OUTER HOUSE,
COURT OF SESSION

[2010] CSOH 42

OPINION OF LORD DRUMMOND YOUNG

in the cause

SCOTTISH WIDOWS SERVICES LTD

Pursuers;

against

(FIRST) HARMON/CRM FACADES LTD (in liquidation); (SECOND) BUILDING DESIGN PARTNERSHIP; and (THIRD) W.S.A. INC

Defenders;

CA13/09 and CA15/09

and in the cause

SCOTTISH WIDOWS SERVICES LTD

Pursuers;

against

(FIRST) KERSHAW MECHANICAL SERVICES LTD; and (SECOND) BUILDING DESIGN PARTNERSHIP

Defenders:

Pursuers: Dean of Faculty; Smith; Pinsent Masons LLP

Defenders: (Harmon) MacColl; HBJ Gateley Wareing LLP

(Building Design Partnership) Lake QC; Simpson & Marwick

(W.S.A. Inc) Ellis, QC; Cowie; Biggart Baillie LLP

(Kershaw) Jones, Solicitor; Brechin Tindall Oatts

23 March 2010

[1] This opinion relates to two separate actions brought to enforce a series of collateral warranties. Both relate to the construction of a new head office for the Scottish Widows Fund and Life Assurance Society ("the Society") at Port Hamilton, Edinburgh ("the Project"). Collateral warranties have become commonplace in construction projects following the decision of the House of Lords in *Murphy* v *Brentwood District Council*, [1991] 1 AC 398. The fundamental problem that they are designed to address is as follows. In a typical large-scale construction project, a significant number of parties will inevitably be involved. These will include the professional team and the main contractor or management contractor, together with a number of subcontractors or works contractors; the latter obviously do not have a direct contractual relationship with

the employer. On the employer's side, the employer may be a developer whose active role is confined to arranging for the works to be carried out. The owner of the property on which the development is carried out will usually intend to transfer its interest to yet further parties, as disponees or assignees or tenants. Alternatively, even if the developer is the owner, it will typically be intended that the property should be let or transferred to other parties. In some cases the parties who are ultimately interested in the property are members of the same group of companies as the owner or developer; in other cases this is not so. If works are performed defectively, or if any member of the professional team acts negligently, it is likely that the party who actually suffers the loss will not be the employer in the building contract, who has either passed on his interest to another party or other parties or has been working on a development that has belonged throughout to another party. Instead, the loss will be suffered by one of those other parties, as owner or tenant of the property or as some form of transferee from the developer. The effect of *Murphy* was to curtail the delictual duties that are owed in that type of situation. The principle of privity of contract prevents any direct contractual action by the party who suffers the loss against subcontractors or works contractors or any member of the professional team. Consequently, in order to ensure that the party who suffers actual loss has a right of action against any party who has provided defective work or against any member of the professional team who has acted negligently, the practice has grown up of taking collateral warranties from all of those who carry out work under the project. A collateral warranty provides, in summary, that the person giving the warranty undertakes various contractual duties to the person who receives the warranty; where the warranty is given by a contractor the obligation is to perform the obligations undertaken in the contract with the employer or, as appropriate, the main or management contractor; and where the warranty is given by a member of the professional team the obligation is to perform the duties undertaken to the employer with due care and diligence. In this way the problem of the legal "black hole", whereby loss is sustained by a party who has no right of action and the party with the right of action suffers no loss, is avoided. Such warranties are an important feature of modern practice in the construction industry. In my opinion they must be construed in such a way as to further their essential purpose, namely to ensure that the party who suffers loss has a right of action against any contractor or member of the professional team who has provided defective work.

[2] The contractual structure in the Project was as follows. In 1996 a company known as Edinburgh Construction Services Ltd ("ECSL") entered into a management contract with Laing Management (Scotland) Ltd ("LMS") in terms of which LMS was to act as management contractor on behalf of ECSL in the Project. Under that contract, ECSL was the employer. The management contract was the Scottish Management Contract Phased Completion Edition (March 1988) incorporating the conditions of the Standard Form of Management Contract 1987 as amended by a schedule of amendments agreed between ECSL and LMS. Harmon/CFEM Facades (UK) Ltd, the first defenders in the Harmon action, and Kershaw Mechanical Services Ltd, the first defenders in the Kershaw action, were works package contractors engaged by LMS in connection with the project. Harmon are now in liquidation. Building Design Partnership ("BDP"), the second defenders in both actions, are a firm of architects. They were engaged by ECSL to provide architectural services for the Project. W.S.A. Inc ("WSA"), the third defenders in the Harmon action, are incorporated in the United States and were the parent company of Harmon. In that capacity they entered into a parent company guarantee relating to Harmon's obligations under a collateral warranty granted by them. ECSL, although the employer for the purposes of the management and works contracts, had no interest as proprietor or tenant of either the site or the development. Consequently collateral warranties were granted by *inter alios* Harmon, BDP and Kershaw in favour of various parties who either had or might come to have an interest in the site or development as proprietor or tenant. It is those collateral warranties that form the subject matter of the present actions.

[3] The Project involved the construction of a building consisting of three five-storey rectangular blocks (Blocks A, B and C) and one eight-storey curved block (Block D/E) set over a two-storey car park and services structure built below ground level. The building had a concrete frame, and was enclosed using a combination of stone or concrete cladding panels and aluminium framed curtain walling and windows. Harmon's works package related to the glazing element, and included curtain walling systems, windows, and other glazing and aluminium elements. Kershaw's works package involved the design and construction of the

standing seam roof. In each case the relevant works package contract was the standard form of works contract (Works Contract/1/Scot and Works Contract/2/Scot).

Pursuers' averments

[4] I will begin by summarizing the history of the parties' transactions as narrated in the pursuers' pleadings. In certain parts of the defenders' submissions the precise sequence of events is important, and accordingly I will give a chronological account. On 28 March 1994, a company known as Edinburgh Development Group Ltd ("EDG") took a lease of the land on which a new head office for the Scottish Widows Fund and Life Assurance Society ("the Society") was to be constructed. Some time thereafter, in July 1995, LMS, the prospective management contractor, engaged Harmon to undertake the glazing systems works package. On 1 December 1995, Harmon entered into a collateral warranty in favour of the Society and a further collateral warranty in favour of a company known as Scottish Widows (Port Hamilton) Ltd ("Port Hamilton"). The terms of the Port Hamilton warranty are considered in detail at paragraphs [25] and [26] below. In March 1996 LMS engaged Kershaw to undertake the works package for the design and construction of the standing seam roof. Subsequently, on 28 November 1996, Kershaw entered into a collateral warranty in favour of the Society; the terms of that warranty were similar to the Harmon warranty. On 15 May 1996 ECSL, the employer, entered into the management contract referred to at paragraph [2] with LMS, the management contractor.

[5] During 1996 ECSL also entered into an agreement with BDP to provide architectural and other professional services for the project; the terms of the agreement are found in a letter of engagement. At about the same time BDP entered into a collateral warranty in favour of the Society; its terms are considered in detail at paragraphs [20]-[24] below. Two further events occurred at about this time. First, WSA entered into a parent company guarantee with Port Hamilton; and secondly, LMS granted a collateral warranty in favour of the Society.

[6] On 21 August 1997 EDG, who held the tenant's interest under the lease of the land, granted a part assignation of their rights under the lease to Port Hamilton. Shortly thereafter, during the winter of 1997/98, the roofs of blocks D and E suffered damage. Then on 10 March 1998 Harmon went into receivership, having ceased work on site a few weeks earlier. Practical completion took place on 23 March 1998. On 13 May 1998 EDG granted a further part assignation of their rights under the head lease to Port Hamilton. On 8 July 1999 Port Hamilton granted a sublease in favour of the Society, and on the same date the tenant's rights under that sublease were assigned by the Society to the pursuers.

[7] Four years later, in 2003, various transfers of rights were made by the Society and Port Hamilton to the pursuers. First, on 10 July 2003, the Society assigned to the pursuers the full benefit of its interests and rights under the collateral warranty granted by BDP in 1996, together with all rights to sue or take action in respect of any breach. On the same date the Society assigned to the pursuers the full benefit of all rights and interests granted to it by LMS (a collateral warranty by LMS in favour of the Society having been granted in 1996). On 13 August 2003 intimation was made to BDP of the assignation of the collateral warranty. On 9 September 2003 Port Hamilton assigned to the pursuers the benefit of the collateral warranties and the guarantee that had been granted by Harmon and WSA. On the same date LMS assigned to the pursuers its rights under the works package contract with Kershaw. On 3 October 2003 intimation was made to Harmon and WSA of the assignation by Port Hamilton to the pursuers of the benefit of the collateral warranties and guarantee that had been granted by Harmon and WSA.

[8] The present actions, together with certain other actions based on collateral warranties granted by other parties, were raised by the pursuers in October 2003 and were then sisted for investigation. After sundry procedure they were transferred to the commercial roll and appointed to debate, at which the defenders argued that the pursuers' pleadings were irrelevant, on a number of grounds. Before I consider these, however, I will summarize the averments made by the pursuers in each action.

[9] In the Harmon action, the pursuers' primary ground of action is based on the collateral warranties granted by Harmon to Port Hamilton in respect of Harmon's obligations under their works contract and by BDP in favour of the Society, and the subsequent assignations by Port Hamilton and the Society in favour of the pursuers of their rights under both of those collateral warranties. Under this ground the pursuers rely on the proposition that the Society and Port Hamilton suffered loss as a result of breaches of warranty by Harmon and BDP and seek to recover that loss by virtue of the assignation in their favour. The pursuers have an alternative ground of action based on the proposition that they themselves suffered loss as subtenants of the Society's head office by virtue of the assignation by the Society dated 8 July 1999. They aver that under the sublease granted by Port Hamilton to the Society (granted on 8 July 1999) the subtenant was obliged throughout the period of the sublease at its own cost to maintain and keep the site and buildings on it in good and substantial repair and whenever necessary to replace, renew and reinstate the buildings on the site. The Society's interest as subtenant was assigned to the pursuers in 1999. It is further averred that Port Hamilton assumed similar obligations as a tenant under the head lease in favour of EDG (granted on 28 March 1994) and the subsequent assignation of that lease in favour of Port Hamilton (the assignations being granted on 21 August and 24 December 1997 and 13 May 1998).

[10] Thereafter the pursuers aver the engagement by LMS of Harmon to undertake the glazing systems works package and events subsequent thereto. On 10 March 1998 Harmon were placed in receivership, having ceased work on site a few weeks earlier. At that stage the works were incomplete, but Harmon had carried out or procured the detailed design of the whole of the works comprised in their works contract and had manufactured and installed the bulk of them. In particular, the curved-on-plan curtain walling, the gasket glazed curtain walling and the structural glazed curtain walling were erected and complete to the point where they were expected to be able to resist the weather. The works that remained incomplete related to copings and flashings and the installation of doors; these are specified in some detail, although ultimately nothing seems to turn on the lack of completion. The pursuers aver that the works carried out by Harmon were defective, and go on to specify the particular defects that are said to have occurred in each of the types of curtain walling, in the glass block walling and in copings, associated flashings, closures and the like. Averments are then made regarding Harmon's breach of contract. Under their works package contract Harmon were obliged to provide workmanship to specified standards, and were further obliged to exercise all reasonable skill and care in the design of the works, the selection of materials and the satisfaction of any performance specification or requirement, in so far as Harmon were responsible for each of those matters. Harmon were in fact responsible for the design of the curtain walling works, and detailed reference is made to the specification to which design and construction of those works was to be carried out. The pursuers than aver that Harmon were in breach of those contractual obligations, and provide details of that breach.

