PLEASE NOTE: THIS OPINION SUPERSEDES THE OPINION ISSUED ON 1 MAY 2026
[2026] CSOH 43

OUTER HOUSE, COURT OF SESSION

[2026] CSOH 44

CA139/24
CA71/22

OPINION OF LORD LAKE

In the causes

OGILVIE CONSTRUCTION LIMITED

Pursuer

against

M1 RE GLASGOW LIMITED

Defender

and

OGILVIE CONSTRUCTION LTD

Pursuer

against

LEACH RHODES WALKER LTD

Defender

Pursuer: Wolffe KC et Reekie, (sol-adv); Brodies LLP
Defender: MacColl KC for M1; DLA Piper Scotland LLP
Defender: McKenzie KC et McKinlay for Leach Rhodes Walker; CMS Cameron McKenna LLP, Nabarro LLP and Olswang LLP

5 May 2026

Introduction

[1] These cases both arise out of works to construct a hotel at Oswald Street, Glasgow which is operated under the Motel One brand. Ogilvie Construction Limited, the pursuer in both actions, were appointed to be the design and build contractors. The defender in the first action, Leach Rhodes Walker, were appointed by Ogilvie as architect for the project. M1 RE Glasgow Limited, were the owner and operator of the hotel who had appointed Ogilvie and are the defender in the second action. I refer to these actions as the LRW action and the M1 action respectively. I refer to the parties by their names rather than their designation to avoid confusion. I heard a preliminary proof before answer in each action concerning issues of whether obligations relied on by Ogilvie and M1 have been extinguished by the operation of prescription in terms of the Prescription and Limitation (Scotland) Act 1973 as amended by the Prescription (Scotland) Act 2018.

[2] Before identifying the issues that arise, it is necessary to set out the background to the actions and the remedies sought in a little more detail. The hotel is a 15-storey building which is averred to be a little over 38 metres tall. The construction used cladding which included a layer of insulation. The design prepared by LRW at the stage that construction commenced specified a 70mm layer of Kingspan Kooltherm K15 insulation ("the 70mm Design"). In 2017, while the hotel was under construction, the Grenfell Tower fire with its appalling loss of life occurred. A review of the cladding design at the hotel was carried out following that and this led to a re-design in which the decision was to add a further 30mm of K15 to the 70mm Design. This is referred to as the 70+30mm Remedial Design.

[3] In 2020, Ogilvie raised the LRW action in which they sought to recover damages in respect of the costs of carrying out works to the hotel to implement the 70+30mm Remedial

Design as opposed to the 70mm Design. This alleged that the 70mm Design was defective and that LRW had been in breach of their duties in producing it. After sundry procedure, a proof before answer was fixed to commence on 11 July 2023. On 23 May 2023, solicitors for LRW sent a letter to solicitors for Ogilvie expressing the view that the 70+30mm Remedial Design was also defective. The proof was discharged and the case was sisted to allow investigations. After those investigations, Ogilvie prepared and lodged a minute of amendment. This added a case against LRW that the 70+30mm Remedial Design did not comply with the building regulations and that they were in breach of their obligations in specifying it. In addition, further averments were added alleging that the design of the cavity barriers - another element relevant to fire safety - was also deficient. In relation to loss, the minute of amendment introduced averments that as a result of the defects, Ogilvie were liable to M1 under the design and build agreement between them. In their answers to the minute of amendment, LRW claimed that any obligations that they owed to Ogilvie in respect of the elements added by the minute (ie in respect of the 70+30mm Remedial Design and the Cavity Barrier Design) had prescribed. They also averred that any obligations that Ogilvie had owed to M1 in regard to both the 70+30mm Remedial Design and the Cavity Barrier Design had prescribed. As the amendment procedure drew to a close, Ogilvie raised the M1 action. In that action, Ogilvie seek declarators that the obligations on them to make reparation to M1 in respect of the 70mm Remedial Design, the 70+30mm Remedial Design and the Cavity Barrier Design have prescribed. M1 dispute this.

[4] All parties led evidence. There were joint minutes in respect of certain agreed facts and it was agreed that all the evidence before the court would be evidence in both actions. Ogilvie led evidence of fact from Robert Innes, formerly commercial manager employed by them, Ronald MacDonald, their managing director, and Neil Robertson, a senior quantity

surveyor employed by them. LRW led factual evidence from Paul Sharrocks, their technical design lead for the project, Stuart Aldred, an architect and a director of LRW at the time of the events being considered, and Justin Marks who works for Koncept Interior Design, a division of LRW which deals with the interiors of the Motel One Hotels. For M1, factual evidence came from Michael Wiessler, director of project management and IT at M1's parent company, and Ben Anderson, a quantity surveyor and project manager who worked for Alex Frame and Associates (AFA) at the relevant time. LRW objected to the evidence contained in the statement of Mr Anderson in which he purports to evaluate the evidence given by Mr McCracken on the basis that this is the function of the court and of the passages in his statement in which he expresses his opinion in relation to issues where he does not have expertise. These objections are well founded and I have not relied on the parts of Mr Anderson's evidence identified. I found all witnesses to be generally credible and reliable. Areas in which the evidence was in conflict and where I have preferred one witness over another are indicated below.

[5] Expert or skilled evidence in relation to fire issues was led from Al Brown for Ogilvie, Andrew McCracken for LRW and Stephen Brooker for M1. In addition, Ogilvie led evidence from Antoine Fatin, a fire engineer, and Euan Geddes, an architect. The following objections were made and insisted in for the evidence of these witnesses:-

(a) Ogilvie lodged a Note of Objections to passages of the evidence of Stephen Brooker in which he expresses a view as to whether it would have been reasonable for M1 to have taken courses of action. The challenge is on the basis is that this is an issue for the court and ought not to be the subject of expert evidence. LRW associate themselves with the objection to the evidence of Mr Brooker.

(b) Ogilvie objected also to the evidence of Mr Anderson in so far as it comments on the report of Mr McCracken. This is on the basis that he is not a qualified fire engineer. LRW also object to parts of the evidence of Mr Anderson in so far as he makes comment on the report of Mr McCracken.

(c) M1 submitted that the evidence of the fire engineering witnesses (including their own witness, Mr Brooker) should be disregarded as it seeks to usurp the function of the court and exceeds their fields of expertise. Alternatively, if it is to be considered, they submit that Mr Booker's evidence should be preferred.

(d) In addition, M1 contended that evidence of what amounted to reasonable diligence was inadmissible as that was an issue for the court rather than for witnesses.

These objections concern variations of the same issue of the legitimate scope of expert evidence. While the issue of what conclusions should be drawn from the evidence is an issue for the court, expert witnesses may put the court in possession of knowledge which can be used in making that determination. As always, it is not the view that the witness takes but the reasons for it that are important. I have had regard only to the reasons expressed by the witnesses and not the conclusions. The comments by Mr Anderson are, however, inadmissible in so far as they express views as to the report by Mr McCracken in his statement.

