



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 16  
CA80/24

Lord President  
Lady Wise  
Lord Clark

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD PRESIDENT

in the reclaiming motion

by

GREATER GLASGOW HEALTH BOARD

Pursuers and Reclaimers

against

(FIRST) MULTIPLEX CONSTRUCTION EUROPE LIMITED and  
(SECOND) BPY HOLDINGS LP (a firm) and BPY HOLDINGS GP LIMITED, the general  
partner thereof

Defenders and Respondents

And

WSP UK LIMITED

First Third Party

And

NIGHTINGALE ARCHITECTS LIMITED

Second Third Party

**Pursuers and Reclaimers: Moynihan KC, Broome; Morton Fraser MacRoberts LLP**

**Defenders and Respondents: MacColl KC, A McKinlay; Brodies LLP**

**First Third Party: Barne KC; CMS Cameron McKenna Nabarro Olswang LLP**

**Second Third Party: D Thomson KC, McAndrew; Womble Bond Dickinson (UK) LLP**

31 March 2026

## **Introduction**

[1] This reclaiming motion (appeal) raises again the proper role of an appellate court when it is invited to reconsider factual findings and conclusions thereon made by a first-instance judge who has heard evidence at a contested proof. The context is the extinction of obligations by the passage of time according to the law on prescription.

[2] Each member of the court has contributed to this opinion.

[3] On 18 December 2009 the pursuers, Greater Glasgow Health Board (“GGHB”), contracted with the first defenders, Multiplex Construction Europe Limited (“Multiplex”), for the design and construction of the Queen Elizabeth University Hospital (“QEUH”) in Glasgow. GGHB has made claims for damages alleging defects in its design and construction amounting to breaches of contract. This action concerns one area with alleged defects: the cladding in QEUH’s atrium.

[4] The atrium is QEUH’s central space, spanning 13 levels. A link bridge connects the two sides of the building. To the link bridge are attached pods serving as breakout rooms and offices. Daily footfall is around 20,000. The atrium, and the pods, are clad with aluminium composite material (“ACM”) panels, some of which had polyethylene (“PE”) cores. GGHB avers that it was a condition of the contract that the atrium cladding achieved the Euroclass B fire resistance standard. However, the cladding did not meet Euroclass B. GGHB seeks damages from Multiplex of £16,325,000 together with interest and expenses.

[5] Multiplex denies breach of contract, contending that it was not a condition of the parties’ contract that the atrium cladding be Euroclass B compliant and counterclaims for £16,896,883.79 it paid GGHB following adjudications it now argues were wrong in fact and law. Multiplex raised “downstream” actions against sub-contractor fire engineers and

architects, respectively the first third party, WSP UK Limited (“WSP”), and the second third party, Nightingale Architects Limited (“Nightingale”), seeking a contribution under collateral warranties granted by them in GGHB’s favour.

[6] Relying on section 6 of the Prescription and Limitation (Scotland) Act 1973, Multiplex contends that any obligation on its part to make reparation to GGHB has prescribed because no relevant claim was made timeously. In response, GGHB acknowledges that more than five years elapsed between its loss and service of the summons in this action on 4 March 2022. It relies upon section 6(4)(a)(ii) of the 1973 Act. That provision was prospectively amended by the Prescription (Scotland) Act 2018, but this is of no relevance for the purposes of the present action. GGHB argues that Multiplex’s conduct induced it to believe the cladding was conform to contract, and thus to refrain from making a claim. GGHB also founds upon section 11(3) of the 1973 Act, arguing it was unaware and could not with reasonable diligence have become aware of its loss until 9 February 2021. WSP and Nightingale maintain that Multiplex’s claims against them have prescribed regardless of the outcome of GGHB’s claim.

[7] Following proof before answer on prescription, the commercial judge held that GGHB had failed to prove it had been induced into error. Even if so induced, GGHB could, with reasonable diligence, have discovered its error by May 2016. Hence, if section 6(4) applied, it did not “stop the clock” long enough to bring GGHB’s claim within the prescriptive period. GGHB could not rely on section 11(3) to delay commencement of the prescriptive period. In the decision now reclaimed (appealed), he *assoilzied* Multiplex, WSP, and Nightingale (i.e. refused the claims against them).

## **Factual background**

[8] The background is set out at paragraphs [8] – [118] of the commercial judge’s opinion; what follows is a summary of (i) parties’ contractual and policy obligations, (ii) the progress of the works, and (iii) post-completion events so far as relevant to the reclaiming motion.

### *The contract*

[9] GGHB and Multiplex based their contract upon the *NEC 3 Engineering and Construction Contract, Option C: Target contract with activity schedule June 2005*, amended by a bespoke agreement. The contract incorporated two volumes of Contract Data, Part 1 and Part 2. Part 2 contained the Employer’s Requirements. Under Clause 20.1 of the NEC contract, Multiplex undertook to “Provide the Works”, defined in Clause 11.2(13) as doing all the work necessary to complete those works in accordance with the contract. Clause 21 provided for Multiplex’s design obligation and that Multiplex was not to commence work until its design was accepted by the project manager. Multiplex separately contracted with WSP and Nightingale for structural, civil engineering and architectural services. Both indemnified Multiplex against “claims, proceedings, compensation and costs payable” to GGHB. Both granted collateral warranties to GGHB warranting and undertaking to (i) comply with their obligations under their contracts with Multiplex, (ii) complete their services in accordance with their contracts, (iii) exercise all reasonable skill, care, and diligence to be expected of competent and qualified professional designers, and (iv) not to use any products or materials not conforming to relevant British or European standards.

*Multiplex's Fire Safety Design Strategy*

[10] Part 12 of Appendix R to the Employer's Requirements obliged tenderers to include an "outline description" of their fire strategy and fire engineered design proposals. A Fire Safety Design Strategy ("FSDS") was to be provided ten weeks prior to construction. On completion, a "comprehensive package of completion documentation and certification on all fire safety measures and the final 'as built' fire strategy" were to be submitted to GGHB's fire safety advisor for review prior to handover - including schedules of the materials used.

[11] Multiplex provided a draft FSDS with its tender in 2009. By September 2014, with input from WSP, the FSDS was in its 11<sup>th</sup> version. Version 11 contained two requirements significant to this litigation. First, it required that the cladding materials in the atrium meet Euroclass B. Second, it provided that the atrium was an external space for fire safety purposes.

*The cladding*

[12] Three types of ACM cladding were installed in the atrium: Larson Signi (Alucoil) PE, Etalbond PE and Alucobond PE, none of which complies with Euroclass B.

*The O&M Manual*

[13] Upon completing the cladding in 2015, Multiplex prepared an operations and maintenance manual for GGHB ("the O&M Manual"). The Manual failed to state that the cladding was not Euroclass B compliant, in a departure from the FSDS. Despite 78 per cent of the cladding comprising either Signi or Etalbond, only some "as-built" drawings showed Signi. None showed Etalbond. The O&M Manual included product literature relating to Alucobond but the specific Alucobond products used were not identified. Only two of

Alucobond's three main products at the time were Euroclass B compliant. The O&M Manual was incomplete and inaccurate, in breach of Multiplex's obligations to GGHB.

*Chief Executive Letter 11*

[14] Chief Executive Letter ("CEL") 11 was issued by the Scottish Government on 17 March 2011, following "a number of significant issues in regard to fire safety management" after handover and commissioning of new hospital facilities. All Scottish Health Boards were obliged to follow it. Statement 3 read:-

"All NHSScotland [*sic*] Bodies commissioning new healthcare buildings for owner occupation, leasing newly constructed buildings from another party or occupying buildings provided under a Public/Private Partnership contract must be satisfied that all design and construction works of such buildings comply with all statutes bearing upon the fire safety of newly constructed buildings."

Statement 5 read:-

"All NHS premises new or existing, owned, occupied or managed by NHSScotland Bodies must be managed in accordance with the mandatory requirements set out hereafter at Annexe B."

Annexe B set out the requirements that each hospital's "Nominated Officer (Fire)" must follow. In particular, they must ensure "suitable and efficient" fire safety risk assessments are undertaken for the estates under their supervision, and ensure such assessments are acted upon.

[15] Annexe C of CEL 11 governed the lead-up to handover of new facilities, identified as a particularly important period for fire safety. Annexe C obliged Nominated Officers (Fire) and Fire Safety Advisers to ensure the commissioning process for fire safety systems was "carefully monitored and supervised". Testing and product information was to be kept as "a permanent reference record of the installed components". It specifically highlighted that a statutory auditing authority, the Scottish Fire and Rescue Service ("SFRS") might require

sight of this documentation. It recommended early and consistent engagement with SFRS given the “progressive and continuously evolving” nature of hospital buildings during final stages of construction and commissioning to ensure that “management processes, policy and procedures, and other measures” adopted upon commission were “consistent with [SFRS’s] statutory expectations”.

[16] Parties’ expert witnesses agreed that CEL 11 required GGHB to review the O&M Manual at handover and verify its accuracy for themselves, as did Mary Anne Kane, Nominated Officer (Fire) for QEUH from 2012. The commercial judge observed that a pre-requisite for keeping accurate records was reviewing them to ensure that they were indeed accurate. The experts agreed that CEL 11 reflected the steps that any owner of premises such as QEUH would be reasonably required to take.