[11] In relation to BDP, in the Harmon action the pursuers aver the contractual duties undertaken by BDP in the appointment letter. These included a warranty by BDP that they were qualified to perform and would perform their duties under the appointment with all reasonable skill, care, expertise and diligence to be expected of architects involved in work of no less value or smaller scope, a similar kind, no less complex and no lower quality than the project. Provision was also made in the appointment letter for cases where BDP were required to incorporate design details provided by others. In that event, apart from BDP's own sub-consultants, BDP's responsibility was limited; nevertheless BDP assumed the role of lead consultant and was bound at all times to direct the team of consultants appointed by ECSL in respect of design. In relation to elements of design that were carried out by among others specialist subcontractors, BDP were responsible for the preparation of performance specifications and tender documents for those elements of carrying out technical checks of the design in so far as that was within the normal expertise of an architect. The pursuers then aver that, in order to perform the foregoing duties in relation to the cladding works that were designed by Harmon, they require the technical knowledge of a specialist consultant and, lacking that knowledge themselves, required to engage such a consultant in order to comply with the warranty that they would use all reasonable skill, care, expertise and diligence to be expected of architects in comparable projects. Details are then given of their employment of a planning consultant, but it is said that the consultant's involvement was only to assist with the preparation of the cladding specification and not to provide expert advice through to completion. It is further averred that BDP had an obligation to visit the site regularly and test parts of the

curtain walling; had they done so, it is said, the defects in Harmon's workmanship would have been apparent, in some cases through visual inspection and in other cases through the carrying out of standard technical checks. This involved carrying out hosepipe tests on sample areas of completed coping installation. It is said that Harmon failed to carry out these inspections and tests and were accordingly in breach of contract.

[12] In relation to WSA, the pursuers aver (in the Harmon action) that WSA entered into a parent company guarantee with Port Hamilton in 1996. That guarantee related to Harmon's obligations under their collateral warranty in favour of Port Hamilton. The terms of that collateral warranty are discussed below at paragraphs [25] and [26], and the terms of WSA's parent company guarantee are discussed below at paragraphs [46] and [47]; the material provisions are set out in the pleadings. It is then averred that the breaches of the works package contract averred in relation to Harmon constituted breaches of clause 3 of the collateral warranty granted by Harmon in favour of Port Hamilton, and that as a consequence WSA were in breach of their guarantee. Finally, the pursuers aver the assignation on 9 September 2003 by Port Hamilton of the full benefit of all of their rights and interests under the collateral warranty and guarantee. That assignation is said to have been intimated to Harmon and WSA by service of the Harmon action on 3 October 2003.

[13] The pursuers go on to make detailed averments of the losses that they claim were sustained in respect of breaches of warranty by Harmon and BDP and breach of the guarantee by WSA. They aver that that loss was sustained by the Society and Port Hamilton, and that they are entitled to recover by virtue of their position as assignees. Port Hamilton as tenants and the Society as subtenants were required to carry out remedial works, and the measure of loss and damage is said to be the cost of carrying out those remedial works. The remedial works had in fact been carried out by the pursuers, the pursuers having taken an assignation of the subtenancy from the Society (on 8 July 1999). Details are given of the remedial works. The cost of those works, including professional fees and expenses, is said to amount to £5,956,974.34.

[14] In the Kershaw action, the pursuers proceed on two bases. First, they claim damages for breach of the collateral warranties granted by Kershaw and BDP in favour of the Society, claiming title to sue under those warranties as assignees of the Society. Secondly, on 9 September 2003 they took an assignation from LMS of the latter's rights under the works package contract with Kershaw, and their second ground of action is based on the works package contract; they sue as LMS's assignee and claim that LMS themselves suffered loss as a result of Kershaw's breach of contract. The pursuers aver that in March 1996 LMS engaged Kershaw to undertake the works package contract for the design and construction of the standing seam roof. When executing the works package contract Kershaw entered into collateral warranties in favour of *inter alios* the Society. Details of the warranty in favour of the Society are given; it is in similar terms to Harmon's warranty in favour of Port Hamilton. The material terms of the collateral warranty granted by BDP in favour of the Society are then specified; this warranty was of course applicable to the whole project, and related to BDP's involvement in Kershaw's work in the same way as it applied to their involvement in Harmon's work. The pursuers then aver that detailed design was undertaken in the second half of 1996 and works began on site in early 1997. The roofing works are then described. In summary, the main roof areas of the five blocks of the building were covered with coated stainless steel strips joined along their lengths by standing seams. The full roof construction comprised metal supports, vapour barriers, thermal installation and breather membrane, tanking, a further membrane and then the standing seam roofing. Apart from the steel purlins to which the structure was secured, all of the elements fell within Kershaw's works package. The structure of the eaves and gutters is also described, including a "bullnose" assembly at the roof edge.

[15] The pursuers aver that during the winter of 1997/98 the roof over blocks D and E suffered storm damage. High winds caused uplift and distortion of the gutters. Further storm damage occurred during the winter of 1998/99, and in early 2001 the bullnose assembly at the edge of the roof on blocks D and E became detached in high winds. On the night of 27/28 January 2002, the bullnose became detached in high winds in several places affecting blocks A, C, D and E. Following inspection, it is averred, the standing seam roofs and eaves were found to be defective in a number of respects that are itemized at some length. The pursuers go on to aver the provisions of the works package contract dealing with workmanship, again in some detail, and state that the various defects represented breaches of Kershaw's obligations under that contract. In

relation to BDP, the pursuers aver the obligations that arose under their letter of appointment; these are essentially the same as those specified in the Harmon action. It is averred that BDP failed to make regular inspections of the progress and quality of the works to determine that the works were in accordance with the contract documentation, and failed to carry out adequate technical checks of Kershaw's design of the standing seam roofs and associated parts of the building. These matters are specified in some detail; it is said that they constituted a breach of BDP's appointment as architects.

[16] The pursuers make detailed averments about the losses that they claim were suffered as a result of breach of the works package contract between Kershaw and LMS and breach of the collateral warranties granted by Kershaw and BDP in favour of the Society. They aver that those losses were sustained by the Society, and that they are entitled to recover as assignees of the collateral warranties granted in favour of the Society. Loss, it is said, was also sustained by LMS as a result of Kershaw's breach of contract. That breach of contract put LMS in breach of its obligations under the management contract with ECSL and in breach of the collateral warranty granted by LMS to the Society. The benefit of that collateral warranty was assigned by the Society to the pursuers. The Society as subtenants of the property were required to carry out remedial works, and the measure of the loss and damage sued for is the cost of those remedial works. As in the Harmon action, the remedial works were in fact carried out by the pursuers, following the pursuers' having taken an assignation of the subtenancy from the Society. As an alternative case, on the hypothesis that the Society did not suffer a loss, the pursuers aver that they themselves incurred a liability as subtenants in respect of the remedial works and accordingly suffered loss and damage themselves as a result of Kershaw's and BDP's breaches of the collateral warranties that were granted to the Society; in that event the pursuers are entitled as assignees to the benefit of those warranties. The remedial works are then specified in detail. The total cost of the remedial works, including professional fees and expenses, is said to have amounted to £2,134,190.87.

Legal analysis: form of collateral warranties

[17] The purpose of a collateral warranty, as mentioned at the beginning of this opinion, is to provide a right of action between parties who, under the standard legal structures used in construction contracts, would not otherwise be in any contractual relationship; it thus confers title to sue on the grantee of the warranty. A collateral warranty constitutes a contract between the granter and the grantee. Under that contract, the granter undertakes that it will perform specified works to a standard of competent workmanship (in the case of a contractor), or will provide specified services and observe proper professional standards of skill and care (in the case of an architect or engineer). If the granter fails to perform its duties to the required standard, the grantee can raise an action to compel such performance; that applies in any case where an action of specific implement is competent. Alternatively, if the grantee suffers financial loss as a result of the defective performance, it may raise proceedings against the granter in order to recover the amount of that loss. In such a case, the primary loss resulting from defective performance is a physical defect in the building. That is clear, in the context of a delictual claim, from *GUS Property Management Ltd* v *Littlewoods Mail Order Stores*, 1982 SC (HL) 157. In that case a building was damaged, allegedly by the defenders' negligence, when it was in the ownership of a company in the same group as the pursuers. The building was then transferred to the pursuers, and the original owners granted an assignation of their right to sue in respect of the loss. It was held (by Lord Keith at 177-178) that the original owners' title and interest to sue arose from the physical damage, and remained with them even after the building was transferred. A similar analysis in a contractual context was adopted in *McLaren Murdoch & Hamilton Ltd* v *Abercromby Motor Group Ltd*, 2003 SCLR 323, at paragraph [34]. The primary physical damage to the building will, however, have economic consequences, which may fall on a number of parties. In delict such economic loss will generally not be recoverable by any person other than the original owner of the building or its assignee (as in *GUS*), but there is no such limitation on recoverability in contract. In delict the right to sue is based on the existence of a duty of care together with breach of that duty and resulting loss caused to the person to whom the duty is owed. In contract, on the other hand, the right to sue is based on the existence of a contractual obligation and breach of that obligation, and the restrictions that limit the existence of a duty of care do not apply; the contact creates the duty. Consequently there is no reason that any person who becomes liable for the cost of repairing a

defect in a building should not be entitled to sue for the cost provided that he is the beneficiary of a collateral warranty granted by the person responsible for the defect.

[18] The main economic consequence of a physical defect in a building is the cost of repair. This may fall on the owner of the building at the time when the defect manifests itself. Alternatively, the liability may have been transferred by the owner to a tenant or to a disponee, and those parties may have passed the liability for repair on to other parties. The transfer of the liability for repair may be done expressly, as where a landlord granting a lease imposes on the tenant the liability for putting the property into a state of proper repair. A further possibility, however, is that the liability for repair is not referred to expressly but is transferred impliedly, as where a disposition or lease of the property is granted without any reference to defects; in that case, if the disponee or tenant wants a building in a state of proper repair, it must undertake the cost of the necessary repairs. If a collateral warranty has been granted in favour of the person who is ultimately liable for the cost of repair, that person can in my opinion raise an action against the granter of the warranty in order to recover the cost of repair, provided that the collateral warranty is in terms that are habile to cover that cost. That, it seems to me, accords with the fundamental purpose of such a warranty, namely to provide a right of action to a person who is liable to suffer loss as a result of defective performance of a building contract or a contract for professional services in connection with a building project.

[19] On the basis of the foregoing analysis, it is necessary to examine the collateral warranties that are relied on and the losses claimed by the pursuers to discover whether those losses fall within the terms of the collateral warranties. I intend first to consider the terms of the collateral warranties granted by BDP favour of the Society and by Harmon in favour of Port Hamilton and the categories of loss that might reasonably be contemplated as falling under those warranties. The collateral warranty granted by Kershaw is similar to the Harmon warranty. Thereafter I will consider the arguments presented by the various defenders in the two actions, which focused in large measure on whether the losses averred by the pursuers were recoverable under the collateral warranties.

The BDP collateral warranty in favour of the Society

[20] In the present case, BDP were employed as project architects by ECSL but granted a collateral warranty to the Society. The purpose of the warranty (in which ECSL are referred to as "the Client" and BDP are referred to as "the Consultant") is set out in the recitals contained in clause 1. This clause provides as follows:

"WHEREAS

A. The Consultant has entered into the Appointment (hereinafter defined) with the Client in terms of which the Consultant has undertaken to carry out the Services (hereinafter defined) in connection with the Project (hereinafter defined).

B. The Society intends to occupy the development constituted by the Project and will have financial responsibilities, liabilities and/or costs in relation to the Site (hereinafter defined) and the Project and occupation and use of the Site and the Project including as a consequence of failures in respect of design and construction by indemnity or otherwise".

That provision makes it clear that the Society has a financial interest in the site. It is the intended occupier, and is liable to incur financial responsibilities, liabilities and costs in respect of the Project and the Site (defined as the land on which the Project is carried out). Such responsibilities, liabilities and costs may be the consequence of failures in design and construction. Thus it is contemplated at the outset that the Society may be the party who suffers the losses caused by defective design.

[21] The main substantive provision of BDP's collateral warranty is found in clause 3. In this clause, the "Appointment" means the professional appointment entered into between ECSL and BDP and the "Services"

means the services provided by BDP to ECSL for the Project pursuant to the Appointment. Clause 3 provides as follows:

"3.1 The Consultant undertakes and warrants to the Society that the Consultant:-

3.1.1 has carried out and shall carry out and complete the Services in conformity with the Appointment;

3.1.2 has observed, performed and complied with and shall observe, perform and comply with all the provisions and obligations on the part of the Consultant to be observed, performed and complied with all as contained in the Appointment.