Principal issues

[6] There are a number of different obligations to make reparation referred to in the two actions which are said to have been extinguished. Each breach of contract may give rise to a distinct obligation to make reparation but, while for any single breach there may

be a number of different losses that arise, there is a single prescriptive period that applies to the obligation to make reparation for that breach. Therefore, in considering whether an obligation has prescribed in terms of the 1973 Act, it is necessary to consider the particular obligation to pay damages for breach of contract which the pursuer seeks to enforce (Lord Doherty in *McClure Naismith LLP* v *Harley Haddow Partnership & Others* 2018 SCLR 257, at paragraphs [17] to [19], and the authorities cited there). Ogilvie and LRW adopted this approach in their submissions. M1 did not refer to these cases but they did not indicate that they disagreed and their submissions were consistent in considering each of the claims separately. The result is that the principal issues arising in the proof before answer were:

(a) Has any obligation which Ogilvie could enforce against LRW in respect of the breach arising from provision of the 70+30mm Remedial Design been extinguished by prescription?

(b) Has any obligation which Ogilvie could enforce against LRW in respect of the breach arising from provision of the Cavity Barrier Design been extinguished by prescription.

(c) Has any obligation which M1 could enforce against Ogilvie in respect of the breach arising from provision of the 70mm Design been extinguished by prescription.

(d) Has any obligation which M1 could enforce against Ogilvie in respect of the breach arising from provision of the 70+30mm Remedial Design been extinguished by prescription.

(e) Has any obligation which M1 could enforce against Ogilvie in respect of the breach arising from provision of the Cavity Barrier Design been extinguished by prescription.

The issue of whether there has been a breach of duty giving rise to an obligation to make reparation is not within the scope of the proofs and they proceeded on the basis that the averments of breach must be assumed to be true/proved.

[7] To answer the above issues, it is necessary to determine when the 5-year prescriptive period commenced, whether the start of the period should be postponed and whether part of the period should be left out of account. In addition, in relation to the obligations of Ogilvie owed to M1 in respect of the 70mm Design, M1 claim that there has been a relevant acknowledgement in that Ogilvie carried out remedial works and it is necessary to consider whether this interrupted the running of prescription.

Commencement of prescription (sections 6(1), 6(3) and 11(1))

[8] In terms of section 6(1) of the 1973 Act, the prescriptive period starts running on "the appropriate date". Section 6(3) states that for obligations of the kind mentioned in Schedule 2, "the appropriate date" is that specified there and that for other obligations, the appropriate date is when the obligation becomes enforceable. The obligations in issue here are to pay damages and they do not fall into Schedule 2. In relation to obligations to pay damages, further provision is made as to commencement of the prescriptive period in section 11. It was amended by the 2018 Act and it is the Act as amended that applied to these actions. In its amended form, section 11 is in the following terms:

> "(1) Subject to subsections (2) and (3) below; any obligation to pay damages (whatever the source of the obligation) for loss, injury or damage caused by an act or omission shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.
>
> (2) …

(3) In relation to a case where on the date referred to in subsection (1) above … the creditor was not aware, and could not with reasonable diligence have been aware, of each of the facts mentioned in subsection (3A), 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.

(3A) The facts referred to in subsection (3) are—
(a) that loss, injury or damage has occurred,
(b) that the loss, injury or damage was caused by a person's act or omission, and
(c) the identity of that person.

(3B) It does not matter for the purposes of subsections (3) and (3A) whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law."

[9] Ever since the decision in *Dunlop* v *McGowans* 1980 SC (HL) 73, it has been common to express the test for the commencement of the prescriptive period in terms of the concurrence of *damnum* and *injuria*. The parties here have done so. This is despite the fact that the 1973 Act uses no Latin and in Johnston, *Prescription and Limitation*, (1st Edition), the author (who is no lightweight when it comes to such matters) expresses his view that the Latin appears to add nothing but the possibility of confusion and would be better discarded (paragraph 4.22). Latin terms are not used by Lord Hodge in the leading authority on the issue, *Gordon's Trustee* v *Campbell Riddell Breeze Paterson LLP* [2017] UKSC 75, 2017 SLT 1287. As the point for commencement of prescription is stipulated in the 1973 Act, identification of the correct date is a matter of applying its terms. For obvious reasons, when dealing with obligations to pay damages, the Act presupposes that when the loss, injury or damage occurs, there will already have been the breach of duty or infringement of right and section 11(1) therefore refers only to the date on which loss, injury or damage occurred. This is the issue that must be considered to determine whether the prescriptive period has started running.

[10] The expression "loss, injury or damage" is used in both section 6 and section 11 and it has been considered in several cases in both the Supreme Court and this court since *David T Morrison* v *ICL Plastics* [2014] UKSC 48, 2014 SC (UKSC) 222. In particular, it was considered by the Supreme Court in *Gordon's Trustee*. There, Lord Hodge noted that the expression must have the same meaning in both sections and said,

> "In s.11(1) the phrase 'loss, injury or damage', which I have emphasised in para.9 above, is a reference to the existence of physical damage or financial loss as an objective fact. Thus if a person's building is damaged in an explosion, or a garden wall is damaged as a result of subsidence, there is physical damage which is enough to start the clock under that subsection, unless either or both of subss.(2) or (3) apply." (Para [19]).

This reference to "objective fact" emphasises that all that is required to start the prescriptive period is the occurrence of the factual elements that constitute the loss.

[11] In this case, there was no physical damage and the losses were economic ones. The commencement of prescription in relation to various types of economic loss has been considered in several recent cases. *Gordon's Trustees* was itself one example in which the loss lay in the inability to remove a tenant from farmland in order to recover possession and develop it. In this situation Lord Hodge said the loss occurred at the point that the trustees did not recover possession at the expiry of the period stated in a defective notice (para [24]). A similar approach was taken in *Midlothian Council* v Raeburn Drilling and Geotechnical Ltd 2019 CSOH 29, 2019 SLT 1327, *WPH Developments* v *Young and Gault* [2021] CSIH 39, 2022 SC 28, and *Tilbury Douglas Construction Limited* v *Ove Arup* [2024] CSIH 15, 2024 SC 383.

[12] On the basis of these decisions, Ogilvie suffered loss for the purposes of section 11(1) in relation to their claims against LRW at the point that they started work to implement the designs in question and thereby incurred expenditure which would be wasted. There is

agreement that construction of the 70mm Design for the cladding began in April 2017. The loss in relation to these elements of the claim first arose then. There is also agreement that the 70+30 mm Remedial Design was issued and works started to install it on or around October 2017. The loss for that claim first arose on that date. The parties to the LRW action are agreed that Ogilvie sought the first payment in relation to the cavity barriers in February 2017. This means that the work must have been carried out prior to then and the prescriptive period in respect of that loss had started running by that date.

[13] In the M1 action, the loss is that the defender had a building which did not comply with the requirements of the building regulations. While it was possible that the works would be remediated under the contract - as was attempted in relation to the 70mm Design - that does not change the fact that on the approach set out in the cases referred to in para [11] above, a loss would have occurred as soon as the building was constructed that contained elements that did not comply with the regulations. At that stage the building was defective and M1 had therefore suffered a loss. No submission was made to the effect that I should treat the installation of the 70mm Design as a temporary disconformity and that the loss therefore did not arise until practical completion (see *Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Ltd* [2017] CSOH 57 and *Agro Invest Overseas Limited* v *Stewart Milne Group Limited* [2018] CSOH 120 and cases cited there). Similarly, M1 suffered loss in relation to the 70+30mm Remedial Design and the Cavity Barrier Design as soon work started to install each of them respectively.