[17] GGHB did not review the O&M Manual at handover.

*Progress of the works, payments to Multiplex, and completion*

[18] On 16 December 2010 GGHB and Multiplex agreed that the contract works should proceed to Stage 3. In October and December 2012 Multiplex became aware that their sub-contractor for the design and fabrication of the pods, J&D Pierce (Contracts) Limited, proposed to use Alucobond NaturAL and Etalbond Light (Etalbond LT). Installation was completed by 22 November 2013, when J&D Pierce made their final payment application.

[19] Multiplex appointed Clad (UK) Limited – subsequently liquidated – as sub-contractor for the construction of the cladding. Multiplex paid Clad on a monthly basis, following application. On 23 November 2012 Clad applied for payment in respect of Signi ACM PE cladding. This was the first occasion on which payment was sought for non-Euroclass B cladding. Multiplex made payment on or around 18 January 2013 and recovered costs

incurred to consultants and sub-contractors in monthly payment applications to GGHB. It sought reimbursement for the 23 November 2012 payment to Clad in December 2012 and received it around January 2013.

[20] On 26 January 2015 Stage 3 of the contract works was completed, subject to a schedule of incomplete works. On 5 February 2015 Multiplex sought payment for the cladding. GGHB paid on or around 24 February 2015. On 15 December 2016 Glasgow City Council (“GCC”) accepted the building warrant completion certificate. The Supervisor’s Final Defects certificate was issued on 15 February 2017.

#### *Post-Grenfell Tower fire investigations*

[21] Following the Grenfell Tower fire on 14 June 2017, the Scottish Government instructed an audit of all external cladding on public buildings in Scotland. Meanwhile, Multiplex’s managing director, Ross Ballingall, ordered an investigation into the use of ACM PE cladding on all its ongoing and recently completed projects.

[22] Responsibility for investigating the cladding at QEUH fell to Ian Powrie, GGHB’s Deputy General Manager of Estates. Mr Powrie consulted the O&M Manual for QEUH. Unsurprisingly, given the problems with the O&M Manual, Mr Powrie was unable to determine what cladding had actually been installed, or where, at QEUH. On 11 July 2017 he emailed Multiplex’s Fergus Shaw seeking clarification. On 17 July Alasdair Fernie, Operations Director at Multiplex, responded, stating that WSP had undertaken “a lengthy consultation process” involving both GCC and SFRS. GCC had regularly attended the construction project to inspect and verify the works, including “witnessing products used”. The trade contractors “confirmed that the various envelope types satisfy the requirements of

the agreed fire strategy". Mr Powrie took from this that the cladding complied with building regulations and the FSDS.

[23] On 13 July 2017, Callum Tuckett, Multiplex's Managing Director for Europe, was asked for his input on a draft GGHB press release regarding the *external* cladding. He queried the words "further detailed work is underway to provide further reassurance". Mr Tuckett objected that this wording "appear[ed] to show a lack of confidence in the extremely lengthy and thorough approval process" of the FSDS carried out by SFRS and GCC. Mr Tuckett highlighted that Multiplex "[had] then confirmed that the installation is compliant with [the] fire strategy". Mr Tuckett's comments were forwarded to GGHB's Director of Communications, Ally McLaws.

[24] At some point during 2017, Mr Powrie met with John Wales, Multiplex's Quality Assurance Manager, at Multiplex's offices. The meeting was not a formal one and was not minuted. During the meeting, Mr Powrie asked about the atrium cladding because it was similar to the external cladding. Mr Wales replied that the atrium cladding panels were not ACM and were decorative panels with fire breaks "as per building standards". Mr Wales said that the atrium cladding "didn't have the same build-up" so would not include ACM panels. As a result of that discussion, Mr Powrie considered that there were no issues with the atrium cladding regarding compliance. He took no further steps to investigate the atrium cladding because external cladding was the focus. Mr Powrie told David Loudon, GGHB's Director of Estates and Facilities, about his discussion with Mr Wales, but Mr Loudon did not ask him to take the matter further.

[25] The commercial judge held that since (i) the meeting was not a formal one; (ii) Mr Wales had no involvement in the construction of the atrium; (iii) the atrium was not in fact under active consideration in the review; (iv) Mr Loudon did not ask for the matter

to be pursued further; and (v) no record was kept of the discussion, the conversation was not considered to be of any significance by GGHB. It did not induce any belief in GGHB that the cladding was conform to the contract.

[26] Throughout 2017 Multiplex and GGHB held a series of meetings. They agreed upon the need to replace Trespa brand external cladding at the Royal Hospital for Children, part of QEUH. They identified that Alucobond cladding was installed on the exterior of QEUH, but Multiplex contested the need to replace it. Unfortunately, Multiplex and GGHB made an identical mistake: although the FSDS provided that the atrium cladding was considered to be *external* cladding, neither Multiplex nor GGHB included it in their reviews. The commercial judge considered that they bore equal responsibility for this error.

[27] In March 2018, however, Multiplex became aware of potential difficulties with the atrium cladding realising by 20 March 2018 that records of the atrium cladding were incomplete. In an internal email, Mr Shaw observed that “the drawings” referenced Alucobond, but “no particular type”. By 23 March 2018 Multiplex knew that the O&M Manual was inaccurate and that ACM PE cladding had been installed in the atrium. By 11 April 2018, they had notified their insurers. On 8 May 2018 Multiplex and Nightingale met with Steve Cooper, a fire engineer. By 2 August 2018, having consulted Kenny Hamill, lead fire engineer at WSP at the time of the design and construction of QEUH, Mr Shaw was concerned that some of the cladding was disconform to contract. He was not, however, a fire engineer and relied upon the professionals engaged by Multiplex.

[28] Therefore, on 29 August 2018 Mr Shaw sent to Emma White, the project lead at Nightingale, the entire email chain between Multiplex and Mr Hamill, observing “there is a strong suggestion that the products do not comply with the CFD” (a reference to fire modelling informing the FSDS). Ms White responded on 31 August:

“We can confirm that the final IBI design package for the Adult and Children’s atria included the specification of Alucobond cladding...At the time of the design, and in compliance with the Fire Strategy, CFD model and Scottish Building Regulations requirements this product was classified as Class 0 in relation to surface spread of flame; this was evidenced by the attached BBA certificate which is included for your information.”

Mr Shaw read this as confirmation that all the cladding products used complied with contractual requirements. He was comforted that Ms White did not raise any concerns on the basis of the material he had sent her. In cross-examination, he accepted that Ms White’s response referred only to Alucobond, and not Signi or Etalbond. At the time, however, he interpreted Ms White’s email as confirmation that the atrium cladding was conform to contract, and on 13 September 2018 reported the positive news to Mr Tuckett.

[29] Multiplex told GGHB nothing of its investigations in 2018.

### *Litigation*

[30] By late 2019, GGHB had identified various defects in the QEUH, but the atrium cladding was not among them. It informed Multiplex that it intended to take legal action and served a summons in January 2020. Following service of those proceedings, Multiplex dispatched Geraint Whalley, a quantity surveyor in their legal team, to QEUH. Mr Whalley observed ACM panels in the atrium and, aware of the risks around ACM, wished to identify the products used. Referred to Multiplex’s 2018 investigations, he considered that they had left key matters unverified. Mr Whalley investigated the atrium cladding himself, consulting with an independent fire engineer. On 21 January 2021, the fire engineer advised Mr Whalley that the ACM PE panels in the atrium cladding posed safety risks.

[31] On 9 February 2021, Mr Whalley wrote to GGHB advising that Multiplex had carried out a review of the cladding which “highlighted concerns” in respect of its suitability.

Multiplex advised “there is a risk that the PE grade ACM cladding in the atria may no longer be considered suitable for installation at the hospital”. Multiplex “strongly urge[d]” GGHB to undertake its own review “immediately”.

[32] Receipt of Mr Whalley’s letter was the point at which GGHB became aware of a potential defect in the cladding. Only on 13 April 2021, following enquiries with Multiplex, did GGHB identify the types of cladding installed.

### **The preliminary proof and the commercial judge’s decision**

[33] The commercial judge identified the questions for decision as (i) when did the prescriptive period begin? and (ii) did section 6(4) interrupt the prescriptive period, and if so between what dates?

[34] On the first question, the commercial judge held that the prescriptive period began at practical completion on 26 January 2015. Thus, GGHB’s claim prescribed on 26 January 2020 (about 2 years and 5 weeks before service of the summons) unless GGHB could delay commencement of the prescriptive period (in terms of section 11(3)) or interrupt it (in terms of section 6(4)). All parties accept the commercial judge’s finding as to the commencement of the prescriptive period.

[35] Regarding section 6(4), the starting point was the evidence of GGHB’s witnesses. The commercial judge heard evidence from, among others, Ms Kane, Hazel McIntyre, a project manager with GGHB, William Russell, a Fire Risk Assessor employed by GGHB until November 2015, Tom Steele, GGHB’s Director of Estates and Facilities since October 2018, and Mr Powrie. The commercial judge found them all credible and reliable.