3.2 The Consultant undertakes and warrants to the Society and it has been employed by the Client [ECSL] as Consultant in respect of the Project, the Services and the Management Contract works and that it has exercised and will continue to exercise the duties of skill, care, expertise and diligence of the type and standard specified in the Appointment for the Project".

The Appointment is the basic contract for the provision of architectural services by BDP; as would be expected, it contains a very elaborate description of the responsibilities of BDP as contract architect and general duties to exercise all reasonable skill, care, expertise and diligence such as would be expected of architects engaged in work on the scale and of the complexity and quality of the Project. These duties are effectively incorporated into the collateral warranty.

[22] Clause 3 of the collateral warranty contains a proviso in the following terms:

"PROVIDED ALWAYS that the Consultant's liability to the Society shall be limited to that proportion of such costs, including but not limited to related professional fees, which it would be just and equitable to require the Consultant to pay having regard to the extent of the Consultant's responsibility for the same and the quantity surveyors, civil and structural engineers, building services consulting engineers and works package contractors in respect of the Project shall be deemed to have given contractual undertakings to the Society in respect of the services which at least impose a liability on them for such costs and shall be deemed to have paid to the Society such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility".

That is a net contribution clause: its effect is to restrict joint and several liability with other parties whose defective workmanship or other negligence may have contributed to the losses sustained by the Society; instead, the liability of BDP is to be restricted to a just and equitable assessment of their contribution to the total loss.

[23] Clause 5 of the BDP collateral warranty in favour of the Society is headed "Continuing Effect". It provides that the provisions of the collateral warranty shall continue to have effect as between the Society and BDP even if the employment of BDP or the provision of the Services is suspended or terminated. That is obviously motivated by the fact that it was contemplated that the Society would occupy the development in future and would have continuing responsibilities that might result from failures in design and the like, all as specified in recital B. That is something that might occur after the termination of BDP's appointment. Clause 7 of the BDP warranty provides for assignation. It states that the Society may assign its rights under the warranty in whole or in part, but only as specified in the clause. Assignation may be made to a range of persons, in some cases with a requirement of consent on BDP's part. The prospective assignee that is relevant for present purposes is the fourth, "a company which is a subsidiary of the Society (or a subsidiary of a holding company which is a subsidiary of the Society) without consent of the Consultant provided that the primary purpose of such assignation is not to transfer or assign the Society's rights in respect of this Agreement and then transfer or dispose of the assignee so it is no longer a subsidiary as aforesaid". That is subject to a further requirement that, read short, the benefit of other collateral warranties in favour of the Society should be transferred, but no issue turns on that provision. The effect of that clause is that assignation is permitted in favour of any company that is a subsidiary of the Society. The pursuers are such a company.

[24] Finally, clause 8.1.1 of the collateral warranty, headed "Tenant Warranties", provides as follows:

"Within twenty one days of written request from time to time, the Consultant shall execute and deliver to the Society a Tenant Warranty Agreement in terms of the draft Tenant Warranty Agreement set out in the Schedule hereto in the name of the first occupational tenant or tenants of the Project or any part or parts thereof. Ten Tenant Warranties in aggregate with any BPF Warranty Agreements which are provided or are to be provided pursuant to the Appointment will be provided free of charge but payment of £1,500 for each BPF Warranty above ten will be made".

The purpose of this clause is obvious in the context of a development that is likely to be tenanted in whole or in part. If different parts of the development are to be leased to a range of tenants, those tenants may incur a loss as a result of the professional negligence of the architect, and they may in consequence require a collateral warranty to protect them against that possibility. Such tenants could not be dealt with by assignation under clause 7 because of the restrictions on assignation contained in the latter clause. Clause 8 is intended to provide for such warranties as and when they are required by tenants. The need for such warranties is perhaps most obvious in a development such as a shopping centre, but I understand that the Scottish Widows head office includes areas leased to tenants who are otherwise unconnected with the Society. The purpose of clause 8 is to deal with tenants of that nature. It was argued for BDP, and for other defenders in relation to their collateral warranties, that the function of clause 8 was wider than that. The submission was that the parties contemplated a complex and interlocking network of collateral warranties. An important feature of that network was that any person who occupied the building as a tenant should obtain a collateral warranty of the sort contemplated by clause 8; otherwise such person would fall outside the scheme of warranties. That applied in particular to the Society and Port Hamilton, who occupied respectively as subtenants and tenants; unless those parties obtained a collateral warranty such as was contemplated by clause 8, they were not protected. In my opinion that argument proceeds on a fundamental misunderstanding of the system of collateral warranties. So far as the Society is concerned, a comprehensive warranty is provided in clause 3. That warranty is granted with a view to the matters mentioned in recital B, namely that the Society intended to occupy the development and would have financial responsibilities and the like in relation to the Site and the Project, including the possible consequences of failures in respect of design and construction. The wording of that recital is comprehensive; it covers occupation by the Society and the financial responsibilities of the Society. Nothing is said to limit such occupation or such financial responsibilities to actings of the Society other than as a tenant. Indeed, limiting the scope of clause 3 in that way would serve no commercial purpose whatsoever. For this reason I am of opinion that clause 8 has no bearing on the rights of the Society under the BDP collateral agreement. As mentioned below, a similar point relates to the collateral warranties granted by and in favour of other parties, in particular Port Hamilton.

The Harmon collateral warranty in favour of Port Hamilton

[25] At this point I will also consider the collateral warranty granted by Harmon in favour of Port Hamilton; this is relevant to the claims against Harmon and WSA. In that document Harmon are referred to as "the Works Contractor", and Port Hamilton are referred to as "the Fund". The recitals in that warranty are as follows:

"WHEREAS

A The Management Contractor has entered into the Works Contract (hereinafter defined) with the Works Contractor in terms of which the Works Contractor has undertaken to carry out the Works (hereinafter defined) in connection with the Project (hereinafter defined).

B The Fund has entered into an agreement to provide development finance for the Project.

C The Fund will have an interest in the Project in respect of its financing and in respect of its subsequent use and ownership".

These provisions make it clear that Port Hamilton, like the Society, had a financial interest in the Project, in that it had entered into an agreement to provide development finance, and might in future have an interest as either a user of the premises or the owner thereof. Whether as financier, user or owner of the building, it was plainly contemplated that Port Hamilton might be the party responsible for meeting the costs of any defective work and thus the party that suffers financial loss in consequence of Harmon's breach of contract.

[26] The operative provisions of Harmon's collateral warranty are found in clauses 3 and 4. Clause 3 deals with the standard of performance; it provides in summary that Harmon undertakes and warrants to Port Hamilton that it has carried out and will carry out and complete the works in conformity with the Works Contract, that it has exercised and will continue to exercise the standard of skill, care and diligence specified in the Works Contract, and that it has exercised and will continue to exercise skill, care and diligence in design and the selection of goods and materials. Clause 4, headed "Duty of Care", provides that Harmon acknowledges that Port Hamilton has and will be deemed to have relied exclusively upon Harmon's skill and judgment in respect of the works carried out under the Works Contract. Clause 6 of Harmon's collateral warranty, headed "Continuing Effect", is in substantially identical terms to clause 5 of the BDP warranty, and is clearly based on the view that Port Hamilton was likely to be interested in the Project in future, whether as financier, user or owner. Clause 8 of the Harmon warranty deals with assignation, and provides that Port Hamilton "shall be entitled to assign or transfer this Agreement or any rights hereunder or any part, share or interest herein". Finally, clause 12.1 of the warranty granted by Harmon in favour of Port Hamilton, headed "Tenant Warranties", provides that within three days of a written request Harmon will execute and deliver to Port Hamilton a Tenant Warranty Agreement and Tenant Guarantee in terms of specified drafts. The purpose of this clause is in my opinion exactly the same as that of clause 8.1.1 of the BDP collateral warranty in favour of the Society, and my comments on the latter clause apply equally here, except that there is no restriction on assignation; nevertheless, I do think that this affects the result.

Legal analysis: pursuers' case against BDP

[27] The pursuers' case against BDP proceeds on two alternative bases: first that the Society had suffered loss recoverable under BDP's collateral warranty in favour of the Society; in that event the pursuers sued as the Society's assignee; and secondly that the pursuers had themselves sustained loss which they could nevertheless recover under the collateral warranty in favour of the Society, once again as the Society's assignee. The sequence of events averred by the pursuers is as follows. Practical completion occurred on 23 March 1998. The damage had occurred before that, and Harmon had ceased work by that time. On the same date Port Hamilton were granted a part assignation of the head lease by EDG; this had the result of transferring the whole of the head lease to Port Hamilton. On the same date Port Hamilton granted a sublease to the Society. On 8 July 1999 the Society granted an assignation of the sublease to the pursuers, and on 10 July 2003 the Society assigned to the pursuers their rights under the collateral warranty from BDP. The sublease granted by Port Hamilton to the Society included the following provision:

"9. Tenants' Additional Obligations

9.1 The Tenants accept the Leased Subjects and the Buildings and every part thereof in their present condition and at all times throughout the period of this Lease at their own cost and expense the Tenants shall maintain and keep the Leased Subjects the Buildings and every part thereof in good and substantial repair maintained and in a clean condition, prevent disrepair and deterioration (and whenever necessary the Tenants shall replace, renew, rebuild and reinstate the Buildings) which obligation shall subsist irrespective of the cause of damage, deterioration or destruction (any implied warranty by the Landlords being expressly excluded)...".

Nature of loss claimed by pursuers

[28] Counsel for BDP submitted in the first place that the loss averred by the pursuers related to the state of the building. The defects in the building had become apparent by the time of practical completion. By that stage, accordingly, loss had been suffered. The pursuers' primary position was that that loss had been

sustained by Port Hamilton and, separately, the Society as tenant and subtenant respectively; each of those, the pursuers averred, incurred a liability for repair under the lease or sublease. That liability for repair was not the loss, however; the loss was rather the physical defect in the building, which existed by the time of practical completion. The cost of repair might indicate the measure of loss, but it was not itself the loss. The result was that the physical loss was suffered by a person other than Port Hamilton or the Society: that might be ECSL, the employer under the building contract, or the person who owned the building at practical completion. If the owner at practical completion had a collateral warranty, it could take action under that warranty for its loss; alternatively ECSL might be able to sue. Nevertheless neither the Society nor Port Hamilton had any proprietary interest at the time when the loss was sustained, and consequently they could not recover any loss. That by itself was fatal to the pursuers' case.

[29] In my opinion this argument is incorrect. The fallacy is the assertion that, in a case based on breach of contract, the only loss that is suffered is the physical defect in the building. The physical defect is certainly the primary loss, as explained above at paragraphs [17] and [18], but it produces economic consequences in that it has to be repaired. That liability for repair is also a loss, and the person who incurs such a loss can in my opinion sue to recover it if he is in a direct contractual relationship with the person whose breach of contract has produced the loss. That, on the pursuers' averments, is the present case. Moreover, it is clear from the terms of BDP's collateral warranty in favour of the Society that it was specifically contemplated that the Society would occupy the development and might incur liabilities or costs, including liabilities or costs resulting from failures in design. Thus the type of loss founded on by the pursuers is expressly referred to in the collateral warranty. BDP relied on the analysis of loss at paragraph [34] in *McLaren Murdoch & Hamilton Ltd* v *Abercromby Motor Group Ltd*. The point made there is that in a case involving a defective building the physical defect in the building is itself loss, which is recoverable by the then owner of the building; moreover, that physical loss is independent of issues of quantification. It does not follow, however, that the physical loss is the only loss arising from a breach of contract; the physical defect may produce further economic loss, which can fall on a range of parties who may or may not have a right of action against the person responsible for the physical defect.

Significance of the sublease in favour of the Society

[30] Counsel for BDP submitted in the second place that the sublease in favour of the Society, subsequently assigned to the pursuers, was not sufficient to give either the Society or the pursuers any right of action against BDP. First, it was submitted that the acquisition of the sublease by the Society was a device that was obviously lacking in substance; it should accordingly be set aside. In my opinion this argument cannot be sustained. The grant of the sublease in favour of the Society was clearly intended as one of a planned series of steps designed to preserve the effectiveness of the system of collateral warranties. As such it was a critical transaction, and I do not think that it can be said to lack substance.