[14] With the exception of the claim by Ogilvie against LRW in respect of the 70mm Design, the dates for commencement of the prescriptive period are more than 5 years before proceedings were raised founding on the breach in question. They can therefore be said to be subject to *prima facie* prescription. The issue is therefore whether the parties seeking

to rely on the obligations can establish that there was a relevant acknowledgment of the obligation or that the commencement of the period should be delayed or that part of the period should not count.

Relevant acknowledgement (section 10(1))

[15] Although they have no pleadings on the point, M1 claim that the actions of Ogilvie in carrying out remedial works once the problems with the 70mm Design were identified amounts to a relevant acknowledgement in terms of section 10 of the 1973 Act of an obligation owed by Ogilvie to them to make reparation in respect of the design. In this regard, they rely on Johnston, *Prescription and Limitation* (2nd Edition), paragraph 5.72, and Lord Doherty in *Huntaven Properties Limited* at para [104] - [105]. Ogilvie's response is these works were carried out in implementation of the obligation to construct a building that complied with the statutory requirements and that they were not referable to an obligation to make reparation. LRW adopted the same line in their submissions.

[16] Section 10(1) stipulates that a relevant acknowledgement occurs where "there has been such performance by or on behalf of the debtor towards implement of the obligation as clearly indicates that the obligation still subsists". It is clear from the use of the definite article in this subsection that the acknowledgement arises in relation to a specific obligation. To similar effect, in *Gibson* v *Carson* 1980 SC 356, Lord Allanbridge said that the performance in question must be,

> "such performance by or on behalf of a debtor must be such a kind of an act or abstention that can only reasonably be explained by reference to *the particular obligation in question*." (p 360 - Emphasis added)

Johnston, *Prescription and Limitation (2nd Edition)* paragraph 5.72, echoing *Gibson*, says,

> "Other clear examples of relevant acknowledgments would be carrying out repairs to work which had been done or goods which had been supplied; here clearly it would be necessary to be able to relate the work done *to the particular obligation*." (Emphasis added)

[17] It is clear from these that, when applying section 10(1), it is necessary to determine what is "the obligation" towards which there has been performance and which is therefore said to have been acknowledged. There is an issue as to how this applies where there has been breach of a principal obligation contained in a contract giving rise to one or more secondary obligations such as one to make reparation. Although in *Dunlop*, Lord Keith refers to the obligation to make reparation for loss, injury and damage caused by a breach as being a singular obligation (p 81), it does not follow that the principal obligation which has been breached and the secondary obligation to make reparation are to be treated as one. They have different content and will often arise at different times. While carrying out remedial works might be seen as an acceptance or acknowledgement that something has "gone wrong" in relation to the primary obligation, that is not the test contained in section 10(1). In terms of the Act, the acknowledgement in question is not that there has been a breach, but that an obligation is in existence. So, in the examples given in Johnston, repairs to work done or goods supplied would be referable to the underlying primary obligations to carry out works or furnish goods to the required standard as they were directed to ensuring that *that* obligation was met. They would not be directed to fulfilment of the secondary obligation to make reparation. The carrying out of works or supply of goods cannot only reasonably be explained by the existence of an obligation to make reparation.

[18] The obligations relied on in the current case are secondary obligations to make reparation. The carrying out of remedial works is or at least could be, as Ogilvie and LRW submit, referable to the primary obligations in the contract. The works cannot be said to be explained only by an obligation to make reparation. Therefore, applying the words of the Act and the decision in *Gibson*, they do not amount to a relevant acknowledgement of it. The carrying out of works in implement of the contract is not performance towards implement of *that* obligation. There has accordingly been no relevant acknowledgment of it.

Postponement of commencement of prescription - section 11(3)

[19] Parties advised me that the terms of the section 11 as amended by the 2018 Act have not yet been the subject of consideration by a court. Both M1 and Ogilvie rely on the amended section 11(3) to argue that the commencement of the prescriptive period was delayed. Ogilvie dispute this in relation to M1's claims against them and LRW dispute this in relation to Ogilvie's claims. In relation to their claims against LRW, Ogilvie submit that they did not have the knowledge required by section 11(3A) in relation to the claim that the 70+30mm Remedial Design was a breach of contract until a letter dated 24 May 2023 was sent to them by solicitors acting for LRW. They argue that they had no knowledge of the matters in relation to the Cavity Barrier Design until they received a report from Efectis, fire safety consultants engaged by them in December 2023. In response, LRW argue both that Ogilvie were aware of the objective factors that constituted their loss and that M1 were aware that the hotel had been designed and constructed by Ogilvie and that it had incurred cost to them. They submit that the 2018 Act addressed the issue that had arisen in *David T Morrison* but not the issues that arisen in *Midlothian Council*, *WPH* and *Tilbury Douglas*. They argue that the Act has not changed the meaning of "loss, injury and damage"

in section 11(3). They say that Ogilvie had awareness of the matters referred to in subsection (3)(b) and (c) from the date of practical completion as they knew that they had incurred costs in constructing the design and that the design has been prepared by LRW. They submit that it remains the position that it is not a requirement that the creditor is aware that something has gone wrong and that they have suffered a detriment before the prescriptive period starts running.

[20] In relation to their claims against Ogilvie, M1 argue that they were unaware of loss in respect of the 70+30mm Remedial Design until April 2024 when they received correspondence from Ogilvie saying that it might not comply with the building regulations. They argue that the effect of the 2018 Act is that for the clock to start running, the creditor must be aware that the loss was caused by an act or omission of an identifiable person. Nothing that they saw in the reports leading up to October 2017 (considered below) would have given them that awareness or would have led to a reasonable person undertaking further investigation. Ogilvie, on the other hand, contend that Mr Wiessler of M1 was aware of all three matters specified in section 11(3A) from October 2017 and thereafter - more than 5 years before seeking to establish their rights in response to the action raised against them.

[21] In relation to the M1 claims, LRW contend that M1 had knowledge that the insulation material included in the design was not non-combustible and that there was no alternative certification that would mean that it still complied with building regulations. On that basis, they argue that they had direct knowledge to the facts which form the basis of M1's claims. In relation to the cavity barriers, they argue that in light of the information they had, they could with reasonable diligence have become aware of the cavity barrier breach. LRW emphasise that the requirements in section 11(3A) (b) and (c) do not contain any requirement that the creditor must know that something has gone wrong or that it

has suffered a detriment. They also argued that M1 in fact had direct knowledge of the ingredients of Ogilvie's claim in that they were aware that the specified insulation was not non-combustible and also that no BR135 certification (considered below) was available.

[22] In order to consider what awareness the various parties had from time to time, it is necessary to review the evidence that was led as to the awareness of the parties over time. In the main, there was no controversy as to the various events although there were differences in how matters were characterised and what conclusions can be drawn as to awareness of the parties. It is easiest to consider first the evidence as to the events and the background of building regulations and then to consider what knowledge the parties may be said to have had.

