the [contractors] that the [engineer] now contends amount to loss in the form of the cost of abortive work would never have been paid by the Pursuer. The Pursuer was accordingly and necessarily led into error, by the conduct of the [engineer], in paying those sums, in respect that such sums were paid on the basis that they were contractually due when, in truth, but unknown to the Pursuer, the works were defective in numerous respects. As a consequence of that error, the Pursuer was induced to refrain from making a relevant claim in relation to the obligations which the Pursuer seeks to enforce by the present action in respect that it was unaware that there was anything wrong with the [contractors'] workmanship and therefore unaware that it had, or might have, suffered any loss as a result of the *First Defender's* breaches of contract, and was thus unaware of its right to raise proceedings. The Pursuer persisted under that misapprehension from the point at which it first incurred the expenditure that is now said by the [engineer] to constitute the loss up until it became aware of the defects latent in the Building which was, at the earliest, upon receipt of the outcome of the SBA investigations carried out in 2013 and 2014. It was not until that date that the Pursuer discovered, and could not with reasonable diligence have discovered, the truth of the matter and the error that it had been labouring under. Accordingly, that period should not be reckoned as, or as part of, the prescriptive period pursuant to section 6(4)(a)(ii) of the 1973 Act..."(emphasis added).

Mr Thomson indicated that the reference to "First Defender's" appeared to be an error and that it ought to read "Defenders'". Counsel for the other parties did not take issue with that.

[16] Similarly, for their part the contractors aver that, on the hypothesis that the relevant sums paid to the contractors were loss caused by the engineer's breach of contract, they were paid by the pursuer in error as a result of the architect's incorrect certification, which in turn was caused by the engineer's failure adequately to inspect and supervise the contractors' work because the architect was reliant on the inspection of the structurally significant work by the engineer and his advice about that in order to certify the structural components of the contractors' work. That error induced the pursuer to refrain "from making any claim anent the said monies or the said supervision and inspection", and the pursuer could not with reasonable diligence have discovered the error until "within a space of five years preceding"

the service of the summons. Accordingly, the period during which the error persisted was not to be counted in computing the five year period applying to the engineer's obligation to make reparation to the pursuer (s. 6(4)).

[17] The contractors adopt an analogous position in relation to the claims of the architect and the clerk of works that at the time the action was raised against the defenders any obligation each of the architect and the clerk of works may have had to make reparation to the pursuer had prescribed because more than five years had elapsed since the payments were made to the contractors. The contractors aver that the pursuer made the payments in error as a result of the architect's incorrect certification, which incorrect certification was caused by the architect's failings of supervision and inspection. They also aver that the pursuer made the payments in error as a result of the architect's incorrect certification, which in turn was caused by the clerk of works' failings of adequate inspection and reporting. They aver that in each case the error could not have been discovered with the exercise of reasonable diligence until within five years of the action being raised; and that the period during which the error persisted is not to be counted in computing the five year period (s 6(4)).

The relevant statutory provisions

[18] Section 3 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940 provides:

> "3.— Contribution among joint wrongdoers.
>
> (1) Where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses, they shall be liable inter se to contribute to such damages or expenses in such proportions as the jury or the court, as the case may be, may deem just:

Provided that nothing in this subsection shall affect the right of the person to whom such damages or expenses have been awarded to obtain a joint and several decree therefor against the persons so found liable.

(2) Where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid, he shall be entitled to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded, such contribution, if any, as the court may deem just.

...."

[19] 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...

...

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

...

(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section—

(a) any period during which by reason of—

(i) fraud on the part of the debtor or any person acting on his behalf, or

(ii) error induced by words or conduct of the debtor or any person acting on his behalf, the creditor was induced to refrain from making a relevant claim in relation to the obligation …

…

shall not be reckoned as, or as part of, the prescriptive period:
Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph.

(5) Any period such as is mentioned in paragraph (a) or (b) of subsection (4) of this section shall not be regarded as separating the time immediately before it from the time immediately after it.

…

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.

…"

In terms of paragraph 1(d) of Schedule 1, section 6 applies to any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation.

Counsel's submissions

Notes of argument

[20] The parties lodged notes of argument in advance of the debate.