[31] Secondly, counsel submitted that the liabilities incurred by the Society under the sublease in its favour were not caused by the alleged wrongs; they involved economic loss that was distinct from the physical state of the premises. The losses for which the pursuers sought recovery were as a matter of common sense attributable to the Society's entering into the sublease, which had been entered into a considerable time after the breaches of contract. In those circumstances it could not be said that the losses were caused by the breaches of contract averred by the pursuers. The breaches of contract might have provided an opportunity for the loss, but it was entering into the lease that was the effective cause of the Society's and, through assignation, the pursuers' loss. Reference was made to *Galoo Ltd* v *Bright Grahame Murray*, [1994] 1 WLR 1360, per Glidewell LJ at 1369-1375, to *Monarch Steamship Co Ltd* v *Karlshamms Oljefabriker (A/B),* 1949 SC (HL) 1, and to *Alexander* v *Cambridge Credit Corporation Ltd*, (1987) 9 NSWLR 310, a decision of the Court of Appeal of New South Wales which was extensively cited in *Galoo*. Those cases make it clear that the "but for" test of causation is a necessary but not sufficient condition for recovery; in addition to that test, it must be possible to say as a matter of common sense that the breach of contract or fault of the defender was the effective or dominant cause of the pursuer's loss. That is undoubtedly correct, but in my opinion it cannot be said that on the pursuers' averments there was no effective causal link between the alleged breach of

contract on the part of BDP and the losses that the pursuers seek to recover. In determining whether a breach of contract is the effective cause of loss, it is always relevant to consider whether the loss in question was one that might reasonably be considered to fall within the contemplation of the parties to the contract. To that end, it is necessary to examine the contract. In the present case, the collateral warranty granted by BDP to the Society specifically contemplated, in the recitals in clause 1, that the Society might occupy the site and incur liabilities or costs as a consequence of failures in design and construction. It is obvious that such occupation could take a number of legal forms, but the Society's becoming subtenant is perhaps one of the most obvious of these. It is in my opinion immaterial that the Society did not become subtenants until some time after the loss emerged. The critical point of the collateral warranty was to protect the Society as a possible future occupier who might have financial responsibilities in relation to the project and the site as a result of failures in design and construction; that is clear from the second recital of the warranty. On that basis, I consider that it was clearly within the contemplation of the parties to the warranty that the Society might not become occupiers, or might not incur financial responsibilities as a result of failures in design and construction, until after defects appeared in the building. Nevertheless the warranty contemplated that the Society might recover its loss resulting from failures in design and construction so far as they were caused by BDP's breach of contract. On that basis I do not think that the sublease can be considered the effective cause of the Society's loss, BDP's breaches of contract merely forming part of the background; the proper analysis is rather that those breaches of contract were the effective cause of the Society's loss, and the entry into the sublease was simply an event, contemplated by the contract, that brought those losses home to the Society.

[32] Thirdly, counsel for BDP submitted that the sublease in favour of the Society did not in fact impose any obligation to perform the remedial works averred by the pursuers, or at least the pursuers did not aver that there was any such obligation in the sublease. The relevant clause in the sublease, clause 9, is set out at paragraph [27] above. Counsel submitted that that clause did not impose any requirement to put the premises into a good condition; instead it merely imposed an obligation to keep the premises in good and substantial repair. That did not cover remedial works of the sort found in the pursuers' pleadings. In support of that construction, he referred to *Crédit Suisse* v *Beegas Nominees Ltd*, [1994] 4 All ER 803, *Taylor Woodrow Property Co Ltd* v *Strathclyde Regional Council* 15 December 1995, unreported, *Lowe* v *Quayle Munro Ltd*, 1997 SLT 1168, *Welsh* v *Greenwich London Borough Council*, [2000] 3 EGLR 41, and *Southwark London Borough Council* v *Tanner*, [2001] 1 AC 1. The solicitor for Kershaw, who adopted BDP's argument on this point, also referred me to *McCall's Entertainments (Ayr) Ltd* v *South Ayrshire Council (No 2)*, 1998 SLT 1421.

[33] Those cases make it clear that each case turns on the particular wording of the clause under consideration, that an attempt must be made to give effect to each word in a repairing clause, and that the clause must be read as a whole: see, for example, *Crédit Suisse* at 820j-821 per Lindsay J, and *McCall's Entertainments* at 1427A per Lord Hamilton. In *Crédit Suisse* it was held that a distinction must be drawn between an obligation to repair and an obligation to keep and put premises into good and tenantable condition; in the former case, the obligation did not arise unless there was a disrepair, whereas in the latter case all that is required is that the subject matter is out of that condition. The case was followed in *Taylor Woodrow*, where Lord Penrose stated (at 22-24) that an obligation to keep premises in good and substantial condition might be wider than an obligation to repair, and that under the former obligation it would not be necessary to identify any element of disrepair as a precondition of work under the obligation. In *Lowe* the obligation was "to repair and keep in good and substantial repair and maintained... and to replace or renew or rebuild whenever necessary the leased subjects". Lord Penrose held (at 1171L) that an obligation to repair arose where there was a state of disrepair. In *Welsh* a tenancy agreement included an obligation on the landlords "to maintain the dwelling in good condition and repair...". It was held by Robert Walker LJ (at 43M) that the reference to "a good condition" was intended to mark a separate concept and to make a significant addition to what was conveyed by the word "repair". Latham LJ drew a similar distinction (at 44D), and observed that the phrase "good condition" seemed to concentrate the mind upon the state of the dwelling, whereas "repair" looked at the matter more from the perspective of the need to do particular repairing work. In *Southwark London Borough Council* v *Tanner* Lord Hoffmann stated (at 8C) that "Keeping in repair means remedying disrepair. The landlord is obliged only to restore the house to its

previous good condition. He does not have to make it a better house than it originally was". In *McCall's Entertainments* the repairing clause began by stating that the tenants accepted the subjects in their present condition, and bound the tenants "to keep at all times during the currency of this lease the subjects... in good repair, condition and decoration in every respect". Lord Hamilton stated (at 1427B-F) that the effect of the opening words was to relieve the landlords of the common law obligation to put the subjects into a tenantable condition, but that did not of itself impose that obligation on the tenants. The clause accordingly obliged the tenants to give up possession of the subjects in the same general state as they were at the outset of the lease; there was no obligation of improvement. In that case (unlike the present) there were no express obligations of replacement, renewal or rebuilding. That formed the context in which the obligation to keep in good repair must be construed, and negatived any obligation to improve the condition of the subjects.

[34] Clause 9.1 of the Society's sublease begins by stating that the tenants accept the subjects in their present condition; that indicates, in accordance with *McCall's Entertainments*, that there is no obligation on the landlords to put the subjects in a tenantable condition at the start of the sublease; nevertheless those words do not impose any such obligation on the tenant. The sublease continues by obliging the tenants to "maintain and keep the Leased Subjects the Buildings and every part thereof in good and substantial repair maintained and in a clean condition, prevent disrepair and deterioration". It further includes an obligation on the tenants whenever necessary to replace, renew, rebuild and reinstate the Buildings. On the basis of the authorities discussed in the last paragraph the obligation to maintain and keep the subjects in good and tenantable repair does not amount to an obligation to improve the subjects in any way; it merely involves maintaining the subjects in the same condition as they were in at the start of the sublease. For the pursuers it was submitted that the wording used was sufficiently wide to embrace defects caused by the various defenders' breaches of contract in the design and construction of the building. The difficulty with that submission is that some at least of the defects existed prior to practical completion, which occurred on the date of which the sublease was granted. Nevertheless, I do not think that this construction of clause 9.1 debars the pursuers from making a claim under the BDP collateral warranty. The sublease subsisted from 14 April 1998 to 13 April 2023. At the start of the lease it had become apparent that the building was not wind and watertight because of defects in the glazing and shortly after the start of the lease it became apparent that the roof was defective; that caused the building not to be wind and watertight. Normally a landlord would have an obligation to repair such a defect, but such an obligation was excluded by the opening words of clause 9.1. The result was that the subtenants, the Society, were left with a building in a manifestly unacceptable condition with no right of recourse against their landlords, Port Hamilton, or against the owner of the building. In such a situation the only remedy available to the subtenants was to perform the necessary remedial works themselves. On the pursuers' averments the works were in fact paid for by the pursuers, who were assignees of both the Society and Port Hamilton. Port Hamilton had no obligation to the Society to carry out repairs, but obviously they too would have an interest to ensure that the defects were made good as they were the tenants under the head lease of the building. I am accordingly of opinion that it is immaterial where the obligation to make the defects lies as between Port Hamilton and the Society; the defects had to be made good, for practical reasons, and it is the expense of making them good that gives rise to a claim under each of the collateral warranties. Ultimately the repairing obligations in the lease and sublease are of negative significance: if there is no obligation to carry out repairs, the subtenant or tenant is compelled to do so simply to have a building fit for occupation. It is the fact that necessary repairs have been carried out at the expense of the grantees of the collateral warranties or their assignee that gives rise to a claim.

[35] Counsel for BDP further submitted in relation to the sublease that the costs of meeting any repairing obligation under the lease were not a valid measure of the loss for the breach of any obligations on the part of BDP. The cost of remedial works was normally assessed by what was required to put the building into the condition in which it would have been had there been compliance with the contract, in this case the collateral warranty. In this case, however, it was submitted that the pursuers were attempting something different, namely compliance with the standard required under the sublease. On the basis of the pursuers' pleadings, I am of opinion that this argument is not correct. What is averred in the Harmon action (in article 9 of condescendence) is that the Society and Port Hamilton had suffered loss in respect of which the pursuers were entitled to recover as assignees. It is then averred:

"Port Hamilton as tenant and the Society as sub-tenant were required to carry out remedial works. The measure of said loss and damage is the cost of remedial works. These have in fact been carried out by the pursuers, as hereinafter condescended upon, the pursuers having taken an assignation of the sub-tenancy as condescended upon".

That makes it clear that the pursuers rely as the measure of their loss not on the extent of any obligations under the sublease but upon the cost of the remedial works, which is the cost of repairing the defects in the building. In the Kershaw action it is averred (in article 8 of condescendence) that the Society as subtenant were required to carry out remedial works, and that the measure of the loss and damage suffered by them is the cost of those works. As in the Harmon action, the works had in fact been carried out by the pursuers as assignees of the Society. Thus the two actions are in the same position.

Joint and several liability

[36] In both actions the pursuers conclude for payment from the defenders jointly and severally. In the Harmon action the sum sued for is sought from Harmon, BDP and WSA jointly and severally, and in the Kershaw action in the first conclusion the sum sued for is sought from Kershaw and BDP jointly and severally; the second conclusion is for exactly the same sum from Kershaw alone. Counsel for BDP submitted that in neither action was there scope for a finding of joint and several liability in relation to BDP. This argument was based on the net contribution clause in BDP's collateral warranty in favour of the Society, the terms of which are set out in paragraph [22] above. That clause, the proviso to clause 3, provides that BDP's liability to the Society is limited to such proportion of the costs incurred by the Society as would be just and equitable having regard to the extent of BDP's responsibility; for that purpose, it is to be assumed that all other consultants and works package contractors have given contractual undertakings to the Society imposing a corresponding liability on them. Counsel submitted that that limitation was an inherent part of the warranty given by BDP and must be given effect; reference was made to *National Children's Home* v *Stirrat Park Hogg*, 2001 SC 324. Consequently the decree sought from BDP must reflect the terms of the proviso.