[23] Following the Grenfell Tower fire in 2017, M1 were concerned to ensure the safety of their hotels. To that end, they appointed AFA, a construction consultancy business used by them for advice and to act as employer's agent in building projects, to assist them with the issue. AFA had already been appointed in relation to the Glasgow project. The individual dealing with the instruction at AFA was Ben Anderson. In July 2017, Mr Anderson emailed personnel from LRW noting M1's concern following the Grenfell Tower fire and intimating that they had decided "to investigate the installation of cladding and insulation materials for all Motel One hotels in the UK". This was to ensure that the materials did not pose a threat to guests, that materials were in accordance with the applicable regulations and that no combustible materials had been used.

[24] On 19 July 2017, AFA acting on behalf of M1 engaged Atelier 10 ("A10") to undertake a "post contract role as fire engineers / consultants". A10 are a consultancy providing various building related services. They were instructed to review the design for the Oswald Street hotel against up to date fire safety legislation and guidance and produce

a report. In implement of this instruction, on 3 August 2017, A10 provided the first of three reports in relation to the hotel. These reports play a key role in determining the state of the parties' awareness of the problems. The first A10 report advised that the then current design - the 70mm Design - did not comply with building regulations. This led to the redesign and the 70+30mm Remedial Design. On 21 August 2017, A10 provided a second report that carried out the same assessment but in respect of the 70+30mm Remedial Design. There is some dispute as to what the effect of this was so it is necessary to consider it in a little detail and also to consider what is involved in achieving compliance with the statutory requirements.

[25] Compliance with Mandatory Standard 2.7, stipulated in Schedule 5 of the Building (Scotland) Regulations 2004, was a particular concern. Standard 2.7 deals with spread of fire on external walls and states,

> "Every building must be designed and constructed in such a way that in the event of an outbreak of fire within the building, or from an external source, the spread of fire on the external walls of the building is inhibited."

The relevance of this to what happened at Grenfell Tower is obvious. This requirement is considered in the Non-Domestic Technical Handbook ("NDTH"). This is published by the Scottish Government and gives guidance on how to achieve the standards contained in the 2004 Regulations. While there must be compliance with Standard 2.7, the NDTH sets out more than one way this can be achieved and the choice as to which approach is taken is for the building owner and the person carrying out the works. The first option is that the NDTH stipulates certain requirements which, if adhered to, will in general have the result that the building complies with the regulations. This option was referred to by the experts in their joint statement as the "Linear Route to Compliance". If this option had been pursued it would have required that the insulation used in the construction of the walls

was non-combustible. The second route to meeting Mandatory Standard 2.7 identified in the NDTH at 2.7.1, is to achieve compliance with a document referred to as BR135. The contents of this document were not referred to directly in the course of the oral evidence but it is referred to in the joint statement of the fire experts where it is made apparent that it provides two alternative methods of demonstrating compliance. After reference to the Linear Route to Compliance, the joint statement, paragraph 2.2, states the following,

> "2.2 THE BR 135 ROUTE
>
> 2.2.1 This means either [*sic*] adopting the Alternative Guidance set out in NDTH (2013) [2.7.1], which states:
>
> > 'Alternative guidance - BR 135, 'Fire Performance of external thermal insulation for walls of multistorey buildings' and BS 8414: Part 1: 2002 or BS 8414: Part 2: 2005 have been updated to include the most up-to-date research into fire spread on external wall cladding. The guidance provided in these publications may be used as an alternative to non-combustible or low risk classifications (as described in clauses 2.7.1 and 2.7.2) and for materials exposed in a cavity, as described in clause 2.4.6.' (Original Emphasis)
> >
> > a) Conducting a full-scale fire test according to the methodology in the relevant version of BS 8414-1 or BS 8414-2, (a 'BS 8414 Fire Test') and then assessing the data from the fire test against the performance criteria in BR 135 and reporting the outcome in a BR 135 Classification Report (a 'BR 135 Classification Report'); or
> > b) Conducting a Desktop Assessment of evidence from fire tests conducted according to BS 8414-1 or BS 8414-2, and/or from BR 135 Classification Reports (a 'Desktop Assessment')."

Although there is a reference in the passage quoted to emphasis, there is no emphasis either in the quotation in the joint statement or in NDTH itself. As explained in evidence, reference to the BR135 route meant implementation of either sub-paragraph a) or b) from the passage quoted. It was common ground that there was no intention to pursue option a) - a BR 135 Classification Report. In relation to b), the evidence was that in order to achieve compliance, in addition to having a desktop assessment, it would be necessary to reach

agreement with the local authority that what was proposed and had been considered in the assessment demonstrated compliance.

[26] In August 2017, the second A10 report concluded that the 70+30mm Remedial Design did not satisfy the Linear Route to compliance. This was on the basis that one of the requirements stipulated in the NDTH was that the insulation should be non-combustible and that K15 did not have a non-combustible classification. The report expressed the view that the insulation could be changed for one that was classified as non-combustible or a model of the wall build up could be tested by an accredited body. That would be option a) above - obtaining a BR 135 Classification Report. It then stated,

> "As an alternative to the above routes, an alternative route to compliance, based on a fire engineering assessment (which is subject to discussion and approval with the approving authority) has been carried out in this report to assist the client in reaching a suitable external wall build up.
>
> Rationale and relevant testing data on the proposed systems have been provided in order to augment their suitability. The assessment has determined grounds for acceptance of the external wall make up in conjunction with the Kingspan K15 thermoset insulation
>
> It is the opinion of Atelier Ten that the proposed construction of the external walls Incorporating Kingspan K15 Rainscreen insulation panels, will meet the performance criteria set out in BR135."

In effect, the second A10 report would be the desktop assessment for the approach in b) above. The quoted passage makes it clear that while the assessment had "determined grounds for acceptance of the external wall make up", for the Mandatory Standard to be met, it was necessary that their engineering assessment be subject to discussion with and approval of the approving authority - the council. Although describing the 70+30mm Remedial Design as a "viable alternative" and expressing the view that it "will meet" the criteria, the report noted that,

> "Atelier Ten are not accountable for discussing the proposed solution with the approving authority or fire service. The client is responsible for attaining compliance with mandatory Standard 2.7."

[27] There is an issue of what these statements in the report mean in terms of compliance with building regulations. Reading the report as a whole, it is apparent that as matters stood at its date, the 70+30mm Remedial Design did not comply with the building regulations as the agreement of Glasgow City Council had not been obtained. It does, however, express the view that it would be possible to obtain that agreement from the council in which case it would comply. In the joint statement of the fire experts the opinion is expressed that the second A10 report confirmed that the BR135 route to compliance "will be" met. I take this to mean that it would be the desktop assessment required for the approach in paragraph b) of the passage quoted, that it would be possible to obtain agreement of Glasgow City Council to the assessment contained in the report and once that was done there would be compliance. It does not change the point that without agreement/approval from the Council compliance had not been achieved.

[28] The second A10 report was made available to Ogilvie, LRW and M1. Mr Innes of Ogilvie said that LRW had progressed the issue of obtaining a BR135 Certificate with building control and that Mr Sharrocks of LRW who was responsible for the cladding and insulation at the initial design stage confirmed to him by email dated 22 August 2017 that a copy of the report confirming compliance was not required and that building control would proceed to issue a Stage 2 Building Warrant.