[36] None could give the necessary evidence of GGHB’s corporate state of mind – i.e. what did the statutory Board think? Mary Anne Kane’s evidence was that compliance

with the FSDS “would have been” the responsibility of the Board’s project team. She identified a Fire Safety Adviser, Gilbert Donnelly, who was not a witness, as responsible. However, nobody would have done a physical check. It was not her role (and outside her expertise) to assess the cladding as installed against the O&M Manual. Hazel McIntyre did not begin working at QEUH until 2017, nevertheless her evidence was that the fact that the completion certificate in December 2016 did not list the cladding as an outstanding defect “would have led” GGHB to believe it was conform to contract. She did not consult the O&M Manual until February 2021.

[37] William Russell completed a fire risk assessment on 2 November 2015. This involved only visual inspection of the cladding. Otherwise, he assumed that the FSDS was implemented correctly and the cladding had been installed in accordance with the building warrant. He was a fire risk assessor, not a fire safety adviser, and considered therefore that he had no duty to ensure that documents were kept detailing what products were installed. It was not his role to carry out an intrusive inspection nor did he need to consult the O&M Manual.

[38] Tom Steele became GGHB’s Director of Estates and Facilities in October 2018. In October 2018 he became aware of a number of issues with QEUH, but the cladding was not among them. He reviewed correspondence with Multiplex prior to his appointment and gave hearsay evidence of what “would have been” brought to the attention of the Board but conceded he had no direct knowledge.

[39] The commercial judge noted that the state of mind of a body corporate was established either by leading evidence of a particular individual or group of individuals constituting the “directing mind and will” of the corporation, or via the law of agency where particular employees are considered agents of the corporation (*Dryburgh v Scotts Media Tax*

[2014] CSIH 45; 2014 SC 651, Lord Drummond Young at [21] – [24]). None of GGHB’s witnesses was a Board member. None could give direct evidence as to the Board’s state of mind. There was thus no evidence of error on the part of the Board. Turning to agency, no agency relationship was pled by GGHB. In any event, no witness gave evidence that they were *induced* into error, as opposed to being ignorant of the true position; the commercial judge drew an analogy between going outside without an umbrella in ignorance of the weather, and going outside without an umbrella when one has been told it is dry. GGHB was in the former category.

[40] On inducement, GGHB submitted that a continuum of conduct on Multiplex’s part led it into error. Multiplex sent its 5 February 2015 “Assessment of Work” and the Final Defects Certificate on 15 February 2017, on both occasions seeking payment from GGHB. GGHB argued this constituted an implied representation that the works had been carried out according to the contract, no payment being otherwise due. In 2016, Multiplex submitted the building warrant completion certificate to GCC and provided the final version of the FSDS, both suggesting that the cladding complied with the FSDS. Multiplex supplied an inaccurate O&M Manual. GGHB relied upon Mr Tuckett’s statement in his email of July 2017 that QEUH had been constructed in accordance with the FSDS and the meeting between Mr Wales and Mr Powrie. Finally, GGHB contended that Multiplex’s failure to inform it of its own post-Grenfell investigations amounted to inducement of error by silence.

[41] The commercial judge rejected these arguments. He held that routine acts such as requests for payment were not apt to induce error in GGHB. As Lord Malcolm observed in *Tilbury Douglas Construction v Ove Arup* [2024] CSIH 15; 2024 SC 383 at [61]:

“[I]t is doubtful whether the subsection is aimed at conduct as everyday as providing services and accepting payment therefor. If merely tendering a design or sending an

invoice in respect of what turns out to be defective work is sufficient for the purposes of section 6(4), not many prescriptive periods will commence.”

Neither Mr Tuckett’s email of July 2017 nor Mr Wales’s statement to Mr Powrie were sufficient. Mr Tuckett’s email simply repeated assurances already given, rather than making fresh representations. Those assurances related to the exterior cladding, not the atrium cladding. In any event, there was no evidence that anyone other than Mr McLaws had seen the email, let alone relied upon it. Mr Wales had never been responsible for the atrium, and Mr Powrie took no action other than to report to his superior, David Loudon. There was no evidence that Mr Loudon placed any reliance on Mr Wales’s statements to Mr Powrie and Mr Loudon did not give evidence.

[42] The errors in the O&M Manual could not interrupt prescription because GGHB did not uncover them until March 2021 (following notification by Multiplex in February).

Although Multiplex was in breach of contract over the O&M Manual, GGHB could not be induced into error by a representation of which it was unaware. There was no evidence that anyone in GGHB was deceived by the FSDS and the individual who reviewed it, Gilbert Donnelly, was not called as a witness.

[43] Multiplex’s silence before March 2018 was irrelevant. Before then both parties erroneously treated the atrium cladding as internal cladding. GGHB was as able as Multiplex to realise that error. However, from March 2018 Multiplex was aware of a potential issue and neglected to inform GGHB. GGHB relied upon the decision of Staughton J in *Stag Line Ltd v Tyne Shiprepair Group Ltd (The Zinnia)* [1984] 2 Lloyd’s Rep 211 at 218 – 219. In *Stag Line*, a firm of shiprepairers became aware that a defective part had been installed on a vessel it had been contracted to repair but said nothing. Staughton J held that there was no general rule of law obliging a party to a contract to act against its interest.

Nevertheless in the circumstances – where it was unlikely the defect would come to light unless there was a casualty, where there was a danger to life at sea and of damage to very valuable property, and where the rules of the ship’s classification society were being broken – there was an implied contractual term that the repairers would inform the shipowners.

GGHB argued that the present case was on all fours with *Stag Line* and urged the commercial judge to read a similar implied term into the contract.

[44] The commercial judge rejected this submission. First, he noted Staughton J’s comment that the idea that a party in breach of contract is obliged to inform the other party was a “novel concept” devoid of supporting authority. Second, even if there was such an implied term, it did not follow that Multiplex’s silence interrupted the prescriptive period, as opposed to being a separate breach of contract. Third, the facts of *Stag Line*, particularly the unlikelihood of the defect coming to light, did not apply to the present case given GGHB’s obligations under CEL 11. Fourth, under GGHB’s interpretation of *Stag Line* virtually every section 6(4) case would become self-proving. Fifth, while Multiplex arguably ought to have alerted GGHB in 2018, that did not mean their failure to do so created a cause of action for GGHB.

[45] On the counterfactual that GGHB succeeded in demonstrating error or inducement, the commercial judge considered whether GGHB could with reasonable diligence have discovered the true position. He noted that GGHB pled its error was not knowing the atrium cladding contained ACM PE panels until 9 February 2021. “Reasonable diligence” obliged GGHB to take such measures as a reasonably prudent person in its position would do, having regard to all the circumstances. The difficulty for GGHB was CEL 11. The dynamic situation as a hospital building neared completion was precisely the situation CEL 11 was created to address. CEL 11 required GGHB to consult the O&M Manual and

thereafter verify its accuracy. When the O&M Manual was finally checked – whether by Multiplex in 2018 or GGHB in 2021 – its deficiencies were immediately identified and an investigation to establish the true position followed.

[46] GGHB failed to follow its own policy - one which reflected nothing more than what a reasonably prudent owner of premises would have done. The pervasive assumption within GGHB was that the FSDS had been complied with. That was reflected in the evidence of Ms Kane and in particular of Mr Russell. Had GGHB followed CEL 11, the date upon which GGHB could with reasonable diligence have discovered any error depended on when GGHB would have discovered the deficiencies in the O&M Manual. Mr Russell carried out the fire risk assessment in November 2015. In the hypothetical scenario that the O&M Manual had been checked then, the commercial judge estimated that GGHB would have discovered the true position in around six months. On the best-case scenario for GGHB the running of the prescriptive period would be paused only until May 2016 and would have elapsed in May 2021.

[47] Section 11(3) did not assist GGHB for three reasons. First, GGHB did not plead a section 11(3) case. This in itself was fatal. Second, applying *Gordon's Trustees v Campbell Riddell Breeze Paterson LLP* [2017] UKSC 75; 2017 SLT 1287, GGHB became objectively aware of its loss when it took possession of a hospital which was disconform to contract; this occurred on 26 January 2015. Finally, GGHB's case based on section 11(3) failed on reasonable diligence for the same reasons as for section 6(4).

[48] Accordingly, the commercial judge *assoilzied* Multiplex. He noted that any claim by GGHB against WSP and Nightingale relied upon their collateral warranties. GGHB's case for postponing or interrupting the prescriptive clock was based entirely on Multiplex's

alleged conduct. Therefore, even had GGHB's claim not prescribed against Multiplex it would nonetheless have prescribed against WSP and Nightingale.

[49] Finally, the commercial judge observed that the counterclaim "likely [fell] to be granted" as GGHB had received payments for obligations which had prescribed, although he put the case out By Order to be addressed on further procedure.

### **Grounds of appeal**

[50] First, under the heading of section 6(4) and the inducement of error, GGHB submits that the commercial judge erred in finding that inducement of error required "a representation of some sort by the debtor" because relevant conduct may include silence or inactivity. He further erred by failing to consider whether Multiplex's conduct contributed to inducing error on GGHB's part. The commercial judge erred in distinguishing *Stag Line*; a major fire risk in a hospital was akin to the defective part in *Stag Line*. The characterisation of GGHB as ignorant was wrong, it had a mistaken positive belief that the cladding was conform to contract. The commercial judge approached Multiplex's conduct individually rather than in aggregate. He erred in relation to the conversation between Messrs Powrie and Wales. His approach to the attribution of error was misconceived; there was no need to plead that senior employees in a substantial organisation were acting under delegated authority.