Counsel for the engineer's submissions

[21] Mr Walker submitted that the engineer should be assoilzied from the action directed against it by the pursuer and from the claim for contribution directed against it by the contractors; failing which, dismissal of that action and of that claim should be granted.

[22] The starting point was that the obligation to make reparation for loss, injury and damage caused by an act, neglect or default was a single and indivisible obligation and only one action could be prosecuted to enforce it (*Dunlop* v *McGowans* 1980 SC (HL) 73, per Lord Keith of Kinkel at p. 81; *David T Morrison & Co Ltd* v *ICL Plastics Ltd* 2014 SC (UKSC) 222, per Lord Reed at para 11). On a fair reading of the averments of the pursuer and the contractors they maintained that breaches of contract by the engineer caused the works as constructed to be defective, with the result that much of the work carried out was abortive and requires to be replaced. There had been the concurrence of *injuria* and *damnum* by no later than the date of practical completion because the building had been defective from at least that time (*Dunlop* v *McGowans, supra*; *David T Morrison & Co Ltd* v *ICL Plastics Ltd, supra*; *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287; *Murphy* v *Brentwood* [1991] 1 AC 398, per Lord Keith of Kinkel at p. 466B-H: cf. *Huntaven Properties Ltd* v *Hunter Construction Aberdeen Ltd* [2017] CSOH 57, per Lord Doherty at paras 68 and 73; *Musselburgh & Fisherrow Co-operative Society Ltd* v *Mowlem Scotland Ltd* 2004 SCLR 412, per Lord Eassie at paras 27-26; *Strathclyde Regional Council* v *Border Engineering* 1998 SLT 175, per Lady Cosgrove at p. 179K). While the pursuer had not been aware of the existence of defects at the date of practical completion, its case was that it had relied upon the engineer duly performing its obligations, and that it had relied upon what the engineer had done. It had incurred expenditure in reliance on those matters. It had been aware at the time of the expenditure that it was being incurred. As it turned out, the expenditure had been abortive

to a very substantial extent. Although the pursuer had not known then that the expenditure was wasted, there was no escaping that - taking the pursuer's pleadings *pro veritate* - as a matter of objective fact the expenditure had been financial loss caused by the engineer's breaches of contract (*Dunlop* v *McGowans, supra*; *David T Morrison & Co Ltd* v *ICL Plastics Ltd, supra*; *Gordon's Trustees* v *Campbell Riddell Breeze Paterson, supra*; *Midlothian Council* v *Raeburn Drilling and Geotechnical Limited and another*, *supra*). It was *damnum* - part of the loss, injury and damage caused by those breaches. It followed that there had been the concurrence of *injuria* and *damnum*, and the pursuer had had actual knowledge of *damnum*, more than five years before the action was raised. The obligation of the engineer to make reparation to the pursuer had been extinguished by prescription unless the pursuer's and the contractors' averments anent the application of section 6(4) were relevant.

[23] It was for the pursuer and the contractor to make relevant averments of the circumstances in which section 6(4) was said to provide relief. Reference was made to *BP Exploration Operating Company Limited v Chevron Transport (Scotland)* 2002 SC (HL) 19, per Lord Hope of Craighead at para 31; Lord Clyde at para 66 - 67; Lord Millett at para 105. It was accepted that "words or conduct" in section 6 (4) ought to be construed broadly (*Heather Capital Ltd (In Liquidation)* v *Levy and McRae* 2017 SLT 376, per the Opinion of Lady Paton at para 63). However, even allowing for that, the pursuer and the contractors had not discharged the onus of satisfying the requirements of the subsection. Their averments were irrelevant. The sums paid to the contractors were paid because they had been certified as due, not because of any breach by the engineer or in reliance on its advice. Neither the pursuer nor the contractors had pled that the engineer had breached clause 6(5)(f) of its contract. Neither of them specified precisely what it was that the engineer did or failed to do which caused the architect to certify erroneously. All that they focussed upon was what they allege ought to

have been said. In any case, even if conduct of the engineer had induced the pursuer to erroneously believe that the sums certified were due for work properly done, it did not follow that that error induced the pursuer to refrain from making a relevant claim in relation to the engineer's obligation to make reparation. For that to have occurred the nature of the pursuer's error would have to have been of an entirely different character. The pursuer and the contractors conflated error as to the certified sums being due with error inducing the pursuer to refrain from making a relevant claim to enforce the engineer's obligation to make reparation. They did not relevantly aver the existence of the second sort of error. Additional objections to the contractors' averments were that they were in the conditional tense and they did not fully coincide with the pursuer's averments. In so far as they differed from the pursuer's averments they must also be irrelevant, because the pursuer was the party with the factual knowledge as to what, if any, error it laboured under.