[37] In my opinion BDP are correct in their basic analysis of the proviso to clause 3; it is a net contribution clause, and it limits the pursuers' ability to recover from BDP. In effect it restricts joint and several liability so far as BDP are concerned, limiting BDP's liability to a fair assessment of the consequences of their own breach of contract. If any decree is pronounced at the conclusion of each action, it will have to reflect the terms of the net contribution clause. At this stage, however, the critical question is whether the effect of the clause requires to be reflected in the conclusions of the summons. In my opinion this is not necessary. Indeed, it would be virtually impossible to draft a conclusion that reflected the clause. After proof, for example, it might be determined that BDP were seriously culpable and that they should bear a substantial part of the responsibility for the defects that arose; in that event joint and several liability between Harmon and BDP would extend to a substantial sum. Alternatively, it might be determined that BDP's culpability was slight, and that their contribution was accordingly small; in that event joint and several liability would be confined to a relatively small sum. The conclusion has to be capable of covering both of these possibilities. These practical considerations lead to the view that a conclusion in the present form is acceptable as a matter of relevancy. Nevertheless, following proof, the net contribution clause must apply according to its terms. That means that the court must, in pronouncing decree, take into account the effect of this net contribution clause and other similar clauses in other collateral warranties and restrict joint and several liability accordingly.

Pursuers' alternative case: loss sustained by them rather than Society

[38] The pursuers alternative case is based on the proposition that the cost of repairing the defects in the building fell on them rather than the Society; consequently the loss was theirs but they were able to recover it under the BDP collateral warranty as the Society's assignees. In the pursuers' fourth plea in law in the Harmon action, this is expressed as follows:

"Esto the Society has not suffered a loss, the pursuers themselves having incurred a liability as sub-tenants in respect of the remedial works, having suffered loss and damage as a result of the first and second defenders' breach of warranty to the Society, and being entitled as assignees to the benefit of the warranty granted by the first and second defenders to the Society... the pursuers are entitled to reparation...".

Counsel for BDP criticized this formulation. He submitted that it sought to recover for the pursuers' liability as subtenants to carry out the works required by the sublease; those were not the works required in consequence of BDP's breach of contract. In addition, counsel repeated his criticisms of the pursuers' primary case, based on the proposition that the loss had been sustained by the Society and could be recovered by the pursuers as the Society's assignees. In particular, at the time when damage was suffered, before practical completion, the pursuers had no interest in the property as subtenants. Consequently they had not suffered any loss. The submission regarding joint and several liability was also repeated.

[39] On BDP's submissions relating to joint and several liability, I accept the underlying argument, as indicated above, but reject the proposition that this renders the pleadings in their present form irrelevant, or the conclusions in each action incompetent. Otherwise, in so far as the arguments on the alternative case repeat those made in respect of the primary case, I reject them for the reasons given above in relation to the primary case. In relation to the criticism of the formulation of the pursuers' plea in law relating to the alternative case, I agree with counsel for BDP that the measure of loss that could be recovered is that resulting from any breach of contract on the part of BDP, and is not to be measured by the pursuers' liabilities under the sublease in their favour. On this matter, I refer to paragraph [34] above; the sublease explains why the pursuers carried out the works, to enable them to occupy premises that were wind and watertight, but the existence of a liability under the sublease to carry out repairs or to make good defects is not in my opinion essential to recovery. The right to recovery rather proceeds on the collateral warranty, which confers a right to sue for the physical loss caused by defects in the building and any recoverable economic consequences that the physical loss may have. On this analysis the pursuers' fourth plea in law is not particularly well framed, in that it refers to the pursuers' incurring a liability as subtenants. Nevertheless, it seems to me that the intention is clear enough: the pursuers are subtenants of the building; as subtenants they required to make good the defects in the building in order to have premises that were wind and watertight; and in doing so they incurred liabilities. I think that the plea in law can be construed in that sense, and accordingly I do not find this part of the pursuers' case to be irrelevant.

[40] At this point it is convenient to deal with a further argument made by counsel for BDP. BDP, together with the works contractors, granted a substantial number of collateral warranties, and some of those collateral warranties were assigned to persons other than the original holders. The possibility accordingly arises that more than one beneficiary of a collateral warranty will raise proceedings in respect of the same loss. I agree that this problem requires a solution, but I think that that is fairly easy. The liability of the defenders is limited to the cost of remedying defects in the building. Once that cost has been recovered, any liability of the defenders will come to an end; reparation has been made. Consequently, if multiple proceedings are raised at the same time, it would be appropriate to conjoin all of the actions to ensure that any damages are paid to the correct party and that no double recovery is ordered. It would clearly be in the interests of the defenders to make a motion to that effect. In the unlikely event that an action by one beneficiary of a collateral warranty had concluded before an action by another beneficiary was raised, double recovery can be avoided by a different route. In this case, the defender should be able to plead that it has made reparation for the damage in question, which will be a defence against the claim. The second claimant's remedy in that situation is to raise an action against the first claimant to compel it to account for the money is that it recovered from the negligent defender. Whatever happens, procedures can be devised to prevent double recovery.

Specialist knowledge attributed to BDP

[41] Counsel for BDP made further submissions based on the terms of BDP's letter of appointment. That letter was referred to in clause 3 of the collateral warranty in favour of the Society, the terms of which are set

out at paragraph [21] above. In the Harmon action the pursuers averred that Harmon were responsible for the design, installation and assembly of the curtain walling described in the Works Contract. They further averred that Harmon failed to design and install a system of curtain walling that prevented water penetration under any combination of wind and precipitation. In the Kershaw action the pursuers averred that Kershaw were obliged to design and construct the relevant roofing works in accordance with BDP's specification for metal roofs. BDP's letter of appointment contained sections dealing with the scope of their duties (clause 1.3 and the First Schedule), professional responsibility (clause 1.4), responsibility for works designed by others (clause 1.5) and co-ordination of consultants' services (clause 1.8). Clause 1.4 provided that BDP would perform its duties under the appointment with all reasonable skill, care, expertise and diligence to be expected of architects involved in work of a similar or greater value, scope, kind, complexity and quality. Under the same clause BDP were obliged to integrate the architectural and related services with the carrying out of the contract works. Clause 1.5 provided that, where BDP were required to incorporate design details provided by others (apart from BDP's sub-consultants), BDP's responsibility was limited to the extent required for performance of their own duties, and BDP would not be responsible for breaches of contract on the part of others, notably other consultants or specialist works package contractors, in respect of their design works. Clause 1.8 obliged BDP to direct the team of other consultants appointed by ECSL in respect of project design. BDP were responsible for leading the other consultants in respect of design, and would be the medium for communication between ECSL and the other consultants. The services to be provided by BDP were set out in detail in the First Schedule. As is to be expected, these were described at some length. In respect of detailed design, BDP were responsible along with the other consultants as appropriate for developing and completing the scheme design and co-ordinating and integrating into the overall design the design services provided by other consultants, specialists and contractors (paragraph 5.1). In relation to design by works package contractors, paragraph 5.11 of the First Schedule set out BDP's responsibilities. These related to selection of specialist contractors and the like and the preparation of performance specifications. The First Schedule also made provision for the provision by BDP with other consultants of production information, tender documents and bills of quantities (paragraphs 6.1-6.4) and for site visits (paragraph 9.3).

[42] The following duties were referred to at some length in article 7 of condescendence of each action. In the Harmon action, the pursuers aver that in order to perform their duties in relation to the curtain walling, in particular those set out at clauses 5.1 and 6.1-6.4, BDP required the technical knowledge of a specialist cladding consultant and that as BDP lacked that knowledge themselves they required to engage such a consultant to comply with the warranty of due skill and care in clause 1.4 of the appointment. It was further averred that in any event an architect involved in work of similar size and complexity, exercising reasonable skill, care and expertise, would have employed a specialist planning consultant. Counsel for BDP submitted that those averments were irrelevant, and that they were not founded on any proper construction of BDP's appointment. In particular, clause 1.4 involved a warranty that BDP were able to perform services in question, but did not contain any undertaking to engage others to provide any particular additional information. What this amounted to was that the pursuers were trying to ignore the fundamental standard of what a reasonable architect would do and to incorporate the standard of a reasonable cladding consultant. As a result the averments relating to the employment of a planning consultant should not be remitted to probation.

[43] In my opinion the foregoing argument is not well founded. A modern building, especially on the scale of the Scottish Widows project, is extremely complex and requires the application of numerous specialized techniques. Many of these will obviously be known to an architect of ordinary competence, but equally some may involve a more specialist knowledge than such an architect would normally possess. In the latter case, the architect may well require to obtain the services of a consultant with the necessary specialized knowledge. Indeed, this is expressly contemplated in the appointment; clause 1.5, dealing with responsibility for works designed by others, states that, where BDP is required to incorporate design details provided by others "excluding [BDP's] sub-consultants but including any consultants who may be directly appointed by the Client or Works Package Contractors", BDP's responsibility is to be limited to the performance of their own duties. Thus where a specialist consultant was appointed by the Client, ECSL, or by a works package

contractor such as Harmon, BDP were not to be responsible for the design work carried out by that consultant except in so far as BDP might contribute to the consultant's breach of contract. Where, on the other hand, work was carried out by BDP's own sub-consultant, BDP would be fully responsible for any breach of contract or fault on the part of that sub-consultant. This is in accordance with the ordinary contractual structure found in the construction industry. I am accordingly of opinion that what the pursuers are offering to prove is that an architect of ordinary competence exercising ordinary skill and care, and in particular fulfilling the duties set out in clauses 5.1 and 6.1-6.4 of the First Schedule to the appointment, would not have relied on his own knowledge of curtain walling but would have employed a specialist sub-consultant. That does not involve any innovation on the ordinary duty of an architect. Whether those averments are well founded is, of course, a matter for proof.

Averments relating to testing of copings

[44] Counsel for BDP also attacked certain averments in the Harmon action relating to the testing of copings. The pursuers averred that BDP ought to have tested copings during installation in the course of site visits. This was said to be required by the duty to visit the site in accordance with clause 9.3 of the First Schedule to BDP's appointment, and would in any event have been common practice in respect of curtain walling. BDP should have carried out routine visual inspections of works in progress, and should have ordered the opening up of any work that was suspected to be defective and water testing of the completed coping installations. Counsel for BDP submitted that those averments were not justified by the obligation in paragraph 9.3, which was to visit the site as appropriate, and at least weekly, and to make regular inspections of the progress and quality of the works to determine that in so far as reasonably practical they were in accordance with the contract documentation. The pursuers had made a jump in the pleadings from a duty to make site visits to a duty to carry out tests, and from responsibility for visual inspections to opening up and water testing. Clause 9.3 imposed a simple duty of inspection. Moreover, reference to common practice was not appropriate because the appointment letter defined the scope of BDP's duties in detailed terms. On this basis the averments relating to testing of copings should not be remitted to probation.

[45] The essential question raised by this submission is whether the duty in paragraph 9.3 is capable of including obligations to open up work suspected as defective and to carry out water testing once the works were complete. Paragraph 9.3, in addition to imposing an obligation to visit the site as appropriate and at least weekly, obliges BDP to make "regular inspections of the progress and quality of the Works to determine that in so far as is reasonably practical they are in accordance with the contract documentation". The latter obligation is in two parts: BDP are under a duty to make regular inspections, and the purpose of those inspections is to determine whether the works are in accordance with the contract documentation, so far as practical. The second part of the obligation seems to me to be relatively onerous, in that there is a responsibility for ensuring that the works contractors have observed the provisions of their contracts. In my opinion it is impossible to say as a matter of relevancy that that responsibility does not involve either opening up or testing. In this connection, I observe that the pursuers' pleadings state that the duty to open up applied in respect of work that was suspected to be defective. That is not a general duty, but is rather a duty to investigate fully cases where it is thought that a works contractor is in breach of contract. So far as water testing is concerned, that does not appear to be a particularly onerous test; in essence it involves directing hoses at the building to make sure that it is watertight. On a fair reading of the pursuers' pleadings, I consider that they are contending that a degree of opening up and water testing would be common practice when obligations such as those found in paragraph 9.3 are imposed. Whether that is so is a matter that must await proof. It cannot, however, be said that the reference to common practice is irrelevant; even in the case of detailed contractual duties such as are found in the appointment letter it may be reasonable to refer to common practice to fill out the precise content of those duties.