[51] Second, under the heading of reasonable diligence, the commercial judge erred in law by requiring GGHB to prove when the period of error should have ended through reasonable diligence. Multiplex did not explain why the O&M Manual contained misleading content. There was no basis to infer that, were inquiries made of Multiplex *before* Multiplex itself consulted a fire engineer (as it did in January 2021), these would lead to

discovery of the true position. Six months was unreasonably short. Third, under the heading of section 11(3), the commercial judge erred in stating that no section 11(3) case was pled. He erred in finding that GGHB was objectively aware of its loss by 26 January 2015; section 11(3) was intended to deal with latent damage and the disconformity of cladding was latent damage. Finally, the commercial judge had wrongly excluded certain of GGHB's averments from probation.

### **Submissions**

#### *GGHB*

[52] The commercial judge's approach to inducement began from the wrong starting point in holding that GGHB's error amounted to mere ignorance of the true position. GGHB's error was a positive belief that the cladding was conform to contract. The commercial judge's error coloured his approach to the evidence and contributed to his errors in analysing Multiplex's conduct. The commercial judge did not acknowledge that silence could constitute conduct (*Heather Capital Ltd (In Liquidation) v Levy & McRae* [2017] CSIH 19; 2017 SLT 376, Lady Paton at [63]). The applications for payment, the Building Warrant completion certificate, and the Final Defects Certificate, all implied that the cladding was conform to contract. It was obvious that GGHB would assume compliance until told otherwise (*Caledonian Railway Co v Chisholm* (1886) 13 R 773).

[53] Silence was particularly important where the debtor had a duty to speak. The commercial judge had erred in his treatment of *Stag Line*. He acknowledged similarities between *Stag Line* and the present case. However, he erroneously distinguished it by finding that there was no principle of Scots law requiring a party to a contract to act against its own interests. That ran contrary to *Stag Line's* reasoning regarding a duty to speak where

there was potential danger to life or damage to valuable property. The significance of *Stag Line* was that it bolstered the argument arising from Multiplex's silence. Representations had continuing effect once made (*Cramaso LLP v Visc Reidhaven's Trs* [2014] UKSC 9; 2014 SC (UKSC) 121). Multiplex's silence from 2018 would obviously leave GGHB with the impression that the cladding conformed to contract.

[54] In oral submissions, however, GGHB placed little emphasis on *Stag Line*. While not resiling from the position that Multiplex had a duty to inform, it submitted that all it required to demonstrate was that Multiplex's decision not to do so prolonged GGHB's error. Reference was made to *AMN Group Ltd v Gilcomston North Ltd* [2008] CSOH 90, 2008 SLT 835 at [75] – [78]. In *AMN Group*, the owner-operators of an auction mart sought damages from contractors, engineers, and architects involved in its construction. The pursuers relied on section 6(4) on the basis that they had asked the architects (the third defenders) to investigate and advise upon developing problems with the roof. The architects provided “highly questionable advice that none of the companies involved in the roof cladding had any legal or contractual obligation to take any action” (at [55]) and only after months had passed without “any sensible response”. The Lord Ordinary held that “prolonged inaction in the face of a legitimate expectation of expert advice and assistance” qualified as conduct capable of inducing error. *Stag Line* was authority for the proposition that sometimes there was a duty to warn, but even if there was no such duty Multiplex's silence, despite knowing of a potential safety risk since March 2018, was on all fours with *AMN Group*.

[55] On Multiplex's requests for payment and submission of building warrants and completion certificates, the commercial judge further erred by following Lord Malcolm's observations in *Tilbury Douglas*; these were *obiter* and inconsistent with the broad definition of “conduct” in *Heather Capital*. In *Rowan Timber Supplies (Scotland) v Scottish Water Business*

*Stream* [2011] CSIH 26, invoices rendered for services not provided at all were held to amount to a representation. There was no difference in principle between *Rowan Timber* and the present case. The matters on which GGHB relied were not “routine”. It was an offence knowingly to submit a false or misleading completion certificate, and so not a routine matter. Applying for a building warrant and completion certificate for QEUH was anything but routine; QEUH was among the largest and most complex developments in Scotland. The applications were “pored over”, including a consultation by WSP with GCC and the SFRS, who regularly attended to inspect the works.

[56] The commercial judge further erred by rejecting the evidence of GGHB’s corporate knowledge on an agency basis. Pleadings in a commercial action were intended to be brief. The test was fair notice, which Multiplex had from GGHB’s witness statements. GGHB was a substantial organisation, which handled day-to-day matters through officials. It was perverse to expect officials to report to the Board that the works conformed to contract; one would expect escalation only if they did not. That heightened the significance of the O&M Manual; GGHB’s officials could hardly inform the Board that the Manual was inaccurate, because Multiplex had concealed that for almost three years. The evidence, in any event, established that GGHB officials were induced into error by Multiplex’s continuing silence, particularly Mr Powrie and Mr Loudon following their 2017 meeting. The commercial judge’s error could be demonstrated by considering the counterfactual had Multiplex informed GGHB’s officials of the true position. If GGHB had then contended that its officials’ knowledge could not be attributed to it because the officials did not inform the statutory Board its position would be untenable.

[57] A statutory office-holder, absent provision to the contrary, might delegate his or her functions to a senior officer (*DPP v Haw* [2007] EWHC 1931 (Admin); [2008] 1 WLR 379,

Lord Phillips of Worth Matravers at 33; *Noon (River Manager) v Matthews* [2014] EWHC 4330 (Admin) at 38). Where practical reality meant the statutory office-holder could not personally discharge its conferred functions, a power to delegate would be implied. GGHB was constituted under a power conferred on the Scottish Ministers by section 2 of the National Health Service (Scotland) Act 1978. That power was expressed in general terms. *Haw* applied. It followed that, in approaching the attribution of error, the commercial judge erred by holding evidence was required from the statutory Board. Evidence from officers was sufficient; it could be assumed that they acted under delegated authority.

[58] On reasonable diligence, the commercial judge erred in requiring GGHB to prove when their error began and ended; the onus was on the debtor (*Heather Capital and Highlands and Islands Enterprise v Galliford Try Infrastructure* [2023] CSOH 21; 2023 SLT 1077). This was a *lacuna* in Multiplex's evidence which the commercial judge resolved by speculating it would have taken six months from November 2015 for GGHB to discover the error. This was impermissible. GGHB conceded that CEL 11 required it to verify the O&M Manual and that it did not do so. However, it was Multiplex that produced the inaccurate O&M Manual, in breach of contract, and failed to supply the correct information despite being asked repeatedly. Why should the commercial judge assume GGHB could with reasonable diligence discover within six months something Multiplex did not discover until 2021, and then only after consulting a fire engineer?

[59] GGHB highlighted their averment that "[GGHB] was not aware, and could not with reasonable diligence have been aware, of loss, injury or damage before 9 February 2021". That was expressly a section 11(3) case. GGHB's loss flowed from physical characteristics of the cladding – i.e. ACM PE panels. GGHB did not know, on practical completion, that this was so. With reference to Lord Reed's observations in *David T Morrison v ICL Plastics* [2014]

UKSC 48; 2014 SC (UKSC) 222 at 15, this was “latent damage” of which GGHB was ignorant until 9 February 2021. Multiplex failed to establish an earlier date on which GGHB could have become so aware, despite holding the onus of proof. As a result, sections 11(1) and (3) meant that the prescriptive period ran from 9 February 2021.

### *Multiplex*

[60] The commercial judge dealt with the evidence of each of GGHB’s witnesses in turn. He outlined the alleged representations upon which GGHB sought to rely and gave considered reasons for rejecting them. GGHB’s subsequent references to various passages of evidence was nothing more than a belated attempt to fill in the gaps identified by the commercial judge which failed to engage with his analysis of the evidence and ignored the full evidential position. GGHB’s fundamental problem was its failure to lead sufficient evidence to prove its case on prescription.

[61] None of GGHB’s witnesses gave evidence that they were induced into error. This struck at the heart of GGHB’s claim because it meant there was no evidence of an error attributable to the statutory Board, whether directly or on agency principles. If the commercial judge was incorrect on that point, his findings on reasonable diligence were nonetheless fatal to the claim.

[62] GGHB’s case failed because it had not led sufficient evidence to support reliance on section 6(4). In any event, the commercial judge correctly identified that silence could in principle enable a creditor to rely on section 6(4), citing *Heather Capital* at [63] and [64]. The terms of the opinion itself, referring to “silence” on Multiplex’s part and “active and passive representations” made that abundantly clear. Questions of contribution to error, or the

aggregate of Multiplex's conduct, all ignored the decisive finding that none of GGHB's witnesses gave evidence of being induced into error.