[24] Mr Walker's final argument was not foreshadowed in the engineer's pleadings or in its note of argument. The pursuer founded upon breaches of the engineer's obligations relating to design (Cond. 12.2 and 12.3) and inspection (Cond. 12.4). Each of the breaches was said to have caused the pursuer's loss. *Ex hypothese* of the pursuer's pleadings the abortive expenditure was *damnum* caused by each of those breaches. The contractors sought contribution from the engineer on the grounds that the engineer breached the design obligations and the inspection obligations which it owed to the pursuer. Accordingly, even if the pursuer had relevantly averred that conduct of the engineer in relation to (i) inspection of the contractor's workmanship, and (ii) advice (or lack of advice) thereanent to the architect for the purposes of certification, induced the pursuer to believe that the work certified had been satisfactorily done and that the contractor was entitled to payment for it, and that error induced the pursuer to refrain from enforcing the engineer's obligation to make reparation for breach of its inspection

obligations, the pursuer had not relevantly averred that the error induced it to refrain from enforcing the obligation(s) to make reparation for breach of the engineer's design obligations. That (or those) obligation(s) to make reparation had prescribed. Since the pursuer sought to recover a global loss said to have been caused by breach of each and all of the obligations founded upon, and the obligation(s) to make reparation for breach of at least some of those obligations had prescribed, the pursuer's averments of loss were irrelevant.

Counsel for the architect's submissions

[25] Mr Bowen moved for dismissal of the contractors' claim against the architect for contribution.

[26] The contractors averred that the architect was in breach of its contract with the pursuer because of its failure to supervise and inspect the contractor's work and, in consequence, its incorrect certification of the sums to be paid by the pursuer to the contractors. The pursuer suffered loss as a result of those breaches when it paid the contractors, because that expenditure was wasted. The pursuer had actual awareness of the expenditure at the time it was incurred - it mattered not that it did not know it had suffered a detriment (*Gordon's Trustees*; *Midlothian Council*). Accordingly, any obligation of the architect to make reparation had prescribed long before the action was raised unless the contractors' section 6(4) averments were relevant.

[27] The contractors' averments of error induced by the architect were irrelevant. Reference was made to *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Limited* [2011] CSIH 26. They were inconsistent with the pursuer's averments of error induced by the engineer. The contractors could not found on conduct of the architect because the pursuer did not found on such conduct.

[28] Finally, Mr Bowen adopted Mr Walker's submissions about breaches of design obligations. He submitted that those submissions applied *mutatis mutandis* to the breach of the architect's design obligations upon which the contractors founded (Answer 10.3). Once again, this argument was not foreshadowed in the architect's pleadings or in its written submissions.

Counsel for the clerk of works' submissions

[29] Mr Manson sought *absolvitor* from, failing which dismissal of, the contractors' claim against the clerk of works for contribution.

[30] Any claim for reparation the pursuer may have had against the clerk of works had prescribed before the action was raised against the defenders. The pursuer could not have relevantly, competently, and timeously sued the clerk of works at the time when it sued the contractors (see *Farstad Supply AS* v *Envirico Ltd* 2010 SC (UKSC) 87, per Lord Hope of Craighead DPSC at para 40). Here any *injuria* on the part of the clerk of works occurred prior to 23 May 2002 at the latest. *Damnum* occurred at the latest by the time of the pursuer's payments to the contractors in satisfaction of the interim certificates. In large part those sums were abortive expenditure because the works which they paid for were defective. The defective work did not achieve its purpose and it requires to be replaced by remedial work. The pursuer was aware at the time that the expenditure was being incurred. While it was not aware then that it represented a loss caused by the clerk of work's act, neglect or default, as a matter of objective fact (*ex hypothese* of the pursuer's and the contractors' pleadings) it was such a loss (*Gordon's Trustees*; *Midlothian Council*).