[29] Following receipt of the second A10 report, Ogilvie proceeded with works to implement the 70+30mm Remedial Design. However, M1 still had concerns regarding the fire safety and whether the design complied with the building regulations. Mr Anderson said that another employee of AFA, Stepehen Fealty, raised concerns about the conclusion

in the second A10 report that the performance criteria required by BR135 would be met by the 70+30mm Remedial Design. He said that there were questions arising from the first two A10 reports and that they wanted to hear directly from the experts and said that they had been seeking confirmation that the façade was compliant "for several months" but Ogilvie had not been definitive in their response. As a result, acting on behalf of M1, AFA instructed a further report from A10. Just before it was received, they asked that it be provided in draft. The third A10 report was dated 17 October 2017. In relation to the external walls, as before, it concluded that the design did not meet the requirements for adoption of the Linear Route to Compliance with Mandatory Standard 2.7 as the insulation for the wall did not meet the non-combustible classification. It went on to say:

> "The following options are available to satisfy guidance:
>
> 1. Provide an insulation product that achieves a non-combustible reaction to fire classification (in accordance with Annex 2.E. of the NDTH); OR
> 2. Provide an insulation product that achieves the performance levels in BR135 'Fire Performance of external thermal insulation for walls of multi-storey buildings' when read in conjunction with the test methodology in BS 8414: Part 1:2002 or BS 8414: Part 2: 2005; OR
> 3. Provide a performance based solution that demonstrates the proposed thermal insulation within each external wall is better or no worse than a guidance based solution – See Note 1 of this table."
>
> and
>
> "Note 1- If certification cannot be provided to demonstrate the design element is compliant, the opinions of the approving authorities should be sought as a means of coming to agreement that the relevant Mandatory Standard of the Building (Scotland) Regulations (Schedule 5; Section 2) has been met through an alternative design solution."

While the first point would bring it into compliance with the Linear Route for compliance stipulated in the NDTH, the others refer to the alternative routes identified in BR 135. In contrast to the second A10 report, in this report there is no expression of confidence that

it will be possible to obtain the agreement of the council and achieve compliance by an alternative route.

[30] The third A10 report contains only a passing reference back to the second A10 report. The email under cover of which it was sent to Mr Anderson said it was provided in draft as there were aspects of the design which require further discussion in order to determine whether the Mandatory Standard had been met. Mr Anderson of AFA forwarded the report to Mr Wiessler at M1 and Mr Marks of LRW. Mr Marks was working under a separate commission to LRW by M1 and was not part of the OCL design team. Both Mr Wiessler and Mr Anderson understood there to be an information barrier between the two teams at LRW. Despite this I accept the evidence of Mr Sharrocks who worked there that he was free to discuss matters with Mr Marks unless he was expressly advised otherwise and that he had not been so advised. It was not sent to Ogilvie at the time.

[31] In addition to the reports from A10, M1 also sought advice from Adam Bittern of Astute, fire engineering consultants. On 19 October 2017 he sent an email to Mr Anderson stating that the insulation material in a cavity did not meet the requirement of being non-combustible. He explained also that the NDTH would, however, allow combustible materials in an external wall if BRE135 [*sic*] certification is provided. There were in fact many references in the evidence and in the questions by counsel to "BRE135". I have assumed that these were intended to be references to BR135. It was explained in evidence that BRE is a body that undertakes testing required by BR 135 and this may have led to the error. Mr Bittern asked whether the "certification" was available for the wall/cladding system. In a later email on 25 October, he said that without seeing the certification it was difficult to comment on whether the design met the building regulations and that without it, the addition of 30mm of K15 insulation in the 70+30mm Remedial Design would not meet

the requirements as the insulation was combustible. He expressed the view that it was critical to get the "BRE135" certification for the original and proposed schemes to be sure of compliance with the building regulations.

[32] Mr Wiessler gave evidence that having taken legal advice to the effect that the obligation to deliver a building that complied with the building regulations rested on Ogilvie, M1 decided not to pursue further the lines of inquiry they had started with Astute and A10 and to "push the issue back to [Ogilvie] who knew there was an issue based on the earlier report that had been disclosed to them". As a copy of the third A10 report was not provided to Ogilvie his reference to the earlier report could only have been the second A10 report which had said that compliance could be achieved under the BR135 route provided that the council agreed with the proposal. At the same time, the adoption of the 70+30mm Remedial Design had resulted in additional costs and had an effect on the building programme. Ogilvie made a claim under the contract to M1 in respect of this. This was resisted by M1 who issued Notice VE0125 in terms of the contract requiring Ogilvie to deliver a façade compliant with the statutory requirements.

[33] In pursuit of the strategy to push things back to Ogilvie and against the background of the claim being advanced by Ogilvie, on 8 December 2017 Mr Wiessler wrote to Ogilvie and referred to a provision in the contract which said that if either employer of contractor became aware of a divergence between statutory requirements and the contractor's proposals, they must give notice of it to the other. This was mentioned in the context of who bore the responsibility for implementing the 70+30mm Remedial Design. It is notable, however, that despite the reference to the contract provision, the letter makes no mention of the non-compliance of that design with the statutory requirements as raised in the third A10 report. The letter ended, "Please also confirm that the façade design is now compliant with

the building regulations and provide all necessary certification and evidence of compliance". After some further correspondence on this issue in which M1 reiterated their request for confirmation of compliance, on 23 February 2018 M1 received a letter from Ogilvie which stated, "We can confirm that, based on advice from our design team, the design of the installed cladding is compliant with Building Regulations". Mr Wiessler's evidence was that this letter was considered at Board level and that it

> "provided sufficient confirmation and assurance to allow us to conclude that the redesign to the external wall cladding was compliant with Building Regulations, including fire safety regulations".

M1 did not carry out any further investigations.

[34] Mr Wiessler gave evidence that Mr MacDonald of Ogilvie contacted him after having received the letter of from the solicitors for LRW dated 23 May 2023 bringing to their attention the possibility that the 70+30mm Remedial Design did not comply with the building regulations. In response, Mr MacDonald had obtained reports from Mr Brown and Effectis. On the basis of them he contacted Mr Wiessler again in January 2024 to inform him of the conclusion that the cladding did not meet the requirements of the building regulations.

[35] In light of these facts, it is necessary to consider to what extent Ogilvie and M1 were aware of the matters referred to in section 11(3A). In that the third A10 report was not made available to Ogilvie at the time, there is a material difference between the information available to them. I do not consider that the fact that Mr Marks had been sent the third A10 report and passed it his colleagues at LRW working for Ogilvie is sufficient to mean that Ogilvie had knowledge of its contents. There was no suggestion that the report had actually been passed to anyone in Ogilvie or that its contents had been discussed with them. Witnesses were asked whether LRW and/or M1 were under a duty to pass a copy of the

report to Ogilvie, but any such duty is not sufficient to mean that Ogilvie had the necessary awareness. Whether considering actual knowledge or whether it could have been obtained by reasonable diligence, the matter is viewed from the standpoint of the creditor in the obligation - Ogilvie. If there was a duty owed to them to impart the information, breach of that duty could give rise to a claim by Ogilvie but that is not the subject matter of this action. Breach of the duty does not in any way mean that Ogilvie are deemed to have knowledge which they did not have.