[63] To attribute error to the statutory Board, GGHB sought to rely upon the evidence of Mr Steele, who held a mandate from the Board to investigate defects. However, Mr Steele did not join GGHB until 2018. Prior to that date, his state of knowledge was irrelevant to any analysis of what GGHB believed. In 2017, he was employed by the Scottish Government. GGHB's reliance on Mr Steele was undermined by what Mr Steele himself said. Consistent with the commercial judge's analysis of error versus ignorance, in 2017 Mr Steele had been ignorant. He had not been labouring under an error, still less one induced by Multiplex. When he joined GGHB in 2018, the error upon which GGHB sought to found was already there. Whether the court approached the question of attribution on the basis of *Dryburgh* or *Haw*, the evidence demonstrated no error on GGHB's part at the corporate level.

[64] The commercial judge correctly rejected the argument from *Stag Line*. First, GGHB averred no contractual term, implied or otherwise, obliging Multiplex to inform GGHB of a breach of contract. Second, *Stag Line* was a first-instance decision from England and Wales and not binding on the commercial judge. Third, unlike the creditors in *Stag Line*, GGHB could, by following CEL 11, have discovered the non-compliance. In any event, given the fact that Multiplex had been investigating the cladding in 2018 was unknown to GGHB, it could hardly have affected its state of mind. There was no basis for the commercial judge to ignore Lord Malcolm's *dicta* in *Tilbury Douglas*. The meaning of section 6(4) contended for by GGHB was circular. *Caledonian Railway Company* did not support GGHB's position; the court in that case had interpreted the Triennial Prescription Act 1579 which did not contain any provision equivalent to section 6(4). The facts of the case, involving a positive pretence

by the debtor, were not on all fours with the present action. GGHB's revised position, based on *AMN Group*, failed for the same reasons as its revised position based on *Haw* failed – silence was relied upon during a period when the error had already become operative.

[65] The commercial judge's decision on reasonable diligence was correct. He did not decide that the burden of proof lay with GGHB, rather all he did was restate the principle, confirmed in *Tilbury Douglas* at [50] that the creditor must identify the dates it seeks to have left out of the prescriptive period. In any event, at [152] he expressly confirmed that he had reached his decision based on all the evidence led, rather than on burden of proof. The reason for the O&M Manual's inaccuracy was irrelevant where it had been taken *pro veritate* that it was inaccurate and that this was a breach of contract. Multiplex led expert evidence that had GGHB complied with CEL 11 it would have discovered the errors in the O&M Manual and, through investigation, identified the issues with the cladding. The commercial judge's six-month timetable was not impermissible speculation; it was generous to GGHB given that, in the real world, GGHB had determined the true position within three months (13 April 2021, following the letter of 9 February 2021). In any event, in a counterfactual scenario where GGHB consulted the O&M Manual and discovered it was incomplete and inaccurate, it would no longer have been in error. Reference was made to *Glasgow City Council v VFS Financial* [2022] CSIH 1, 2022 SC 133 at [53] and [55]. The commercial judge's findings on the evidence were not "plainly wrong" or ones which no reasonable judge could have made (*Henderson v Foxworth Investments* [2014] UKSC 41; 2014 SC (UKSC) 203).

[66] The commercial judge was correct to hold that no fair notice was given of a section 11(3) argument. GGHB made no such case in its pre-proof note of argument. In any event, the commercial judge had correctly applied *Gordon's Trustees* and *Tilbury Douglas*. In January 2015 GGHB was aware of the practical completion of a building it now offered to

prove was subject to a defect, namely non-compliant cladding. This was precisely the scenario addressed in *Gordon's Trustees* and *Tilbury Douglas*.

*WSP and Nightingale*

[67] WSP and Nightingale emphasised the commercial judge's findings on the evidence and the difficulties they caused for GGHB. WSP highlighted the importance of non-compliance with CEL 11. CEL 11 required a record of all installed materials to be kept, per the fire experts' joint report. Had GGHB complied with CEL 11, the product information relative to the atrium cladding would have been available to it, consistent with the underlying aims of CEL 11. The common opinion of the fire experts was that GGHB should have employed an independent expert to ensure compliance. The argument based on latent damage was misconceived; latent damage was damage that manifested over time. GGHB's complaint was that the panels were disconform to contract, not that they were inherently defective or deteriorating.

[68] WSP made four further points. First, classification of error was a red herring. The issue was not whether the creditor's error was the result of a positive belief or an absence of knowledge, but whether it was induced. The commercial judge had found, on the evidence, that it was not. Second, the relevant state of mind was the creditor's, not the debtor's. GGHB had effectively abandoned its reliance on *Stag Line* and now sought to rely on *AMN Group*. The approach in *AMN Group* sat uneasily with the later UK Supreme Court authority of *Gordon's Trustees*. On a post-*Gordon's Trustees* analysis, the pursuers in *AMN Group* would be held to have discovered their loss, at the latest, at the point the deterioration of the building became apparent. Third, a new argument on the attribution of error had been advanced during the hearing on the summary roll, based on delegation rather than agency.

The defenders and third parties had come to court to meet the case that was pled. It was unfair to allow GGHB to open up a new line of argument not argued before the commercial judge.

[69] Finally, GGHB's submissions on reasonable diligence regarding the period from 2018 – 2021 were irrelevant. The commercial judge had considered matters soon after completion, when CEL 11 obliged GGHB to check the O&M Manual. Had the O&M Manual been kept and checked as it should have, the discovery of the error would have been patent at that stage.

[70] Nightingale aligned itself with the submissions made by Multiplex and WSP. It highlighted GGHB's point that the error ended in February 2021, when it was put on notice that there was a matter for investigation. As the commercial judge found, notice would have been given earlier had GGHB complied with its duties. The statute was clear: the prescriptive period ran from the point the creditor "*could*" have discovered the error. GGHB's criticisms of the commercial judge's approach to the end of the period of error were, therefore, beside the point.

## **Analysis and decision**

### *Legal principles*

[71] As Sir David Edward observed in *Adams v Thorntons* WS 2005 1 SC 30 at paragraph [73], one of the reasons for the law of prescription is that, as time passes, it becomes increasingly difficult for a court to arrive at a just solution. Elements material to the case may no longer be available and such evidence as is still available may have become confused or uncertain. If the law of prescription is to be effective, it is, in Sir David's words, "important to hold to the principle that it is for the party claiming the protection of

section 6(4) or of section 11(3) to demonstrate that the statutory conditions for avoiding the axe of prescription are satisfied.” We agree. The court’s duty is to apply the language Parliament has chosen to use when prescribing the conditions which must be met before the operation of the normal rules on prescription can be relaxed. The question is whether, on the evidence, the creditor has satisfied the requisite statutory conditions to disapply the usual effects of the passage of time on the obligation in issue.

[72] Section 6 of the Prescription and Limitation (Scotland) Act 1973, so far as relevant, reads as follows:-

“6.— Extinction of obligations by prescriptive periods of five years.

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

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

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

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

[...]

(2) Schedule 1 to this Act shall have effect for defining the obligations to which this section applies.

(3) In subsection (1) above the reference to the appropriate date ... is a reference to the date when the obligation became enforceable.”

Schedule 1, paragraph 1(d) provides that an obligation to pay damages is an obligation to which section 6(1) applies.

[73] Section 11(1) of the 1973 Act provides that, for the purposes of section 6, an obligation to make reparation becomes enforceable on the date when the loss, injury or damage occurred, which is the date where there is a concurrence of *injuria* (injury) and *damnum* (loss) (*Dunlop v McGowans* 1980 SC (HL) 73, Lord Keith of Kinkell at paragraph 81). Section 11(2) provides that where loss, injury, or damage is attributable to a continuing act, the obligation becomes enforceable upon cessation of the act.

[74] Section 11(3) of the 1973 Act, as in force at the relevant time, provides that commencement of the prescriptive period may be postponed:

“(3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware.”

In other words, for a creditor who is unaware that it has suffered loss, injury or damage the five-year prescriptive period does not begin until the date upon which it either discovered the loss or the date upon which a court determines, following proof, that it *could* have discovered the loss with “reasonable diligence”.

[75] For the purposes of section 11, the phrase “loss, injury or damage” refers to “the existence of physical damage or financial loss as an objective fact”. Where, as in this case, a person “purchases defective goods [or] incurs expenditure”, the prescriptive period starts when the person acquires the goods or incurs the expenditure (*Gordon’s Trustees v Campbell Riddell Breeze Paterson LLP* [2017] UKSC 75; 2017 SLT 1287, Lord Hodge at paragraph 19, following *Morrison* [*David T Morrison v ICL Plastics* [2014] UKSC 48; 2014 SC (UKSC) 222]). There is no requirement that the creditor knows it has suffered “a detriment ... rendering the creditor poorer or otherwise at a disadvantage”. All that is required, for the prescriptive period to commence, is that the creditor knows that it has incurred expenditure (*Gordon’s Trustees* at paragraph 21).

[76] Once commenced, the prescriptive period may be interrupted by section 6(4):

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

- (a) any period during which by reason of—
  - (i) fraud on the part of the debtor or any person acting on his behalf,
  - or

(ii) error induced by words or conduct of the debtor or any person acting on his behalf,  
 the creditor was induced to refrain from making a relevant claim in relation to the obligation, and  
 (b) any period during which the original creditor (while he is the creditor) was under legal disability,  
 shall not be reckoned as, or as part of, the prescriptive period:  
 Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph.”