Legal analysis: pursuers' case against WSA

[46] The pursuers' case against WSA is based on the parent company guarantee granted by WSA in respect of certain obligations undertaken by Harmon, which was its subsidiary. The parent company guarantee was

granted in favour of Port Hamilton, and related only to the collateral warranty granted by Harmon in favour of Port Hamilton; that collateral warranty is discussed at paragraphs [25] and [26] above. The parent company guarantee, in which WSA is referred to as "the Guarantor", Port Hamilton is referred to as "the Fund", and Harmon is referred to as "the Works Contractor", begins with certain recitals. First, the guarantee was stated to be supplemental to the warranty agreement between Port Hamilton and Harmon "relative to obligations performed and carried out and to be performed and carried out by the Works Contractor under a Works Contract between the Works Contractor and Laing Management (Scotland) Ltd". Secondly, it was narrated that WSA, through one of its subsidiaries, owned the majority interest in Harmon. Thirdly, it was narrated that WSA had agreed to guarantee the due performance of the warranty by Harmon in the manner aftermentioned. It can thus be seen that the underlying purpose of the guarantee was the standard purpose of a parent company guarantee, to provide the creditor with personal security in the event of the insolvency of the subsidiary. Moreover, it is clear that the guarantee was granted to provide security against non-performance of Harmon's collateral warranty in favour of Port Hamilton. Thus the guarantee is related to the collateral warranty and through the collateral warranty to the complex of other contracts that were concluded for the purposes of the project.

[47] In the body of the agreement, clause 2 provided as follows:

"In supplement of the Works Contractor entering into the Warranty with the Fund:-

2.1 the Guarantor unconditionally and irrevocably guarantees to the Fund the due, and proper, performance, observance and compliance by the Works Contractor of each and all the obligations, duties and undertakings of the Works Contractor under and pursuant to the Warranty as and when such obligations, duties and undertakings shall become due and performable according to the terms of the Warranty as the same may be amended by the Fund and the Works Contractor, which amendments the Guarantor hereby authorizes and unconditionally and irrevocably guarantees in accordance with the terms of this Guarantee;

...".

Clause 4.8 provides that the Guarantor's liability is not to be affected by any assignation of the collateral warranty. Assignation of the collateral warranty is expressly permitted by clause 6. The effect of the guarantee is accordingly that WSA as guarantor undertakes that Harmon will perform all its obligations under the collateral warranty that it granted in favour of Port Hamilton. The measure of WSA's obligations is thus the obligations that Harmon undertook in favour of Port Hamilton.

[48] Counsel for WSA submitted that the pursuers' averments so far as directed against his clients were irrelevant, on a number of grounds, and also that the joint and several decree sought by the pursuers was incompetent. To some extent his submissions made the same points as those for BDP, usually with some difference of emphasis. Consequently I will deal with each of the arguments raised, referring where necessary to the corresponding BDP argument.

Joint and several liability

[49] Counsel contended that a joint and several decree was incompetent and that in any event there were no relevant averments of joint and several liability. His primary proposition was that joint and several liability could not exist where a pursuer founded on distinct and different obligations which have different measures of loss. Put another way, the proposition was that joint and several liability requires contribution to the same loss and damage, and for this purpose the loss had to be of the same kind; that was not the same as an assertion that the losses came to the same monetary amount. So far as the joint and several conclusion was concerned, it gave rise to three problems. First, the loss claimed was averred to have been suffered by both the Society and Port Hamilton. On that basis, the loss suffered by each could not be regarded as a single common result so as to justify joint and several liability. Moreover, the warranties founded on were in favour of different parties, and in such a case there could not be a common result such as was necessary to produce joint and several liability. Secondly, joint and several liability could not exist for the whole sum claimed

because of the net contribution clause in BDP's warranty; this was the point taken by counsel for BDP (see paragraphs [36] and [37] above). Thirdly, the case for joint and several liability made by the pursuers depended on the proposition that two distinct parties, the Society and Port Hamilton, suffered the same loss, but there were no relevant averments of that. Reference was made to a number of authorities: *Grunwald* v *Hughes*, 1965 SLT 209; *Preferred Mortgages Ltd* v *Shanks*, [2008] PNLR 562; *Fleming* v *McGillivray*, 1946 SC 1; and *Royal Brompton Hospital NHS Trust* v *Hammond*, [2002] 1 WLR 1397.

[50] In my opinion the second of these arguments falls to be rejected at this stage for the reasons set out above in relation to BDP's submissions: see paragraphs [36] and [37]. The effect of the various net contribution clauses will, however, require to be taken into account if decree is pronounced against more than one defender. The two other arguments are best considered together. The starting point is in my opinion *Grunwald* v *Hughes*, which was followed in *Preferred Mortgages Ltd* v *Shanks*. In that case an architect was employed to design and supervise structural alterations to restaurant premises. These included the installation of a boiler by heating engineers. A short time after completion of the works a fire broke out in the premises and the owners of the restaurant raised proceedings against both the architect and the heating engineers for breach of their respective contracts. The conclusion for payment of damages was against the architect and the engineers jointly and severally. It was held that the action was competent as laid against both defenders. LJC Grant stated (at 1965 SLT 211-212):

"In an action based on delict it is commonplace to have a joint and several conclusion against two delinquents who have contributed to the single wrong which the pursuer has suffered. ...It seems to me that the test which has been, and should be applied is the same whether the action be based on delict or on breach of contract. The test is whether the two defenders have contributed, albeit in different ways, to cause a single wrong.

... In the present case the pursuers aver a single wrong, the setting on fire of their premises, to which, they say , each defender by his breach of contract contributed".

Lord Strachan stated (at 214):

"In the present case the one wrong of which the pursuer's complaint is the fire and its consequent damage and the pursuers have averred that each defender caused the fire by their breach of contract. In those circumstances... I am of opinion that the action is competent".

The critical issue is accordingly whether the breach of contract by each defender contributed to a single loss sustained by the pursuer. For this purpose it is immaterial that the defenders undertook separate contracts; what matters is that each through its breach of contract should have contributed to a single loss. On this approach it is essential to identify the loss that the pursuers claim to have sustained.

[51] The loss in the Harmon action is the construction of a building with defective cladding, resulting in the building's not being wind and watertight. On the pursuers' averments, I am of opinion that that loss is claimed to be the result of breaches of contract by both Harmon and BDP. As in *Grunwald*, the contracts entered into by Harmon and by BDP, including the collateral warranties, are interrelated in the sense that they were granted for the purposes of the same building project. WSA guaranteed Harmon's obligations to Port Hamilton; they accordingly stepped into Harmon's position so far as Port Hamilton are concerned. The defective condition of the building represents a single physical loss, but it has economic consequences in the sense that the defects must be repaired and the building rendered wind and watertight. The cost of repairing the defects might fall on Port Hamilton or on any assignee of Port Hamilton's interest in the building, because it is the person with the current interest in the building who has the primary interest in having it repaired. For the reasons stated above (at paragraph [29]), provided that that person is the beneficiary of a collateral warranty, I am of opinion that it can recover the cost of repairs from the party who granted the collateral warranty. In the Harmon action such collateral warranties were granted by both Harmon and BDP. Both of those collateral warranties contemplated that the Society and Port Hamilton would in future have an interest in the property; in Port Hamilton's case the collateral warranty indicated that they would have an interest in

the project both through financing it and in respect of subsequent use and ownership. Thus Harmon specifically contemplated that Port Hamilton might be the party that assumed the cost of repair. Moreover, Harmon's warranty was capable of assignation. That clearly contemplated the possibility that Port Hamilton might transfer its interest in the property, with the consequent interest in having repairs carried out. The result of that is in my opinion that the warranty contemplated that the cost of repair might be sustained by a person who acquired an interest from Port Hamilton. So far as WSA are concerned, by guaranteeing Harmon's obligations under the collateral warranty they effectively stepped into Harmon's position.

[52] On the foregoing analysis, it is immaterial that the warranties founded on were in favour of different parties, because the pursuer's claim is that the beaches of contract by the various defenders all contributed to the same loss, namely a building with defective cladding which was not wind and watertight. The economic consequences of making good that loss might be sustained by any one of a range of parties, but it is the same loss that is said to have been caused by each breach of contract. That was of course the position of the pursuers in *Grunwald* v *Hughes*. Whichever party sustained a loss, the measure of the loss is likely to be the same, namely the cost of carrying out the necessary repairs. That is in my opinion the answer to the first argument for WSA on joint and several liability. In relation to their third argument, that the pursuers required to assert that both the Society and Port Hamilton suffered the same loss but did not make averments to that effect, in my opinion the critical point is the analysis of the loss as the physical defect in the building, with the economic consequences thereafter falling on any one of a range of different parties. Both the Society and Port Hamilton (and in due course the pursuers) had an interest in the building. Thus they had an interest in ensuring that it was rendered wind and watertight. In that way I think that the action can be said to be based on a single loss the cost of repairing which was nevertheless potentially shared by more than one party. In the event, of course, it was the pursuers that are said to have made good the loss, but they held assignations of both the sublease and the collateral warranties granted to the Society and Port Hamilton. In that way both the benefit of the contractual obligations undertaken by the defenders (in the collateral warranties) and the incurring of the cost of the remedial work (the economic consequences of physical loss) came together. That in my opinion is sufficient to support a case based on joint and several liability.

[53] In his second speech counsel for WSA presented his argument on joint and several liability in a slightly different manner. He emphasized that the pursuers were attempting to recover a loss resulting from the breach of different legal obligations, one in favour of Port Hamilton and the other in favour of the Society. On that basis, he submitted that collateral warranties to different parties could not be a foundation for joint and several liability. This matter was important because WSA had only guaranteed Harmon's liability to Port Hamilton, not to the Society. In my opinion counsel's basic proposition, that obligations owed to separate persons cannot found joint and several liability, is incorrect and is not in fact vouched by any decided case. This can be seen by considering an example based on the facts of *Grunwald* v *Hughes*, but on the hypotheses that the restaurant was tenanted, the works were instructed by the tenant but the landlord took a collateral warranty from both the heating contractor and the architect, the damage fell to be repaired by both landlord and tenant (because each for their own reasons required premises in a sound condition), and after the damage the tenant took an assignation of the landlord's rights under its collateral warranty. In that case the requirements of joint and several liability, namely two wrongs of a similar nature causing a single loss, would be satisfied. A single party, the tenant, would have the benefit of the whole of the contractual obligations. In these circumstances I am of opinion that the requirements of joint and several liability are satisfied. Another example might be a single loss caused by breaches of contract by the architect and subcontractor. The architect has granted a collateral warranty in favour of the building owner, and the building owner takes an assignation of the main contractor's rights against the subcontractor. In the circumstances it seems clear that in an action by the building owner against the architect and the subcontractor joint and several liability would exist, since both contributed to the same loss. The short point in both cases is perhaps that joint and several liability depends upon the existence of a single loss and assumes the breach of separate obligations as the causes of that loss. I do not think that the existence of a parent company guarantee affects the existence of joint and several liability. In the last hypothetical example, if the subcontractor's parent company had guaranteed its obligations, the result is simply that the subcontractor's obligations can be enforced against the parent company. The measure of those obligations is still the subcontract with the main contractor, but if that

contract is assigned along with the guarantee to the building owner and a defect emerges as a result of a breach of the subcontract, the normal rules of joint and several liability should apply, and the guarantor merely steps into the place of the subcontractor.