[31] The onus was on the pursuer and the contractors to make relevant averments entitling them to rely upon section 6(4) (*Pelagic Freezing Ltd* v *Lovie Construction Ltd*, [2010] CSOH 145,

per Lord Menzies at paras 86 and 94; Johnston, *Prescription and Limitation* (2nd ed.), para 6.107). The contractors' averments did not advance a relevant or sufficiently specific case that by reason of error induced by words or conduct of the clerk of works the pursuer had been induced to refrain from making a relevant claim in relation to the obligation of the clerk of works to make reparation. The contractors did not aver any factual basis for inferring what was in the pursuer's mind at the material times. The pursuer had not sued the clerk of works, so its averments were of no assistance in that regard. In addition, the contractors had not specified precisely when the period of error ended - all that they said was that the error continued to a time within five years of the action being raised. That was not good enough. Moreover, there was sheriff court authority (*MacDonald* v *Clydesdale Bank plc* [2017] SC EDIN 65) that "words or conduct" had to be something different from the conduct which gave rise to the breach. However, Mr Manson accepted that the learned sheriff had not been referred to *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Limited, supra,* and that the sheriff's view appeared to be difficult to reconcile with the Opinion of the Court (per Lord President Hamilton at paras 17-18).

Counsel for the pursuer's submissions

[32] Mr Thomson moved the court (i) to sustain the pursuer's plea to the relevancy of the engineer's averments in so far as they relate to the new prescription argument and to exclude them from probation; and (ii) to refuse to sustain the engineer's pleas to the relevancy and to prescription.

[33] Mr Thomson maintained that *Midlothian* had been wrongly decided. Lest the present case should go further, he embraced the arguments which had been advanced unsuccessfully by the pursuer in *Midlothian*. They were reproduced in his note of argument,

which he adopted, but he did not seek to develop them. The arguments were that *Gordon's Trustees* did not set down a general rule that the prescriptive period commences on the date when expenditure, which is found to have been wasted, was incurred. It was clear from paragraph 24 of Lord Hodge JSC's judgment that the loss was the pursuers' inability to obtain vacant possession. The legal expenses which were incurred later were a head of loss, but they did not trigger the start of the prescriptive period, which had already begun. In *Dunlop v McGowans* and in *Gordon's Trustees* the pursuers had clearly incurred wasted expenditure in engaging solicitors to secure removal of the tenants, but in neither case had the court regarded the date of that expenditure as the appropriate date from which the prescriptive period should run. The appropriate date had been the later date on which the pursuers ought to have obtained vacant possession. *Gordon's Trustees* was not authority for the proposition that prescription ran from the date when an employer paid for construction work. The examples given by the court at paragraph [19] would have been irrelevant had that been the position. The court cited the example of physical damage to property and explained that the date of the loss was the date on which that physical damage occurred, subject only to section 11(2) and s 11(3). *Gordon's Trustees* had followed the approach set out in *Dunlop v McGowans* and in *David T Morrison & Co Ltd* v *ICL Plastics Ltd*. What required to be identified was when loss was caused by the *injuria* - not when particular heads of loss were sustained. The approach in *Midlothian* resulted in section 11(3) having no role in construction cases where a building had to be demolished or substantially reconfigured. In such cases, the initial expenditure in paying the contractor would be viewed as having been wasted and the loss occurring (and prescription commencing) on that date. Since the employer would invariably be aware that it had paid for the works, then on that hypothesis it would have been aware of the loss for the purposes of section 11(3). There would be no

place for a postponement of the prescriptive period in terms of that subsection. The incurring of expenditure had not been *damnum* in either *Midlothian* or in the present case. In each case the pursuer's loss had been the existence of latent defects/physical damage. The pursuer had neither actual nor constructive knowledge of the latent defects/physical damage until 2013/2014.