[36] As noted above, the second A10 report expressed the opinion that, "the proposed construction … will meet the performance criteria set out in BR135". There was nothing similar in the third A10 report. Ogilvie lay considerable stress on this but it is necessary to consider carefully what the second A10 report does say. In both, the primary position was that as the insulation did not have a non-combustible classification it would not meet the NDTH "linear route" to comply with Mandatory Standard 2.7. Both reports suggested the alternatives of changing the insulation material or subjecting a mock up to tests complying with BS8414. It is clear on the evidence that neither of these approaches was adopted. The final alternative in both reports is expressed in terms that differ slightly but, in that they are derived from BR135, it is apparent that they refer to the same thing.

[37] In both reports, it is made clear that the final alternative depends on getting the agreement of the council as approving authority to a fire engineer's assessment. The second A10 report, states expressly that is the client's responsibility to get that approval. In it, A10 say that the assessment that has been carried out has "determined grounds for acceptance" and go on to express the view that the proposed design would meet the performance criteria in BR135. The third A10 report notes the option of seeking to achieve an agreement with the approving authority that the Mandatory Standard is met but makes no comment as to

whether this has been done. It does not mention that an assessment has been carried out and does not express a view that there are grounds for acceptance.

[38] It was common ground among the expert witnesses that the third report did not "reconfirm the conclusions of the Second A10 Report in respect to the BR 135 Performance Criteria". However, Mr Aldred considered that the conclusion of the third A10 report was consistent with what had been said in the second A10 report. Mr Brown accepted that the two reports set out the same routes to compliance but he considered in addition that it did not demonstrate compliance with what he termed the acceptance criteria of BR135. In cross-examination, Mr Geddes conceded that there was little difference between the second and third reports as both made it clear that for compliance to be achieved there would have to be a "sign-off" by the council of the proposals. He said that the only difference was that the second report offered a view as to whether the performance criteria were met and the third report did not.

[39] A number of factual witnesses gave evidence of their understanding of the second A10 report. Mr Innes of Ogilvie said that his understanding was that because the insulation was not non-combustible it would be necessary to rely on BR 135 but that the addition of another 30mm of insulation to the specified 70mm meant that compliance would be achieved. He accepted, however, that A10 had made it clear that they were not "signing off" the design and it would be necessary to get the agreement of the local authority.

[40] Mr Sharrocks said that his understanding of the second A10 report was that it was a desktop study confirming compliance with the requirements of BR135. As the report states clearly that A10 had not obtained approval from the council this can only sensibly mean compliance with the performance requirements stated in BR135 - the first part of this route to compliance prior to seeking agreement. This was consistent with the evidence from

Mr Aldred that it was a desktop study to be sent to the council for approval and that, if this was obtained, the alternative route to compliance was achieved. Although Mr Anderson and stated that the second report showed that at the time it was written, compliance had not been achieved, that is not inconsistent with the evidence of Mr Sharrocks and Mr Aldred. It was common ground that compliance would only be achieved when the Council gave approval and it was clear that as at the date of the report that was not then in place. In summary, it is apparent that as at the date of the second A10 report, within Ogilvie there was awareness both that to achieve compliance with the building regulations it would be necessary to have agreement of the Council to the 70+30mm Remedial Design and that such agreement was not in place.

[41] As to getting the necessary approval, Mr Sharrocks said that he had contacted the council in this regard at the insistence of Mr Connell of Ogilvie. Mr Sharrocks said he phoned the council rather than putting it in writing as he was being pressed by Ogilvie for an answer. His evidence was that the council officer said he was happy with the proposals and did not want a copy of the report. Had matters rested there, it might have been questionable that this constituted approval from the council required to ensure compliance. However, as noted above, when updating Mr Connell of Ogilvie of the position, Mr Sharrocks said that he had been told that the Stage 2 Warrant for the works would be issued the following week and the warrant was in fact duly issued. All three expert witness fire engineers agreed in their joint statement was that this would be seen by Ogilvie that the path to compliance outlined in the A10 reports had been achieved. On that basis, I conclude that when the Stage 2 Warrant was issued, Ogilvie would have considered that there was compliance with the building regulations. Or, to put it another way, they would have had no knowledge that there was a defect in the design which would mean that the building

would not comply with the building regulations. They were not aware of that until after they had received the letter from the solicitors for LRW dated 23 May 2023 putting them on notice. As they did not get the third report when it was issued, they were not made aware of the non-compliance issue at this time.

[42] I have considered the position in relation to knowledge that the design did not conform to statutory requirements on the basis that this took up a large part of the evidence that I heard and the submissions made on it, and also in case either or both of these cases are considered further in future. It does not appear to me, however, that the outcome of the cases turns on awareness of non-compliance with the building regulations. It is necessary to go back to consider what awareness a creditor in an obligation must have for the prescriptive clock to start running. This issue has been considered in a number of cases in recent years. The leading authority is *Gordon's Trustees* where Lord Hodge succinctly states the position as follows,

> "[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."

[43] The final sentence of that passage could potentially be taken to mean that, even if the creditor does not have to be aware of the existence of the obligation in respect of which the clock is to start running, they must be aware of a deficit of some sort - that they have not obtained what they contracted for. That approach would be consistent with paragraph [19] of Lord Hodge's judgment quoted above. In *Gordon's Trustees* the pursuers were at least aware that their tenants had refused to vacate the land at the expiry of the period specified in the notice that had been drafted by the defenders. They were aware that things were not

as they intended them to be. In *Morrison* there was clearly knowledge of the explosion. Here, there was no similar awareness. The matters which were known to Ogilvie and M1 as to the erection of the building and making payments under the contract are entirely consistent with the proper performance of the contractual obligations on LRW and Ogilvie respectively. While it is true that Ogilvie were aware of incurring expense in carrying out the construction of the building and M1 were aware of having incurred expenditure to Ogilvie in that regard, their losses lie not in that expenditure *per se* but in the fact that they erected or received a non-compliant building. In this situation, the harshness of the rule identified by Lord Hodge in para [22] of *Gordon's Trustees* is apparent. Taking this approach, the obligations could prescribe before the creditors were even aware that they existed. Cases that have followed *Gordon's Trustees* have also illustrated this harshness. In *Midlothian Council*, *WPH Developments* and *Tilbury Douglas Construction Limited* the prescriptive period was found to have started running before there was knowledge of the issue which formed the basis of the actions which were raised later. However, in *WPH Developments*, the Inner House, following *Kennedy* v *Royal Bank of Scotland plc* [2018] CSIH 70, 2019 SC 168, expressly rejected an argument that the *ratio* in *Gordon's Trustees* could be limited to a situation in which the detriment was known to the creditor (paras [25] and [36]) and that is binding on me. Although these decisions concerned the 1973 Act as unamended, the 2018 Act continues to use the occurrence of "loss injury and damage" and the knowledge of that to determine when the prescriptive period starts. It does not make any express change to what is meant by "loss, injury or damage" with the result that the meaning established in these cases continues to apply. Accordingly, this element of the test in section 11(3A)(a) is met in respect of losses both in respect of the cladding and the cavity barriers. Ogilvie and M1 were aware of the matters referred to in paras [12] and [13] above at the time they occurred.