To take advantage of section 6(4), the creditor must prove first the existence of an error relating to its own rights and remedies, second that the debtor caused or induced the error, third that the error was the reason for, or at least contributed to, the creditor’s decision to refrain from making a claim, and fourth when the period of error began and ended (*Tilbury Douglas Construction v Ove Arup* [2024] CSIH 15; 2024 SC 383 at paragraph [50]). “Conduct” is defined liberally, need not be deliberate or blameworthy, and can include silence (*Heather Capital Ltd (In Liquidation) v Levy & McRae* [2017] CSIH 19; 2017 SLT 376 at paragraph [63]). It is not necessary that the debtor’s conduct be the *sole* cause of the creditor’s decision to refrain from making a claim (*Heather Capital* at paragraph [64]).

[77] It is important to stress that there must be evidence to show there was an erroneous state of mind on the part of the creditor (in this case GGHB) at the material time, together with evidence of the influence which that error had on what was and was not done (*Tilbury* at paragraph [54]). The language of the provision makes clear that the court must examine whether the facts demonstrate that the creditor has been induced to refrain from making a claim as a result of error induced by words or conduct of the debtor or any person acting on its behalf.

*Section 6(4) and induced error*

[78] The first issue is whether the commercial judge's conclusion that GGHB had not brought itself within the scope of section 6(4)(a)(ii) of the 1973 Act should be disturbed by this court. The determination by the commercial judge on this issue depended on his assessment of the evidence and his application of the law to the facts he found to have been established by the evidence. GGHB's challenges to the findings made by the commercial judge on the question of whether there had been an error on its part induced by the conduct (active or passive) of Multiplex were based on the proposition that the commercial judge was wrong to reach the conclusions he did. In addressing this proposition, it is important to note that GGHB did not identify any new or additional findings-in-fact which it said should be substituted for the factual findings made by the commercial judge. While GGHB referred in submissions to various short passages from the evidence, it did not seek to argue that the commercial judge's factual findings were not ones properly open to him to reach. Instead, it urged this court to place a different interpretation on the facts in contradistinction to that arrived at by the commercial judge. The issues in the reclaiming motion must, therefore, be addressed on the basis of the commercial judge's factual findings.

[79] There is a fundamental difficulty with the submissions made for GGHB on the issue of induced error due to the role of the Inner House when it comes to reviewing factual findings made by a judge sitting at first instance. The limitations are well-known and need not be set out again at length. As long ago as 1919 Lord Shaw of Dunfermline said in *Clarke v Edinburgh & District Tramways Co* 1919 SC (HL) 35, pp 36, 37 that an appellate court should intervene only if it is satisfied that the judge was "plainly wrong". Lord Hope of Craighead said much the same in *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1 at paragraph 17:

“It can, of course, only be in the rarest of occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion [Lord Hope quoting from Viscount Simon in *Thomas v Thomas* 1947 SC (HL) 45 at p.48 who in turn cites Lord Greene MR in *Yuill v Yuill* [1945] P. 15 at p.19]”

As the Supreme Court explained in *Henderson v Foxworth Investments* [2014] UKSC 41; 2014 SC (UKSC) 203 in order to interfere with the conclusion of the trial judge, an appellate court must be satisfied that the decision cannot reasonably be explained or justified and that it was one which no reasonable judge could have reached (paragraphs 62 and 66).

Lord Reed, after referring to the main authorities on the point, added this at paragraph 67:

“It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

Lord Reed observed that this approach was consistent with the Scottish authorities and also with more recent authority in the UK Supreme Court and in the Judicial Committee of the Privy Council (see, e.g. *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 per Lord Neuberger, paragraphs 52 and 53). In *Woodhouse v Lochs and Glens (Transport) Ltd* [2020] CSIH 67; 2020 SLT 1203 the Lord President (Carloway) observed at paragraph [33] that an appellate court must have due regard to the limitations of the appeal process, with its narrow focus on particular issues rather than the evidence as a whole.

[80] An appellate court must, therefore, approach matters fully conscious of the substantial advantage which the first-instance judge enjoyed because he or she was appraised of the impact of the totality of the evidence, with all its subtleties and nuances of

tone and impression. He or she is in a much stronger position than an appellate court to draw inferences and conclusions from a comprehensive evaluation of competing testimonies. As happened in the present case, the appellate court will often be invited by the party challenging the conclusions of the first-instance judge to look at some isolated passages in the evidence in support of an argument that the wrong conclusions have been reached or that there is some inconsistency or incongruity in the reasoning. Such an exercise will almost certainly be fruitless and sterile, as it transpired to be in this reclaiming motion.

[81] GGHB's acceptance of the commercial judge's factual findings creates major and ultimately insurmountable difficulties for it in challenging his conclusions on induced error. The commercial judge carefully considered all the evidence and arrived at reasoned conclusions based on his factual findings.

[82] The key passages in the commercial judge's opinion begin at paragraph [141]. There he noted that GGHB led no evidence from any Board member, nor evidence as to what the Board's state of mind actually was as opposed to what it "would have been". Crucially, none of the witnesses gave evidence that they were in fact induced into error by any of the factors relied upon by GGHB. The absence of evidence on this point was fatal to GGHB's contention that prescription was suspended through the operation of section 6(4).

[83] GGHB's alleged error lay in not knowing (a) that the cladding panels in the atrium were of ACM type; (b) that the panels had PE cores and (c) that they did not meet the Euroclass B standard. The commercial judge observed that there was no doubt that none of the witnesses led on behalf of GGHB knew any of those things but that in itself was insufficient to bring section 6(4) into play. In a crucial part of his reasoning the commercial judge stated that ignorance of a state of affairs was not necessarily the same as labouring under an error as to that state of affairs. For this reason, it did not avail GGHB for Mr Steele

to say in evidence that had GGHB known of the issue with the atrium cladding that issue would have been included in the 2020 court action. That was no doubt true, but GGHB had to go further than simply showing it was unaware of the issue.

[84] The applications for payment and for the completion certificate were routine acts when viewed in the context of the parties' contract. There was no evidence that either step induced anyone in GGHB into error, far less as a corporate entity. The payment application was assessed by Currie & Brown as GGHB's agent. This fact negated any argument that there was a representation upon which GGHB relied.

[85] While the O&M Manual contained misleading information, there was no evidence that anyone from GGHB consulted it until 2021. Similarly, there was no evidence that anyone from GGHB was induced into error by the provision of the FSDS on 31 August 2016. Mr Tuckett's email of 13 July 2017 was internal; it did not raise any new matter; it was written in the context of a review of the external, not the internal, cladding; and there was no evidence that anyone from GGHB relied on it.

[86] There was no evidence that the conversation between Mr Powrie and Mr Wales played any part in Mr Loudon's thinking; he was not led as a witness. Again, the context of the conversation was the review into the external cladding. Finally, Multiplex's silence about the likely presence of ACM PE cladding was irrelevant. GGHB was unaware that Multiplex was investigating the atrium cladding. To the extent that GGHB had any belief about the atrium cladding, this was the same before and after Multiplex's investigation. There was no principle of law requiring Multiplex to act contrary to its own interests. While Mr Steele said that he believed the cladding to have been installed in accordance with the Building Contract and Fire Strategy, he conceded that he had not applied his mind to the atrium cladding at all nor had anyone on the Board. As the commercial judge noted at

paragraph [63], Mr Steele therefore accepted that he had not applied his mind to an assessment of the materials used in the atrium nor whether GGHB's Fire Risk Assessments had been adequate.

[87] Turning to the main points made by GGHB about the evidence, we consider that the commercial judge was entitled to find that Mr Steele's evidence did not assist in showing that GGHB was labouring under error induced by Multiplex. In cross-examination Mr Steele accepted that he was not able to speak to GGHB's state of mind before 2021. While Mr Steele and the other GGHB witnesses testified that they were not aware of any problems with the atrium cladding, none of them said that they were induced into holding this belief by the failure of Multiplex to tell them that they were concerned about the atrium cladding.

[88] As to the evidence given by Mr Powrie, we consider that the commercial judge was entitled to find that this did not go so far as to establish an erroneous belief induced by Multiplex. As the commercial judge emphasised, Mr Wales had had no involvement in the construction of the atrium; the atrium was not being actively investigated as part of Multiplex's review; and when told of the conversation by Mr Powrie, Mr Loudon took no steps to take matters further. Moreover, there was no record of the Powrie/Wales conversation. In that state of the evidence and bearing in mind, in particular, that Mr Loudon was not called as a witness, it cannot be said that the commercial judge was plainly wrong to conclude that GGHB did not consider the conversation to be of any significance and that it did not induce any belief in GGHB's mind that the atrium cladding was conform to contract.

[89] As Lord Hope explained in *BP Exploration Co Ltd v Chevron* [2001] UKHL 50; 2002 SC (HL) 19 at paragraph 33, the prescriptive period will only be interrupted if the creditor can

prove that it was misled by the debtor's fraud or error induced by the debtor's words or conduct. Lord Clyde made the same point at paragraph 65 where he confirmed that the debtor must have led the creditor to believe something different from the truth and because of this error it has been brought into the position of refraining from making a claim. These *dicta* make clear that it is for the creditor to prove on the evidence that it has been misled and thereby prevented from making a timeous claim. The issue is one of fact.