[34] Mr Thomson submitted that, in any event, the present case was distinguishable from *Midlothian.* First, in that case the engineer's services were completed prior to the commencement of construction, but here the engineer had ongoing involvement in the project after the commencement of the works (and breaches of duty were alleged against it in respect, for example, of its ongoing inspection duties). Second, unlike *Midlothian* this was not a case where the expenditure had been incurred in reliance upon negligent advice given by the engineer to the pursuer. Third, and again in contrast to *Midlothian*, this was not a project that was "doomed" from the outset because of the engineer's defective design. The pursuer's position was that the defenders were jointly and severally liable because their various breaches all contributed to produce a common result. The defects in the finished building could have been avoided if the contractors had duly performed their contractual obligations. Fourth, this was not a case where the whole building had to be demolished and rebuilt - though it was accepted that the remedial work will involve the re-doing of a good deal of the defective work. However, the pursuer's loss was not "abortive expenditure" in the form of payments made to the contractors for the refurbishment works. The loss, injury and damage suffered by the pursuer was the completion of a refurbished building in a defective condition (ie unrestrained against lateral loads, with a defectively installed roof) and the later physical damage to the stonework caused by movement of the external walls during and following completion of the works. The pursuer was unaware (and could not

with reasonable diligence have been aware) of the latent defects or the subsequent physical damage until, at the earliest, the investigations carried out in 2013 and 2014. Accordingly, the prescriptive period in respect of the obligations to make reparation owed to the pursuer by the defenders did not begin to run until that time (s 11(3)).

[35] Mr Thomson also submitted that, to the extent that the payments could be said to amount to "wasted" or "abortive" expenditure, the engineer was not the direct cause of that expenditure. The payments were not made as a result of any breach of contract by the engineer. Rather, they were made pursuant to the pursuer's obligations under the building contract (clauses 30.1.1.1 and 30.8.1 of the conditions of contract). It was certification by the architect which triggered the obligation to pay. The pursuer's knowledge of having made payments to the contractors for the work done by them was not knowledge of expenditure incurred as a result of the breach of contract by the engineer, nor was it knowledge that the certification had been made on the basis of the engineer's advice to (or its failure to advise) the architect.

[36] If the engineer's breach of contract was an effective cause of the expenditure, and if the expenditure did constitute loss, then the period between the expenditure and 2013/2014 was not to be regarded as part of the prescriptive period. To rely upon section 6(4), the creditor must establish three things: (1) error induced by words or conduct of the debtor (or someone on their behalf), (2) that the error induced the creditor to refrain from making a relevant claim in relation to the obligation in question, and (3) the period during which the creditor was so induced (*BP Exploration Operating Company Limited* v *Chevron Transport (Scotland), supra,* per Lord Hope of Craighead at paras 29-31, 27, per Lord Clyde at paras 66 and 68, and per Lord Millett at paras 102-109*; Agro Invest Overseas Ltd* v *Stewart Milne Group Ltd* [2018] CSOH 120, [2018] BLR 187, per Lord Clark at para 129). The pursuer's averments

were sufficient for inquiry. When read fairly, and keeping in view the proper purpose of pleadings in a commercial action (as to which see *Heather Capital Ltd (In Liquidation)* v *Levy and McRae, supra*, per Lord Glennie at para 100), the pursuer's case was relatively simple. The fact that structural aspects of the contractor's workmanship were defective was not known to the pursuer when it made payment. The pursuer averred that the architect had been dependent upon appropriate input from the engineer on those matters. Section 6(4) was intended to militate against injustice. It was not necessary to identify a conscious decision not to raise proceedings; the word "refrain" was not to be narrowly construed. Its scope was wide enough to apply where, because of the words or conduct which induced the error, a creditor had no idea that there was an obligation to make reparation. A very wide variety of circumstances could be "words or conduct" (*Heather Capital Ltd (In Liquidation) v Levy and McRae, supra*, per Lady Paton at para 63). The words or conduct did not have to be an *injuria,* nor did they have to be the sole cause of the error. The payments made by the pursuer to the contractors were made pursuant to certificates issued to it by the architect. The pursuer would have understood from the certificates that the contractors were entitled to payment because the work had been done properly. The engineer, in addition to its inspection obligations, was expressly obliged to advise the architect on certificates for payment (clause 6.5(f) of the ACE Conditions). In certifying the works, the architect necessarily relied upon the engineer's advice regarding the structural elements of the works. Had the engineer performed its contractual obligations in that regard as it ought to have, it would have alerted the architect to the structural defects in the contractors' works and the architect would not have certified the sums which it did. In turn, the pursuer would not have made payment of the sums which were in fact certified. In this respect, the pursuer was led into error by the conduct of the engineer. As a consequence, it was induced to

refrain from making a relevant claim in relation to the obligation to make reparation which it seeks to enforce against the engineer because it was unaware that there was anything wrong with the structural elements of the contractors' workmanship and that it might have suffered loss as a result. The pursuer continued with that lack of knowledge from the point at which it first incurred the expenditure until when it became aware of the defects latent in the building in 2013/2014 at the earliest. It did not discover, and could not with reasonable diligence have discovered, the error before then.