[44] It is necessary then to go on and consider the other two requirements of section 11(3A). It is not easy to apply the requirement in paragraph (b) - awareness that that the loss, injury or damage was caused by a person's act or omission - when there need not be any awareness on the part of the creditor that loss has occurred. Where expenditure has been incurred, even if the creditor is not aware that it represents a loss to them, it should be possible to determine whether there was awareness that it was caused by acts of the identified person. It is less easy to apply where the loss consists of getting an asset which is worth less than it should have been or for which the creditor has overpaid. The loss *arises* when the works were carried out but it *lies* in the fact that the works did not conform to the statutory requirements and therefore the contract. Nonetheless, the 2018 Act uses the same wording as the 1973 Act and the decisions referred to above indicate that awareness of "loss, injury or damage" does not require knowledge of detriment having been suffered. That the same wording is not used in paragraph (b) in conjunction with "caused" is not sufficient to indicate that it must be given a different meaning to import a requirement that there be knowledge that the building did not conform to the statutory requirements.

[45] If the creditor does not need awareness, "that something had gone awry and that he or she has suffered a detriment in the form of wasted expenditure", what is it that the creditor must know was "caused" by the identified person? Read together, paragraphs (b) and (c) require knowledge that the actions of a known party had the consequence which gives rise to the action. To consider the example mentioned by Lord Hodge in para [22] of *Gordon's Trustees* of overpayment in a purchase of property as a result of a negligent valuation, the loss arises when the buyer is committed to the purchase but lies in the overpayment. The creditor does not need to be aware that they have overpaid to meet the requirement in paragraph (a). To meet the tests in paragraph (b) and (c), it would be enough

for them to know that the building was purchased at a price fixed by reference to the advice from an identified party. Applying that to the present situation, what is required is that the parties should be aware that the building was constructed in accordance with a design prepared by a known party - LRW. Here, Ogilvie had the knowledge and they therefore had the awareness of the facts stipulated in subsection (3A) (b) and (c).

[46] The position in relation to the awareness of M1 may be stated more briefly. As noted above, the third A10 report was provided to, among others, Mr Wiessler of M1. Mr Weissler accepted that he had read the report and had admitted that there were "areas of the design" that "did not satisfy Regulatory requirements". While this is not precise about his knowledge concerning the cladding design, the other correspondence sheds further light on that. M1 received advice from Mr Bittern of Astute which emphasised that BR135 certification would be required if the design was to comply with the regulations and they were told by Mr Bittern that, without BR135 certificate, the proposal of adding 30mm K15 insulation would not "meet the regulations". Mr Wiessler said that he understood this. On 25 October 2017, Mr Anderson of AFA had asked in an email why Ogilvie has not sought to obtain BR135 certification. This indicates awareness both that that there was no such certification and that it was required. On 30 October 2017, Mr Anderson contacted Mr Bittern again and asked him to speak to BRE to "confirm whether a BRE Certificate was ever undertaken for the Motel One Glasgow Project". Mr Bittern responded that there was nothing on the BRE database.

[47] The contemporaneous documents and the questioning of the witnesses in relation to this did not focus on whether there was such agreement by the Council and focussed instead on a "certificate". It is apparent, however, that there was an understanding that further documentation was required if compliance is to be achieved by the route stated in BR135

and there was awareness that this documentation was not available. That taken with the evidence from Mr Wiessler's acknowledgement in cross-examination that the A10 report was not enough in itself and that there would have to be approval by the Council of the design means that M1 were aware of the non-compliance. So, although Mr Wiessler also said that, from the standpoint of M1, issue of the Stage 2 Warrant by the council amounted to regulatory approval of the design, and to his knowledge the council were content with the design, I do not accept that this displaces his knowledge that the steps that would be required under BR135 to achieve conformity had not been completed.

[48] I would add that, that while this awareness is stated for completeness and because it was canvassed before me, on the basis set out above, it was not a requirement that they knew of the non-compliance. The loss to M1 occurred when the building was constructed. To have the knowledge stipulated in subjection (3A)(a), the objective fact which they required to know was only that the works had been carried out. On the basis of *Gordon's Trustees,* they did not need to know that the building did not comply with the building regulations. As I note above, it is agreed that work to implement the 70mm Design began in April 2017, the work to implement the 70+30mm Remedial Design began in October 2017 and the work on cavity barriers was carried out before February 2017. M1 were aware of these matters. They were required to pay for these works as they were carried out. Applying *Gordon's Trustees,* they were accordingly aware of the loss. Once again, this includes the loss in relation to the cavity barriers as well as the cladding.

[49] Applying the approach set out above they also had the awareness of the matters specified in paragraphs (b) and (c) of section 11(3A) by reason of their knowledge that the building was being constructed in accordance with a design prepared by LRW for M1. In support of an argument that the amendments to the 1973 Act means that a greater scope of

knowledge is now required before prescription begins to run, M1 rely on the statement by the Scottish Law Commission in their Report on Prescription (July 2017) that the new test in what became the 2018 Act requires that the creditor be aware of the factual cause of loss by the act or omission. They point to the statement in paragraph 3.20 that,

> "If creditors are aware that they have incurred expenditure but do not know that the reason they incurred it was an act or omission of the debtor (as opposed, for instance, to simply paying the debtor's invoice for services rendered), then they do not yet have the awareness necessary for time to start to run against them under the recommended test."

The commission report pre-dated the decision of the Supreme Court in *Gordon's Trustees* and the cases that followed. It cannot be assumed that the 2018 Act was intended to address any of the problems that may be considered to have arisen out of those decisions. Apart from that, the approach taken by the Commission in the passage quoted is not consistent with Lord Hodge's judgment and its consideration of what is meant by "loss, injury or damage" as it has been interpreted in *WPH* and which I have noted above. I do not consider therefore that there is scope for interpreting sub-paragraphs (b) and (c) so as to require awareness that the expenditure in question was brought about by a wrong done to them by the debtor.

Leaving part of the period out of account - section 6(4)

[50] Both M1 and Ogilvie seek to rely on section 6(4) to say that part of the time that has elapsed since they were aware of the loss, injury or damage ought not to count towards the prescriptive period. M1 contended that the contents of the letter sent to them by Ogilvie on 23 February 2018 caused it to believe in error that the cladding complied with the building regulations. They argue that this view was "reinforced" when they were provided with copies of the building warrant and completion certificate and this mean that it did not investigate the position and did not take steps to initiate proceedings. They submit that they

had no reason to investigate the position and therefore the proviso to section 6(4) as to reasonable diligence does not apply. In response, Ogilvie contend that the knowledge that M1 otherwise had at the time the letter was sent meant that it could not have induced an error for the purposes of section 6(4) and that M1 could with reasonable diligence have become aware of the true situation.