[54] Before I leave this part of the case, I should comment on the two other cases relied on by WSA, *Fleming* v *McGillivray*, *supra*, and *Royal Brompton Hospital NHS Trust* v *Hammond*, *supra*. In the first of these a pedestrian had been injured by a van, and sued both the owner of the van and a police constable who was driving the van. The police constable was said to be liable for driving the van negligently and the owner because, in breach of his statutory duty under the Road Traffic Act, he had permitted the driver to use the vehicle in such a way that it was not covered by insurance; thus the pursuer was deprived of recourse against any insurance company. Damages were claimed from the two defenders jointly and severally. Lord Mackintosh, whose decision was upheld by the Second Division, held that the action was incompetent on the ground that the pursuer complained of two quite separate and distinct wrongs. The case against both defenders was of course based on delict, and it is easy to see that the two wrongs complained of were not of the same nature. Moreover, they caused different losses to the pursuer; the negligent driving caused physical injury, but the breach of duty by the owner deprived the pursuer of recourse against an insurance company. Those did not amount to the same loss. The case is thus distinct from a case such as the present, or indeed *Grunwald*, where two defenders are sued for breaches of contracts that are interrelated in the sense that they both relate to the same building project. *Brompton Hospital NHS Trust* v *Hammond* was a case involving contribution under an English statute, but for this purpose it was necessary to decide whether an architect and a contractor were liable in respect of "the same damage" sustained by the employer. The employer's claim against the architect was for the negligent issue of extension certificates and delay, loss and expense arising out of allegedly negligent advice. It was held, however, that the damage caused by the contractor was the failure to deliver the building on time. That was distinct from the damage caused by the architect through giving the extension certificates; the latter damage was the impairment of the employer's ability to proceed against the contractor. The case thus bears certain similarities to *Fleming* where the driver caused physical injury and the owner impaired the pursuer's ability to obtain compensation. Lord Steyn, who delivered the most detailed speech (with which the other Lords of Appeal agreed) relied specifically on a Canadian case, *Wallace* v *Litwiniuk*, (2001) 92 Alta LR (3d) 249, where the Alberta Court of Appeal held that physical injuries sustained in a road accident and a claim for compensation from solicitors who failed to raise timeous proceedings did not involve "the same damage". In the House of Lords, Lord Hope referred (at paragraph [44]) to *Grunwald*, and pointed out that the test in Scotland, whether an action is based on delict or on contract, is whether two persons have contributed to cause a single wrong (which effectively means a single loss). The situation under consideration in that case involved breaches of contract with different consequences; that is quite different from breaches of contract that produce a single defect in a building. I am accordingly of opinion that *Brompton Hospital NHS Trust* v *Hammond* does not assist in the present case.

Lack of averments that Port Hamilton suffered the damage claimed

[55] The next submission made by counsel for WSA was that the pursuers' primary and secondary case against them depended on establishing that Port Hamilton had suffered the loss averred. It was contended, under reference to *GUS Property Management Ltd* v *Littlewoods Mail Order Stores*, *supra*, that the pursuers could only sue WSA as assignees of Port Hamilton; they had no other title to sue. Counsel submitted that the damage to the property that was relied on in the Harmon action was physical damage that had occurred before 10 March 1998, the date when Harmon went into receivership. The right to sue for damages for that loss arose on or before that date with the concurrence of *damnum* and *injuria*: *Dunlop* v *McGowans*, 1980 SC (HL) 73. Loss was sustained as soon as the building work was defective, or at latest when the work by Harmon stopped, which was at the time when receivers were appointed: *McLaren Murdoch & Hamilton Ltd* v *Abercromby Motor Group Ltd*, *supra*, at paragraph [34]. When the damage was sustained, Port Hamilton were only the tenant of parts of blocks A, B and C. At that point they had no interest in blocks D and E. Thus Port Hamilton had sustained no loss in respect of the latter two blocks; the loss had rather been sustained by whichever other party was owner or tenant at the time when damage was sustained. In this respect counsel adopted the argument put forward by counsel for BDP which is summarized at paragraph [28] above.

[56] In my opinion the foregoing argument falls to be rejected for reasons set out at paragraph [29] above, taken together with paragraphs [17] and [18]. In summary, the primary physical loss was initially sustained by the owner or tenant of the building at the time when the defective work was performed; but that physical loss has economic consequences, and any party who suffers those economic consequences, such as a subsequent owner or tenant, can sue for that loss provided that a contractual relationship exists between the party responsible for the defective condition of the building and the person who suffers the economic consequences. In my opinion that is the result that collateral warranties are designed to achieve; anything else would create relationships of excessive complexity. In a case where loss to the occupiers of a building had been caused by breach of contract, confining any remedy to the party who was owner or tenant at the point when the physical damage was sustained would create unreasonable and unnecessary hurdles in favour of a deserved right of recovery. In my view the fundamental point of the system of collateral warranties that is typically used in complex construction projects is precisely to avoid such a result.

[57] Counsel for WSA went on to adopt a further argument for BDP, that set out at paragraph [32] above, to the effect that the sublease in favour of the Society and the lease in favour of Port Hamilton did not impose any obligation to carry out any repairs to the property. The answer to that is in my opinion that set out at paragraphs [33] onwards. There are slight differences in the repairing obligations found in the sublease in favour of the Society (clause 9.1) and the lease in favour of Port Hamilton (clause 8.1.1), in that the latter refers to an obligation to carry out repairs when requested by the landlords and to do so to the reasonable satisfaction of the landlords. Counsel for WSA pointed out that there was no averment that Port Hamilton were ever requested by their landlords to carry out this work, and that until such a request was made there was no liability under the lease to do so. The answer to this point is in my opinion the same as that set out at paragraphs [33] onwards. In short, the existence of a repairing obligation is only of positive significance as between landlord and tenant. So far as any party responsible for defective work is concerned, it is sufficient that the person making a claim against it should have met the cost of repair (in order to ensure that the building that it owns or leases or occupies is wind and watertight) and should have the benefit of a collateral warranty granted by the party who is said to be responsible for the defect. In the present case there may be specialties caused by the interaction of the interests of the Society and of Port Hamilton, but I do not think that it is possible to resolve the incidence of repair as between those two parties as a matter of relevancy. According to their averments, it seems that the pursuers, acting as assignees of both parties, performed the necessary works of repair, and that may be sufficient to resolve the matter.

[58] The next argument for WSA was that the loss resulting from the defective state of the building fell in reality on the subtenant, either the Society or its assignee the pursuers. It did not fall on Port Hamilton. The reason was that, under the sublease granted by Port Hamilton in favour of the Society, liability for the cost of repair had been transferred to the subtenant. In that situation it was illogical to say that loss measured by the cost of repair was ultimately suffered by both the Society and Port Hamilton; at most, Port Hamilton were under a potential liability if the Society or the pursuers did not fulfil their contractual obligations. In my opinion this argument is misconceived. The precise contractual arrangements as between Port Hamilton and the Society are *res inter alios acta* so far as the various defenders are concerned. The critical elements so far as the defenders are concerned are that, first, the pursuers as subtenant of the building carried out the remedial work in order to have a building that was wind and watertight and, secondly, the pursuers are the beneficiaries, directly or through assignation, of collateral warranties granted by the defenders. The crucial point of collateral warranties such as those granted by BDP and Harmon is that, in the event that work is defectively carried out, the person who ultimately performs the necessary remedial work will have a right of action against those who are responsible provided that it is the beneficiary of collateral warranties granted by those persons. In my opinion any consideration of the rights and obligations of the parties must be guided by that fundamental purpose. In relation to the foregoing argument, counsel for WSA made a supplementary submission: it could never be reasonable for Port Hamilton to recover as damages the full amount of potential loss in circumstances where another party paid for the necessary repairs as a result of a contractual obligation to do so and that other party sought to recover the losses at its own. So far as it goes that is probably correct. If, however, that other party sues as Port Hamilton's assignee, it can in my opinion recover the cost of repair. In that event Port Hamilton clearly could not recover that cost; it is axiomatic that double

recovery should never take place. Nevertheless double recovery is not sought in the present action, and if more than one action were raised procedural devices such as those discussed at paragraph [40] above would be available to deal with the problem.

[59] Counsel further referred me to the decision of the House of Lords in *Ruxley Electronics Ltd* v *Forsyth*, [1996] 1 AC 344, at 355 and 357 per Lord Jauncey and 366 and 370 per Lord Lloyd. That case involved a defectively constructed swimming pool. To eliminate the defect it would have been necessary to reconstruct the pool, but the cost of doing so would have been much greater than the effect of the defect on the value of the house. It was held that the cost of reconstruction was out of all proportion to the benefit to be obtained, and that in those circumstances the measure of damage should not be the cost of reinstatement but the diminution in the value of the house caused by the breach of contract. The central point is made by Lord Jauncey (at 357):

"Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of the award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. A failure to achieve the precise contractual objective does not necessarily result in the loss which is occasioned by a total failure".

Lord Lloyd points out (at 366) that it is necessary to measure the pecuniary loss which the plaintiff has in fact sustained, and (at 370) that reasonableness has an impact wider than the doctrine of mitigation. These are undoubtedly important principles to be followed in assessing the quantum of loss that a pursuer has in fact sustained. I do not think that they are relevant to the present case, however; the loss claimed in the Harmon action is the cost of repairing the building to make it wind and watertight. There is no suggestion that that might be disproportionate to the true loss sustained as a result of the defects in the building. The issue between the parties is rather the question of which Scottish Widows company, the pursuers or the Society or Port Hamilton or some other company, has title to sue and a right of action against the various defenders.

Sc*ope of collateral warranty and guarantee: position of Port Hamilton as tenant*

[60] A further argument for WSA was that the losses claimed against Harmon, and through the guarantee against WSA, arose from the obligation of Port Hamilton as tenant to make good the defects in the building. The collateral warranty and guarantee, however, were not intended to cover losses sustained in the capacity of a tenant. In the case of the Harmon collateral warranty, clause 12.1 expressly contemplated that further tenant warranties might be granted. That was sufficient, it was said, to exclude any contention that Port Hamilton could recover losses sustained in its capacity as tenant. This argument largely mirrors Harmon's argument that is summarized at paragraph [24] above, and in my opinion it falls to be rejected for similar reasons. The recitals in Harmon's collateral warranty state that Port Hamilton will have an interest in the project "both in respect of its financing and in respect of its subsequent use and ownership". In my opinion those words are sufficiently wide to cover the interest that Port Hamilton had under its lease of the premises. That lease was an aspect of the financing arrangements, and would certainly involve use, albeit in a constructive sense because the premises were sublet; nevertheless, "use" is a word of very wide significance. It was a relatively long lease, extending to 25 years, and in my opinion it falls within the contemplation of the expression "use and ownership". Moreover, the main substantive obligations of Harmon under the warranty, which are contained in clause 3, are not qualified in any way to reflect the capacity in which Port Hamilton may be interested in the building. Thus Port Hamilton's position is expressly covered; there is no need for them to obtain a separate tenant warranty. The reference to tenant warranties in clause 12.1 is designed to deal not with Port Hamilton but with the possibility that leases will be granted in favour of commercial tenants.

[61] Counsel for WSA developed the foregoing argument. He submitted that the contractual documentation, including not only the collateral warranties and guarantee but the Harmon works contract itself, contemplated a careful system of warranties under which tenants' interests would be separately covered. The parties had

given the matter thought, and the position of the grantee of a warranty as tenant would affect the extent of the granter's liabilities. The parent company guarantee granted by WSA was restricted to the warranty that Port Hamilton had from Harmon, and that was a clear indication that the parties did not expect the guarantee to protect any interest that Port Hamilton might acquire as tenant. Port Hamilton's interests as tenant would be outwith the reasonable contemplation of the parties to these arrangements. Reference was made to *Hadley* v *Baxendale*, [1854] 9 Exch 341, and to *Transfield Shipping Inc* v *Mercator Shipping Inc*, [2009] 1 AC 61. The former case of course lays down the basic rule relating to damages for breach of contract: the damages recovered by the innocent party should be "such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it". In the latter case the financial consequences of a breach of contract were considered in the context of a time charter where the vessel was redelivered late. As a result of the late redelivery the owner lost a follow-on charter that it had agreed at a particularly high rate; by the time the vessel was redelivered market hire rates had fallen substantially. The critical question was whether the owner was entitled to the loss of the higher rate of hire for the whole duration of the follow-on charter or merely for the period of late delivery. It was held that the latter measure was correct.