[37] Mr Thomson stressed that while the pursuer founded on breaches by the engineer of its design obligations, its position was not that the building was destined to fail because of those breaches. On the contrary, in each case where there had been a design breach, loss would not have arisen had there not also been a breach of contract by the contractors. Thus, while the engineer had been in breach in failing to give the contractors appropriate guidance concerning temporary works (Cond. 12.2), the contractors had also breached their obligations anent the design and installation of those works (Cond. 11.1). Similarly, while the engineer had failed to identify in the drawings that lateral restraint was needed on each floor (Cond. 12.3), the contractors were also in breach of contract in failing to install appropriate lateral restraint (Cond. 11.4). Had the contractors not also been in breach the building would not have failed. In those circumstances the error induced by the engineer resulted in the certificates being issued in the terms which they had been, and it caused the pursuer to refrain from enforcing any aspect of the engineer's obligation to make reparation.

Counsel for the contractors' submissions

[38] Mr Howie submitted that section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 contemplates a hypothetical action being raised against another party at

the date when a defender is sued. That other party need not have been sued by the pursuer. Even if the other party has been sued, the party seeking contribution is not thirled to the case which the pursuer advances against that party. The party seeking contribution is perfectly at liberty to suggest that a different case could have been advanced by the pursuer.

[39] *Gordon's Trustees* and *Midlothian* clarified that where as a result of a breach of contract giving rise to an obligation to make reparation a party had knowingly incurred expenditure that transpired to have been wasted, then for the purposes of section 11(3) the party was aware at the time of the expenditure that financial loss had occurred. However, it did not follow that the obligations of the engineer, architect and clerk of works in the present case had been extinguished by the operation of prescription. There were two reasons for that.

[40] First, *Midlothian* could be distinguished on the ground it had not involved defective supervision and inspection.

[41] If it could not be distinguished on that ground, the second ground of distinction was that no issue relating to section 6(4) had arisen in *Midlothian.* If the relevant abortive expenditure had been caused by the contractors' breach, it had also been caused by the breach of contract of the engineer, the architect, and the clerk of works. Each had been obliged to carry out proper supervision and inspection of all the work undertaken by the contractor. The engineer was obliged to draw defects to the architect's attention so that work which was not properly done was not certified for payment. The clerk of works was obliged to draw defects to the attention of the engineer and the architect as appropriate. She was also obliged to draw them to the attention of the pursuer in her reports. The architect was obliged to take account of the information he obtained from his inspections and the information provided by the engineer and the clerk of works when certifying. In the circumstances averred section 6(4) preserved the obligation of each to make reparation to the pursuer (and therefore the

contractors' entitlement to contribution). The acts and omissions of the engineer, architect and clerk of works were "conduct" for the purposes of section 6(4). There was nothing to prevent the conduct giving rise to the breach also constituting or being part of the conduct inducing error. It would be odd if time was suspended against the professional who later confirmed his wrong advice, but not against the clever fraudster who covered his tracks after deceiving his dupe into a loss.

[42] In his written submissions Mr Howie submitted that the court could determine on the pleadings without the need for proof that section 6(4) had preserved each of the obligations of the engineer, architect, and clerk of works to make reparation to the pursuer upon which the contractors founded. If there had been abortive expenditure which was *damnum* caused by the breach of contract of each of those parties then it must necessarily be inferred, because of the way in which the contractual arrangements between the pursuer and each of the other parties operated, that the section 6(4) requirements were satisfied. It followed that the averments of the engineer, the architect and the clerk of works that their respective obligations to make reparation/contribution had prescribed because the pursuer had been aware of *damnum* when work was paid for were irrelevant and ought not to be admitted to probation. In any case, the contractors' averments anent section 6(4) were suitable for inquiry.