[51] LRW also make submissions to the effect that M1 are not able to rely on section 6(4). They argue that the letter amounted to no more than Ogilvie representing that they had performed their obligations and that, on the basis of the authorities considered below, that was not sufficient. They note that the letter arose following the receipt by M1 of the third A10 report and the advice from Astute and that it did not address the issues in each, or the fact that M1 had been asking to see the "BR135 Certification". They submit that having had expert advice from Astute that the design was not compliant without BR135 certification, it makes no sense that they would be led into error by the bare assertion, unvouched by evidence, that the design was compliant. They note also that M1 knew that Ogilvie had not seen the third A10 report and would have been proceeding on the contents of the second. They say that M1 was not led by the letter to believe something other than the truth. They argue that it is of no assistance in relation to the cavity barrier breach as that was not an issue in the context in which the letter was sent.

[52] In response to LRW's arguments that any obligation on them to make reparation has prescribed, Ogilvie argue that they failed to make a relevant claim because LRW did not disclose to them the third A10 report or at least the tenor of what it said. In response to that, LRW note that Ogilvie were not aware that LRW had received the third A10 report and would therefore not have inferred anything or been led into error from not having been sent a copy.

[53] The relevant part of section 6(4) is in the following terms.

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

Subsection (4A) states that for these purposes, it does not matter whether the debtor, or the person acting on the debtor's behalf, intended the fraud or the words or conduct to cause the creditor to fail to make a relevant claim.

[54] The section requires both that there is error on the part of the creditor and that the error was induced by the words or conduct of the debtor. These requirements have been considered recently by the Inner House in two cases. In *Tilbury Douglas Construction Limited* v *Ove Arup and Partners Scotland Limited* [2024] CSIH 15, 2024 SC 383 the pursuer sought to rely on assurances from the defender, their sub-contractor, that their design was valid as having induced error on their part so as to bring them within section 6(4). The Inner House rejected this. Although the defenders had given assurances as to the adequacy of their design, the Inner House noted that it was up to the pursuer whether or not to accept them. In relation to the result to be produced, it was necessary that the conduct of the debtor led the creditors into error as to the remedies available to them such that they did not make a claim. It was concluded that the decision to rely on the defender's representations was made in the pursuer's own commercial interest and that the representation had not resulted in an error in the mind of the pursuer. It was concluded that in that case the

pursuer had supported the approach taken by the defender as a result of their own self-interest and not as a result of error. The Inner House decision also stated that in terms of what behaviour might be relied in as having induced any error, conduct of the contract in providing services and obtaining payment would not be sufficient.

[55] In *Legal and General Assurance (Pensions Management) Limited* v *Halliday Fraser Munro* [2025] CSIH 24, 2025 SLT 1151, the pursuers argued that the collateral warranty which they relied upon as the basis of their action was itself a representation that the defenders had complied with their contract. This was rejected on the basis that it was "circular and illogical" to contend that the provisions which were breached were themselves the ones that led to the error on the part of the creditor (para [89]). The court referred to the decisions in *Caledonian Railway Co* v *Chisholm* 1886 13R 773, and *BP Exploration Co Ltd* v *Chevron* [2001] UKHL 50; 2002 SC (HL) 19 when considering the policy underlying section 6(4). The policy was that there were, "circumstances where there have been words or conduct of the debtor inducing error that would make it unjust for him to rely on the time-bar" (para [88]). The court said again that section 6(4) does not operate where there has merely been an assertion by a party that it has performed is contractual obligations or had not been negligent.

[56] The letter of 23 February 2018 was a representation by Ogilvie that they had complied with their contract. However, on the basis of what was said in these decisions, that is not sufficient "words or conduct" to make it unjust for them to invoke prescription and therefore section 6(4) does not apply. Although that would be sufficient to dispose of the argument advanced by M1, in addition I do not consider that it has been established that the letter induced an error on the part of M1 as to the remedies that were available to them. In this regard, I reject the evidence of Mr Wiessler and Mr Anderson to the extent

that they said it did. It is necessary to put the letter in context and look at the surrounding circumstances. The following factors are relevant:

(a) M1 had been made aware of the non-compliance or at the very least been put on notice of it by the third A10 report. They were not in error prior to the letter being received.

(b) M1 knew that Ogilvie had not been provided with the third A10 report. They did not draw it or its key elements to the attention of Ogilvie when seeking assurances about the design. They knew that in writing the letter, Ogilvie had an understanding of the position which was less complete that theirs.

(c) The request which led to the letter being sent was part of the adoption by M1 of a deliberate strategy to avoid assuming responsibility for the design after they had considered the third A10 report. It is quite understandable that they would not want to dilute the obligations of Ogilvie under the contract by taking on any of the responsibility for design. However, avoiding taking design responsibility and having knowledge of failings in the design are two quite distinct matters. M1 had been made aware by the A10 report that the design did not comply with building regulations or at the very least were put on notice that that might be the position. The purpose in seeking the letter was related to issues of contractual responsibility rather than compliance of design and that is the light in which it would have been read. It did not induce M1 into error as to their remedies and was instead intended to provide them with assurance that they would retain remedies against Ogilvie.

(d) The letter did not address any of the concerns in the A10 reports and did not provide assurance that the steps necessary to achieve compliance with

Mandatory Standard 2.7 had been taken. It could not have induced error in relation to these matters.

(e) Although Mr Anderson claimed that the letter superseded the third A10 report he recognised in cross-examination that this was for the commercial and contractual purposes of M1. The position is largely the same as in *Tilbury Douglas* and the same result follows

[57] In relation to the position as between LRW and Ogilvie, I do not consider that Ogilvie have established that they were led into error as a result of LRW not disclosing the third A10 report to them. I accept that until they received the letter from solicitors for LRW in May 2023 setting out the possible non-compliance, they were unaware of the problem. Although they would have believed that the design was compliant with building regulations and this would be an erroneous belief, it arose from the ordinary operation of the contract and words and conduct that predated the third A10 report. The error was not induced by a decision by LRW not to give them a report of which they were not aware. For completeness, I would add that I do not consider that it is helpful to approach this issue on the basis suggested in submissions of there being a "duty to speak". Section 6(4) requires that the error in the mind of the creditor is induced by words and conduct of the debtor and *Legal and General* is clear that this cannot merely be as a result of the normal operation of the contract. Therefore, if the error has arisen from the normal running of the contract or is induced by another party section 6(4) does not apply. In that situation, section 6(4) imposes no "duty to speak" on the debtor as was submitted. Obviously, if the error was induced by the debtor, section 6(4) will apply and there is no need to impose a duty to speak. It may be that the debtor is under a duty in contract to provide information and a breach of that duty may itself give rise to an obligation to make reparation but it does not affect the application

of section 6(4). The effect of this is that the evidence of Mr Geddes on this issue is not relevant and I have not placed any reliance on it.

Conclusion

[58] Returning to the five obligations identified in paragraph 6, in respect of each of them there was awareness on the part of the creditor of the three matters specified in section 11(3A) and the prescriptive period started running more than 5 years before the obligation in question was founded on in court proceedings. No part of that period falls to be left out of account under section 6(4). In relation to the obligation owed to M1 in respect of the 70mm Design, no relevant acknowledgement in terms of section 10 was made. The result is that all five of the obligations have been extinguished by prescription.

[59] The case will be put out by order for submissions as to how effect should be given to my conclusions.