[90] In our opinion, the commercial judge gave convincing reasons for the conclusions he reached on the evidence that GGHB had not proved as a matter of fact that it was induced into error. It cannot be said that the commercial judge was plainly wrong in respect of any of his findings relevant to this issue. It follows that this court is not entitled to interfere with any of his findings on these points.

[91] We would add that if GGHB's analysis of section 6(4) were correct, it would have surprising consequences, rendering the provision largely meaningless and undermining the whole purpose of the 1973 Act, which is to prevent the bringing of stale claims. It would mean that any creditor wishing to invoke section 6(4) would be able to do so by merely pointing to the debtor's failure to disclose to it the occurrence of the relevant breach of contract or defect. It cannot have been Parliament's intention that a mere assertion by the debtor that it had performed its obligations or had not been negligent would be enough to allow reliance on section 6(4). There is no principle of Scots law requiring a party to act contrary to its own interests by unilaterally disclosing its own knowledge that it had acted in breach of contract and so face the consequence of bringing section 6(4) into play. Any such approach would effectively turn section 6(4) into a provision which proved itself. That would not be a tenable interpretation of the provision.

[92] The other main points advanced on behalf of GGHB on this branch of the case may be dealt with more briefly.

[93] The distinction sought to be drawn by GGHB between the characterisation of the alleged error adopted by the commercial judge and the characterisation for which GGHB contended is immaterial. There is no real distinction between a mistaken belief that the cladding was conform to contract and GGHB being unaware that it did not meet the contractually specified standard. The fundamental reason that GGHB's case on section 6(4) had to fail was that it led no evidence showing that anyone in GGHB was in fact induced into error by any of the factors relied upon by GGHB as having induced error on its part. Matters never reached the point of having to consider whether there was in fact any error which could properly be attributed to GGHB's controlling mind, namely its statutory Board. It was necessary for GGHB to lead evidence demonstrating that there was an erroneous state of mind on its part at the material time, together with the influence of that error on what was and was not done (*Tilbury Douglas*, paragraph [54]). It failed to do so.

[94] GGHB ultimately argued that Mr Steele had given evidence consistent with an implied delegation by the statutory Board to a number of executive officers (referred to as "directors"), including himself. We are not persuaded that Mr Steele's brief evidence on the corporate structures within GGHB justifies any such conclusion being drawn. Moreover, Multiplex, WSP and Nightingale were given no proper notice of this line of argument and were not in a position to answer it. It would be unfair to allow GGHB to introduce it at this stage of the case. In any event, the issue is immaterial since the commercial judge correctly held that none of GGHB's witnesses gave evidence that they had been induced into error by any of the factors relied on by GGHB. As for the case of *Stag Line Ltd v Tyne Shiprepair Group Ltd (The Zinnia)* [1984] 2 Lloyd's Rep 211, on which only faint reliance was ultimately

placed by GGHB, we find that decision to be of no assistance for the purposes of the present case. It did not concern the law of prescription. It was not suggested that any term could be implied into the contract between GGHB and Multiplex, far less any term requiring Multiplex to inform GGHB in the event that it was in breach of contract.

[95] The court considers that there is no merit in the aggregation point put forward on behalf of GGHB. The short answer to this is that the commercial judge considered in detail each of the factors individually relied upon by GGHB for the purpose of inducing error. He concluded that none of them was sufficient for this purpose. That being so, factors could not have counted for more when aggregated together than they did when considered individually.

[96] The commercial judge did not overlook the fact that silence on the part of a debtor is capable in some circumstances of inducing error in the mind of a creditor. At paragraph [142], he noted that GGHB's argument depended on both active and passive representations by Multiplex. In paragraph [150], he considered in detail the chapter of evidence relating to Multiplex's silence. The reason why silence could not be relevant on the facts of the case was directly addressed by the commercial judge in paragraph [150]. He stated the following:

“...even if this court were to follow the same approach as in *Stag Line*, by implying a term into the contract that [Multiplex] ought to have informed GGHB of the possible problem in the atrium, it does not follow that its failure to do so led to induced error, the more so since GGHB was unaware of the fact that [Multiplex] was even investigating the cladding in the atrium. Its belief, to the extent that it held a belief, was therefore the same before and after the investigation.”

GGHB could not have been induced into error by something of which it was on its own evidence unaware until 2021, namely the fact that Multiplex was investigating the compliance of the materials installed in the atrium. The word “induced” in section 6(4)

requires the relevant conduct or omission to have had some influence on the creditor's state of mind. Since Multiplex's investigation into the atrium from 2018 was something of which GGHB was simply unaware, it can have had no influence on its state of mind.

[97] Even if the commercial judge may not have been, strictly speaking, correct to say in paragraph [139] that the conduct founded on by the creditor must have been sufficient to induce an objective reasonable person into error, this made no difference to his reasoning or to the outcome of the section 6(4) point. This is because on the facts as they were found to be established by the commercial judge there simply was no error on the part of GGHB, whether subjective or objective.

[98] None of the other authorities cited to the court is of any real assistance in the circumstances of the present case. *Caledonian Railway Co v Chisholm* (1886) 13 R 773 concerned the 1579 Act, which contained no provisions similar to section 6(4). In any event, it would appear that the defender's positive conduct in that case played an important part in the court's reasoning. *Rowan Timber Supplies (Scotland) v Scottish Water Business Stream*

[2011] CSIH 26 was a case about unjustified enrichment, payment of charge notices having allegedly been made in the erroneous belief that the amounts charged for were due. The conduct of Scottish Water relied on for the purposes of section 6(4) was their issuing of repeated charge notices; this was clearly positive conduct on the part of Scottish Water. Error on the part of the pursuers in paying the charges was central to the cause of action. The case did not involve reliance on failure by Scottish Water to disclose that they were in breach of contract as the basis for the application of section 6(4). The case is not analogous to the present action. Finally, in *AMN Group Ltd v Gilcomston North Ltd* [2008] CSOH 90, 2008 SLT 835 the pursuers were aware of problems with the building, but were uncertain as to the nature, cause and scope of those; these could not readily be ascertained. The facts of

that case were materially different; here GGHB was unaware of any problems with the atrium cladding until 2021.

[99] For these reasons the court rejects the challenges to the commercial judge's decision that GGHB had failed to prove that the facts allowed it to invoke section 6(4).

#### *Reasonable Diligence*

[100] Section 6(4) of the 1973 Act is in two parts. On the principal part, as explained above, we have concluded that there is no identifiable error in the commercial judge's decision that GGHB had not established that the delay was attributable to induced error in terms of section 6(4). We address the second part, the reasonable diligence *proviso*, on the hypothesis that induced error was established.

[101] It is contended that the commercial judge erred in his approach to onus. While the onus was squarely upon GGHB as the creditor to establish induced error, it is said that such onus is inverted for the reasonable diligence *proviso*. The commercial judge is criticised for treating the responsibility for proving the dates on any reasonable diligence period as also falling on GGHB.

[102] We disagree with this interpretation of the commercial judge's approach. While at paragraph [126] of his opinion he asserts, under reference to *Tilbury Douglas* and *Adams* that GGHB required to prove all of the matters listed in section 6(4), that paragraph must be read together with his later unequivocal statement about onus. He records (at paragraph [152]) that parties differed as to where the onus of proof lay in relation to the reasonable diligence *proviso*. He considered that dispute to be "immaterial", since he had reached his decision by having regard to all the evidence led, rather than on the basis that one party or the other had failed to discharge the onus on it.

[103] There is support for the contention that, while it is for the creditor to make relevant averments capable of invoking the first part of section 6(4), it is for the debtor to aver the relevant circumstances relating to the “reasonable diligence” proviso – Johnston, *Prescription and Limitation* (2<sup>nd</sup> ed at paragraphs 6.107-109), *Graham v E A Bell & Co*, 24 March 2000, Lord Hardie, unreported, at paragraph [10]. That position has been stated more recently, correctly in our view, by Lord Sandison in *Batchelor v Opel Automobile GmbH* [2025] CSOH 93, at paragraph [167].

[104] An Extra Division in *Heather Capital* (at paragraph [77]) cited Johnston’s text and *Graham v E A Bell & Co* as contrasting with its view that questions of onus in respect of the reasonable diligence provision were best addressed once evidence had been elicited. However, the context was that the court considered that there were sufficient averments to allow the reasonable diligence proviso to be explored in evidence. That case is not authority for the proposition that the onus of proving both parts of section 6(4) lies with the creditor.

[105] In the event, the commercial judge did not require to resolve the dispute about whether the onus of proving reasonable diligence had shifted to the debtor in the present case. His statement about onus being immaterial after the evidence had been led in the case before him is consistent with the Extra Division’s approach in *Heather Capital*. At the conclusion of the evidence the commercial judge appreciated that he required to consider whether onus was to any extent determinative. In the event it was not; the issue could be resolved by analysis of the whole evidence. The matter was not finely balanced and did not require to be decided by reference to onus. Such an approach is not novel. In *SSE Generation Ltd v Hochtief Solutions AG* [2016] CSOH 177 the Lord Ordinary (Woolman) confirmed (at paragraph [158]) under reference to *Salt International v Scottish Ministers* [2015] CSIH 85, 2016 SLT 82, that questions of onus are seldom decisive once evidence has been heard. The

First Division in *Hochtief* ([2018] CSIH 26, 2018 SLT 579) did not disavow Lord Woolman's position on the issue.