[43] Mr Howie suggested that if the correct approach was that each alleged breach by the engineer and the corresponding obligation to make reparation for that breach ought to be considered separately for the purposes of prescription, then it was possible that the pursuer's section 6(4) argument might not assist it in so far as the pursuer founded upon the obligation(s) of the engineer to make reparation for design breaches. However, that was not a matter which affected the first defender's claim against the engineer for contribution. That

claim was founded only on the engineer's failures to supervise and inspect the contractor's work.

Decision and reasons

[44] 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.

[45] In my opinion, as in *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Limited* (see the Opinion of the Court delivered by the Lord President at para 4), the true issues before the court are issues of relevancy. In my view those issues are as follows.

[46] First, taking the pursuer's averments *pro veritate*, do they disclose a case suitable for inquiry that the obligation to make reparation which the pursuer seeks to enforce against the engineer has not been extinguished by the short negative prescription? Second, taking the contractors' averments *pro veritate*, do they disclose cases suitable for inquiry that the obligations to make reparation which they seek to enforce against the engineer, the architect and the clerk of works have not been extinguished by the short negative prescription?

[47] Those questions can be broken down further. Taking the pursuer's averments *pro veritate*, is it clear from them that the pursuer suffered financial loss caused by the breach of contract of the engineer and/or the architect and/or the clerk of works when interim payments were made to the contractors by the pursuer following certification by the architect? If so, and on that hypothesis, are (i) the pursuer's averments of error induced by the engineer (ii) the contractors' averments of error induced by (a) the engineer (b) the architect (c) the clerk of works, suitable for inquiry?

[48] It is well established that a pursuer's case should not be dismissed as irrelevant unless it is clear that it will fail even if it proves all that it avers (*Jamieson* v *Jamieson* 1952 SC (HL) 44). The same principle applies *mutatis mutandis* to a defender's case for contribution against a third party.

[49] It is also clear that a defender may seek contribution from another party whether or not the latter has been sued by the pursuer. Section 3(2) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940 contemplates a hypothetical action being raised against another party at the date when a defender is sued. If the other party has been sued by the pursuer, the defender seeking contribution is not tied to the case which the pursuer has advanced against that party. The party seeking contribution may advance the same or a different case. In either case it will be for it to prove the case averred. The suggestions by Mr Walker (see para 23 *supra*) and Mr Bowen (see para 27 *supra*) that certain of the contractors' averments must be irrelevant because they do not coincide with the pursuer's averments are not well founded.

[50] Since I have come to the view that the pursuer's case against the engineer and the first defender's cases against the engineer, architect and clerk of works are suitable for inquiry, I think it inappropriate prior to the facts being established to embark upon a detailed analysis of the legal position. However, in order to explain my decision, and in deference to the arguments which I have heard, I provide the following views.

[51] In *Midlothian* the hypothesis upon which the pursuer's averments proceeded was (a) that in 2006 (before construction on the site began) the fourth defender (a firm of engineers) failed to carry out adequate site investigations and failed to advise the pursuer on the need for a ground gas defence system; (b) that between December 2006 and June 2009, in reliance on the advice which the fourth defender had given, the pursuer incurred the costs

of construction of a housing development on the site; (c) that the development was uninhabitable because of ground gas and it had been demolished with a view to it being replaced with a development containing an appropriate defence system. On the basis of those averments it was clear (i) that the pursuer had incurred very substantial wasted costs, and that those costs were *damnum* which had been caused by the engineers' breach; and (ii) that there had been the concurrence of *injuria* and *damnum* by (at latest) June 2009. While at the time the expenditure was incurred the pursuer had not known that the wasted expenditure was a loss caused by the fourth defender's breach, as a matter of objective fact it was such a loss. Since the action was not raised until more than five years after June 2009 the pursuer's averments were irrelevant.

[52] I do not propose to rehearse further the reasons which I gave for my decision in *Midlothian.* I adhere to those reasons. I am not persuaded that the case was incorrectly decided.