[62] The reasons for this conclusion are stated at length, but the general point is that, if the party in breach of contract is to be responsible for any particular loss, that type of loss must have been in the reasonable contemplation of the parties when the contract was entered into. Lord Hoffmann held (paragraph [12]) that liability for damages should be founded upon the intention of the parties, objectively ascertained, because all contractual liability was voluntarily undertaken. It was wrong to hold someone liable for risks which those entering into such a contract in a particular market would not reasonably be considered to have undertaken. That involved assessing whether the loss claimed was of a type contemplated by reasonable persons in the position of the parties. In the case of a time charter, the expectation of the market appeared to be that a charterer did not assume the risk of losses arising from the loss of the following charter. Moreover, the assumption of such a risk was inherently unlikely: the resulting loss would be unquantifiable because the parties would have no advance knowledge of the length or other terms of a following charter. Lord Hope (at paragraphs [31]-[32], [33] and [36]) held that assumption of responsibility forms the basis of the law of remoteness of damage in contract, but that it is determined by more than what was reasonably foreseeable at the time of the contract. The reason is that in contract parties assume definite risks, and if one party wishes to protect himself against a risk that might be thought unusual he can direct the other party's attention to it when the contract is made. Consequently the more unusual the consequence the more likely it is that express provision will be made for it in the contract if it is to result in liability. On that basis, the parties' knowledge when they entered into the contract was of great importance. A party cannot be expected to assume responsibility for something that he cannot control and, because he does not know anything about it, cannot quantify. In the case of a time charter, it is not enough for the charterer to know in general terms that there is likely to be a follow-on fixture. If he is to be liable for the loss of such a charter, the matter must be brought to his attention. Lord Rodger and Lord Walker likewise considered that liability for loss depended on what the parties can reasonably be taken to have contemplated at the time when they entered into the contract, having regard to the nature and object of their business transaction.

[63] In the present case, counsel for WSA submitted that the parties did not intend liability for the further damage suffered by a tenant to be recoverable as damages for breach of the collateral warranty. Instead, a specific tenant warranty was required. In my opinion this argument is misconceived, essentially for the reasons that I have already sought to develop. The Harmon collateral warranty is conceived in favour of Port Hamilton in its capacity as a party financing the development and as a party intending subsequently to use and have rights of ownership in respect of the premises. The obligation relating to performance of Harmon's works contract is unqualified, and there is nothing in the wording of any clause other than the provision for tenant warranties in clause 12.1 that might suggest that Port Hamilton could only recover for losses that they have sustained in a capacity other than as a tenant. Moreover, a limitation to such losses would not make any commercial sense. From the point of view of Harmon as the granter of the warranty and WSA as the party guaranteeing Harmon's obligations, it is impossible to see why Port Hamilton should be entitled to recover

under the collateral warranty if they become outright owner of the property or are authorized to use the property under a licence, but cannot do so if they use the property in the capacity of a tenant. The same is true in relation to any repair costs that Port Hamilton might incur as financier: if Harmon are liable for those, why should they not be liable for costs incurred by Port Hamilton merely because the latter company has taken a lease of the premises? In my opinion the obvious commercial purpose of the collateral warranty was to provide Port Hamilton with a right of action in the event that they (or their assignees) incurred loss as a result of making good Harmon's defective work. For that purpose, it does not matter whether Port Hamilton incurred such loss through their actings as owner, as tenant, as licensee or as financier: they have still suffered a loss as a result of making the building wind and watertight. The reference to tenant warranties in clause 12.1 does not in my opinion refer in any way to the position of Port Hamilton; it is rather conceived, as stated above, as a provision to deal with the possibility that the premises or parts thereof will be sublet to tenants unconnected with Scottish Widows. In that event those tenants will not have any of the original collateral warranties and will therefore require fresh warranties. In the case of Port Hamilton, however, and also in the case of the Society, the original collateral warranty granted in favour of each of those parties is quite sufficient to cover the whole interest of the grantee, including any interest as tenant or subtenant.

[64] In his second speech counsel for WSA returned to the fact that a range of different collateral warranties was contemplated; these included warranties from Harmon in favour of Port Hamilton in the latter company's capacity as "fund" and as "purchaser". (The draft warranties are annexed to Harmon's works contract). On that basis he submitted that the position of any person who might be a tenant would be distinctly catered for using a tenant warranty (a draft of which was annexed to the works contract). In my opinion this argument reads too much into the existence of two potential collateral warranties in favour of Port Hamilton. Both of those warranties refer to Port Hamilton's interest "in respect of its subsequent use and ownership"; the difference between them is that in the warranty in favour of Port Hamilton as fund the immediate reason for the warranty is an agreement that Port Hamilton provide development finance, whereas in the warranty in favour of Port Hamilton as purchaser the immediate reason is an agreement to purchase the property following completion in certain circumstances. The second of these warranties is clearly qualified as to the circumstances in which it may come into operation. For that reason I do not think that it can be relied on to limit the general words used in the fund warranty. In addition, the form of tenant warranty that is provided contemplates a lease in favour of the tenant from ECSL. There is no suggestion that Port Hamilton was in that position.

Legal analysis: pursuers' case against Harmon

[65] Counsel for Harmon submitted that the Harmon action should be dismissed so far as directed against his clients. He stated four grounds on which dismissal was said to be justified. To a very substantial extent those arguments reflected the arguments that had been presented by counsel for BDP and WSA. The pursuers' claim against Harmon is based on the collateral warranties granted by Harmon in favour of the Society and Port Hamilton; that in favour of Port Hamilton is discussed at paragraphs [25]-[26] above; that in favour of the Society is in similar terms.

Joint and several liability

[66] On this matter counsel essentially adopted the arguments presented on behalf of BDP and WSA. In both their principal and alternative cases, the pursuers sought damages for two separate losses incurred by two distinct parties as a result of separate and distinct breaches of warranty. That did not meet the requirements of joint and several liability. The key to joint and several liability, it was said, was the existence of a situation in which more than one party, through breaches of contractual or delictual duty, have materially contributed to another person's suffering a particular loss. Reference was made to *Grunwald* v *Hughes* and to *Preferred Mortgages Ltd* v *Shanks*, both cited above. As indicated above at paragraphs [29] and [50]-[52], I am of opinion that the present case falls squarely within the explanation of joint and several liability stated in *Grunwald*. Two related contracts are involved, namely the collateral warranties granted by Harmon and BDP. These are interrelated; they relate to the same building project, and BDP's obligations extend to the cladding works carried out by Harmon. Both are said to have caused a single item of physical loss, defective cladding

that was not wind and watertight. That physical loss gave rise to economic consequences: the defects in the cladding had to be repaired, and the repairs could have been carried out by any one of a number of parties. Nevertheless, the basic loss is a single item of physical loss that is said to have been caused by breaches of the two contracts, Harmon's and BDP's collateral warranties. The fact that two contracts are involved does not matter any more than it did in *Grunwald*.

[67] Counsel for Harmon emphasized, following *McLaren Murdoch & Hamilton Ltd* v *Abercromby Motor Group* Ltd, *supra*, that the measure of damage should not be confused with the actual loss itself. I agree with that approach. In the present case, however, it seems to me that the pursuers' contention is that the loss sustained was the physical loss. That gave rise to economic consequences, and the measure of loss is determined according to those economic consequences, namely by reference to the cost of repair, but all that flows from the physical loss. It seems to me that any other interpretation would involve an over-sophisticated analysis of what happened. Finally, counsel for Harmon referred to the existence of a net contribution clause in BDP's collateral warranty. On this point he adopted the submissions of counsel for BDP. For the reason stated above at paragraph [37], I am of opinion that there is substance in this argument: the net contribution clause must ultimately be taken into account. Equally, however, I am of opinion that this cannot be done in any sensible fashion until the stage of final decree.

Pursuers' cedents suffered no loss as a result of any breach of collateral warranty

[68] The second argument presented on behalf of Harmon was that the pursuers' cedents, the Society and Port Hamilton, suffered no loss. On the pursuers' pleadings it was said that any loss must have arisen by 10 March 1998, when Harmon went into receivership; no works were carried out by them after that date. So far as the Society were concerned, counsel for Harmon submitted that at the point when work was completed the Society had no interest in the building. They only became subtenants when a sublease was granted to them by Port Hamilton on 8 July 1999. Thus the Society had no interest in the property when the loss crystallized, and thus the loss must have been suffered by someone other than the Society. Reference was made to *McLaren Murdoch & Hamilton Ltd* v *Abercromby Motor Group Ltd* and to *GUS Property Management Ltd* v *Littlewoods Mail Order Stores Ltd*, both cited above. The result was that the Society had no title to pursue any loss. In addition, any liabilities incurred by the Society under their sublease could not properly be said to be caused by breach of contract on the part of Harmon. Entry into the sublease and the undertaking of responsibility thereunder for repairs broke the chain of causation so far as the Society was concerned. Moreover, for reasons developed by counsel for BDP (paragraph [32] above), the sublease did not impose any liability to remedy the defects pled by the pursuers. The repairing obligation in the lease was designed to cover the possibility that the property might fall into disrepair, not pre-existing defects. In my opinion the answers to those arguments are those set out in relation to BDP's submissions, found at paragraphs [31]-[35] above. In short, as a matter of practical necessity, the Society or the Society's assignees as subtenants might require to carry out remedial works to ensure that the property was wind and watertight. That possibility was clearly within the contemplation of the Harmon collateral warranty. It is immaterial that the loss first emerged before the Society had any interest in the property; the collateral warranty was designed precisely to protect the position of a party that might subsequently come to have an interest in the property. So far as the sublease is concerned, I am of opinion for the reason stated at paragraph [34] that the obligations imposed thereunder are of negative rather than positive significance: if the Society or the Society's assignees as subtenants cannot compel their immediate landlord, Port Hamilton, to carry out repairs, they have no option but to carry out the repairs themselves. Likewise, if Port Hamilton cannot compel its tenants to carry out repairs, it may be forced to do so itself. In either of these cases it is the practical necessity of rendering the building wind and watertight that induced the repairs.

[69] In relation to the warranty granted in favour of Port Hamilton, counsel for Harmon adopted the submissions made on behalf of WSA: many of the defects, in particular those in blocks D and E, were not in the area tenanted by Port Hamilton at the date when Harmon went into receivership. In my opinion that argument falls to be rejected for the reasons set out above at paragraphs [17], [18], [29] and [56]. Counsel

further adopted the submission for WSA relating to the repairing obligation under Port Hamilton's lease: see paragraph [57] above. The answer to this point is in my opinion that stated in paragraph [58].

Pursuers' alternative case: pursuers themselves had suffered no loss as a result of any breach of collateral warranty

[70] The pursuers' alternative case against Harmon was based on the hypothesis that the pursuers themselves have incurred a liability as subtenants in respect of the remedial works. In relation to this part of the pursuers' case, counsel for Harmon submitted that the pursuers had not suffered any loss as a result of the breach by Harmon of any collateral warranty. The pursuers had no interest in the property until well after the loss arising from a breach of warranty was said to have arisen. The answer this is in my opinion that the above in relation to BDP's arguments: see paragraphs [30]-[34] above, and in particular paragraph [31].

Claims by tenant or subtenant of property
[71] Finally, counsel for Harmon submitted that the collateral warranties granted by Harmon did not entitle the pursuers or the Society to recovery in respect of losses incurred by a party in the position of tenant or subtenant. The submissions of counsel for WSA were adopted on this point. In my opinion the answer to the argument is that set out above at paragraphs [32] onwards and [57] above.

Legal analysis: pursuers' case against Kershaw

[72] The solicitor for Kershaw accepted that, to the extent that the pursuers' case against them was based on the works package contract, it should proceed to proof before answer. The pursuers had taken an assignation of rights arising under that contract from LMS, the management contractor. It followed that the motion for Kershaw was merely that certain averments should be excluded from probation. These averments related to the pursuers' further case against Kershaw, which was based on the rights of the Society as the pursuers' cedent. In this respect, Kershaw adopted the arguments for Harmon and BDP. Apart from a reference to *McCall's Entertainments (Ayr) Ltd* v *South Ayrshire Council (No 2)*, discussed in paragraphs [33] and [34] above, nothing was added to those arguments. In my opinion the averments that Kershaw sought to exclude from probation should remain, for the reasons discussed above in relation to the arguments of Harmon and WSA.

Conclusion

[73] For the foregoing reasons I will refuse the motions made by BDP, WSA and Harmon for dismissal of the action and the motion made that Kershaw for the exclusion of certain averments from probation. In relation to WSA's submission that the action was incompetent, I will repel their second plea in law (the plea to competency in relation to the joint and several conclusion). Otherwise I will permit both actions to proceed to proof before answer.