[106] The criticism of the commercial judge's assumption that it would have taken GGHB six months from November 2015 to establish the as-built condition of the atrium is also misguided. Having found that the prescriptive period began to run on 26 January 2015, the commercial judge had to address his mind to when, having exercised reasonable diligence, GGHB would have discovered their error. He identified, correctly, at paragraph [155], three questions, the answers to which would resolve the reasonable diligence issue: (i) did GGHB comply with CEL 11? (ii) if not, was that a failure to exercise reasonable diligence and (iii) had GGHB done more, what could it have reasonably discovered and when? These could all be answered having regard to the evidence led.

[107] The stumbling block for GGHB was the failure to comply with its own requirements (CEL 11), something that would clearly be expected of any owner of premises of that type. Compliance with CEL 11 would have involved checking the O&M Manual and verifying for itself what products had been installed. That would have given them the relevant constructive knowledge (*Glasgow City Council v VFS Financial* [2022] CSIH 1, 2022 SC 133 at paragraph [53]). Expert evidence from Mr Woods confirmed that could have been done and Mr Connelly had accepted that CEL 11 imposed obligations no more stringent than those incumbent on any such owner. GGHB does not contend that the commercial judge's findings on the first and second questions posed were erroneous.

[108] On that basis, it was open to the commercial judge to find that, using reasonable diligence, GGHB could have discovered the error almost immediately after completion in November 2015. The nominal six-month grace period he adopted was arguably generous. The O&M Manual had been available to GGHB from March 2015. A thorough check of the

manual when the fire risk assessment was carried out in November 2015 would have led to the discovery of the problem. Any period of induced error would have run in parallel with GGHB's own obligations to consult the O&M Manual and would not have delayed the discovery of the problem for long. Interrupting the prescriptive period until May 2016 would have resulted in the extinction of Multiplex's obligations by May 2021, some ten months before proceedings were raised. The central point is that the judge's analysis had an evidential basis that is not challenged.

[109] It was also legitimate to cross check the conclusion based on the hypothetical use of reasonable diligence against how long it had actually taken GGHB to identify the problem with the cladding in 2021. It took GGHB about two months from the receipt of Multiplex's letter of 9 February 2021 to review the O&M Manual and secure details of the cladding products involved (Opinion, paragraph [62]).

[110] For the reasons given we also reject the contention that the commercial judge erred in his approach to the reasonable diligence *proviso*.

### *Section 11(3)*

[111] The first question is whether GGHB adequately pled a section 11(3) case. It is well-established that in commercial actions the pleadings should be in abbreviated form but also, of course, that fair notice must be given. As already noted, GGHB averred that it was not aware, and could not with reasonable diligence have been aware, of loss, injury or damage before 9 February 2021. It went on to refer to having been induced into error. Thereafter, it averred that Multiplex's obligation to make reparation had not prescribed.

[112] It would have been preferable for GGHB to make clearer that it relied upon section 11(3). However, while there was no specific mention of that provision in GGHB's

pleadings, the averments replicated its language, as well as the date when GGHB claimed it first became aware of that loss, injury or damage. In addition, Multiplex averred (in

Answer 15):

“Moreover, neither the provisions of section 11(3) nor section 6(4) of the Prescription and Limitation (Scotland) Act 1973 have postponed the running of prescription against the pursuer’s claims so as to prevent them being extinguished.”

Each of the third parties adopted that approach in their answers. While it is the averments of GGHB that have to be considered, the responses by Multiplex and the third parties appear to indicate that this was something on which they felt it necessary to comment. We conclude that there was just sufficient fair notice of this part of GGHB’s case.

[113] The next question is whether the commercial judge erred in his finding (at paragraph [133]) that GGHB was objectively aware of the facts which constituted its loss by 26 January 2015 and so it could not pray in aid section 11(3). In reaching his decision, the commercial judge first had to determine which party was correct in relation to the competing dates for the concurrence of *injuria* and *damnum* and in that regard he sustained GGHB’s position that it was 26 January 2015, the date of sectional (i.e. practical) completion. As he observed (at paragraph [39]) the situation at practical completion was that, as a matter of fact, non-compliant products had been installed in the atrium, but that fact was not appreciated by any individual within either GGHB or Multiplex. As GGHB averred, the design and construction of the hospital involved works totalling many hundreds of millions of pounds, including payment made for the cladding on or around 24 February 2015. The commercial judge found (at paragraph [133]) that GGHB, after practical completion, “had taken possession of a hospital which was (taking GGHB’s averments *pro veritate*) disconform to contract”.

[114] In applying the law, the commercial judge made reference to a number of key authorities: *Morrison; Gordon's Trustees; Midlothian Council v Raeburn Drilling and Geotechnical Ltd* [2019] CSOH 29, 2019 SLT 1327; *WPH Developments v Young & Gault* [2021] CSIH 39, 2022 SC 28; and *Tilbury Douglas*. GGHB's contention that the authorities cited were crucially different from the present case, as they involved expenditure which was wasted and therefore a loss, does not properly acknowledge the approach taken by Lord Hodge in *Gordon's Trustees*.

[115] Lord Hodge explained (at paragraph 21):

"It follows that s.11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure."

His Lordship went on (at paragraph 22) to give examples of how this approach would apply:

"Thus a person may begin a legal action and incur expenditure on legal fees on the basis of negligent legal advice or he or she may purchase a house at an over value as a result of the negligent advice of a surveyor. In each case the person may be aware of the expenditure but not that it entails the loss. But it offers certainty, at least with the benefit of hindsight."

This makes it clear that the fact that GGHB was not aware of the physical make-up of the atrium cladding before Multiplex's letter to GGHB of 9 February 2021 is beside the point. Expenditure was incurred at, or shortly after, practical completion and, in accordance with *Gordon's Trustees*, falls to be construed as loss. The result is that GGHB's submission that expenditure in the present case was not relevant cannot succeed. As a consequence, there was no postponement of the prescriptive period until February 2021 in terms of section 11(3).

[116] The submission on behalf of GGHB that there had been latent damage is of no real merit given that the expenditure had already been incurred and so, in that sense, loss was not a result of latent damage. In any event, we are not persuaded that there was latent damage in the atrium. There was no actual damage that manifested itself over time. The panels in the atrium did not become defective nor did they deteriorate, but instead were simply disconform to the contract. The argument put for GGHB that the cladding deficiencies were hidden is of relevance only in relation to whether GGHB could not with reasonable diligence have been aware that loss, injury or damage had occurred, which we have dealt with above.

[117] For the reasons given, the commercial judge did not err in his application of the established legal principles and in determining that section 11(3) could not be relied upon to delay the commencement of prescription.

*Adjusted pleadings*

[118] The final matter to be determined is GGHB's contention that the commercial judge erred in concluding that, even if GGHB had succeeded on the above matters, he would have excluded from probation GGHB's averments, added by adjustment, in Article 14(3). In light of the decisions we have already reached, this can be dealt with in short compass.

[119] The adjustment introduced an averment that the failure of Multiplex to install atrium cladding which met the Euroclass B standard was a breach of section 2.2.10(a) of the Employer's Requirements (to procure that the design and construction were at all times performed in compliance with all Laws and Consents). The commercial judge found (at paragraph [165]) that this adjustment was of an alleged breach of a distinct contractual obligation.

[120] The key question is whether GGHB's adjustments involved it seeking to enforce different obligations (see *WM Morrison Supermarkets plc v LEM Estates Ltd (In Liquidation)* [2020] CSOH 31, 2020 PNLR 16 at paragraph [57] and the authorities cited therein). The substance of GGHB's case was that there had been a failure to install cladding of a Euroclass B standard, or better. This was developed in the pleadings and there was, prior to the adjustment, a reference to Multiplex having breached the terms of the Building Contract, as set out in Articles 4 to 8. Article 4 referred to Multiplex being obliged under the Building Contract, among other things, to provide the works in accordance with the Employer's Requirements. Article 6, quoting from the terms in the Employer's Requirements (at clause 5.1.4.1), referred to the contractor having to "comply with all Law and Consents".

[121] We consider that a pragmatic approach should be taken in considering whether two obligations are distinct or are merely different aspects of the same claim. The averments introduced in the adjustment set out a specific alleged breach, but it fell within the thrust of the pursuer's already pled case. It was not about a different defect. On balance, we conclude that there was no need to apply a separate prescription period, using the date when the adjustment was made. But, in any event, as the commercial judge correctly identified, this matter was immaterial. It did not affect his conclusions on whether the central claims had prescribed, nor does it affect the conclusions we have reached.

### **Disposal**

[122] For the reasons given the reclaiming motion fails. We shall refuse it and adhere to the commercial judge's interlocutor of 27 June 2025, reserving all questions of expenses meantime.