[53] However, in my opinion *Midlothian* was a clear case. It was clear that the pursuer was bound to fail even if it proved all that it averred. I am not satisfied in the present case that the same may be said of the pursuer's averments or of the first defender's averments. In my view it is sufficient to mention two reasons for that.

[54] First, *ex hypothesi* of the pursuer's pleadings there is a dispute as to whether the engineer's breaches were an effective cause of the payments which the second defender and the first and second third parties maintain were *damnum.* The pursuer's position is that they were not. I am not persuaded that I ought to determine, without inquiry into the facts, that the pursuer's position on this point is obviously wrong. I am fortified in that view by the observations of Lord Glennie in *Heather Capital Ltd (In Liquidation)* v *Levy and McRae* at paragraph 100.

[55] Second, if I am wrong about that, I am not convinced that the pursuer and the first defender are bound to fail to establish their section 6(4) error cases. In my opinion each of those cases is suitable for inquiry. The pursuer offers to prove that the engineer's failures of inspection and supervision of the first defender's work resulted in the architect not being advised by the engineer of the defects; which led to the certificates being issued without the benefit of that advice, and payment being made in terms thereof in circumstances where the pursuer had no reason to suppose that any of the work certified had not been properly done. It offers to prove that that remained the position until 2013/14, and that it could not with reasonable diligence have discovered the error until then. The first defender's section 6(4) averments in its case against the engineer are to substantially similar effect. Its section 6(4) averments in its case against the clerk of works are very similar too, and they have the added string that the clerk of works failed to bring the relevant defects to the pursuer's attention in her reports. While, strictly speaking, Mr Manson is correct to say that the contractors have not precisely specified the end date for the pursuer's error, they have made clear that their position is that it persisted until the period within five years of the action being raised (ie at least to 4 December 2010). I think it would have been preferable for the contractors to give greater specification as the pursuer has done (it avers that its error continued until the reports from SBA in 2013 and 2014), but in the whole circumstances I am not persuaded that the matter is of any real significance. The first defender's s 6(4) averments in its case against the architect appear to me to be more straightforward than the section 6(4) averments in the other cases made by the pursuer and the first defender, because the architect was the certifier and the conduct said to have induced the error was its failures of inspection, supervision and certification. I agree with Mr Thomson and Mr Howie that, having regard to the terms of section 6(4) and to the guidance provided in *BP Exploration*

Operating Company Limited v *Chevron Transport (Scotland)*, *Heather Capital Ltd (In Liquidation)* v *Levy and McRae* and *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Limited,* the section 6(4) averments upon which they found are suitable for inquiry.

[56] I do not accept that I ought to conclude at this stage that any of the averments of the engineer, the architect or the clerk of works are irrelevant. In my opinion those averments are also suitable for inquiry. I am sceptical of the suggestion (proffered by both Mr Howie and Mr Thomson) that it must necessarily be inferred, because of the way in which the contractual arrangements between the pursuer and each of the other parties operated, that the section 6(4) requirements were satisfied. I am not prepared to conclude at this point that the evidence of those involved at the material times can have no part to play in the determination of the section 6(4) issues.

[57] That brings me to the submission of Mr Walker that reliance on section 6(4) cannot help the pursuer in so far as its case against the engineer is founded on design breaches (and his related submission that in consequence the pursuer's averments of (global) loss are irrelevant; and to the submission of Mr Bowen that such reliance cannot avail the first defender in so far as its case against the architect is founded on such breaches. I prefer not to opine on those submissions at this stage. There are two reasons for that. First, I have decided for the reasons already given that some form of inquiry is going to be necessary. Second, I do not think it would be fair or appropriate in the whole circumstances to attempt to decide these issues now. They have not been focussed in the pleadings or in the notes of argument. In the pleadings and in the notes the assumption to date has been (i) that the pursuer seeks to enforce a single obligation to make reparation against the contractors in respect of their breaches and a single obligation to make reparation against the engineer in respect of its breaches; and (in relation to the contractors' claim for contribution against the

architect) (ii) that (had it sued the architect) the pursuer could have enforced a single obligation to make reparation against that party for its breaches.

Disposal

[58] I shall put the case out by order to discuss (i) further procedure (including whether the inquiry should be a preliminary proof before answer (and if so its scope) or a proof before answer on the whole dispute); (ii) any motions for expenses which may be made.