OUTER HOUSE, COURT OF SESSION

[2025] CSOH 59

CA83/24

OPINION OF LORD BRAID

In the cause

MULTIPLEX CONSTRUCTION EUROPE LIMITED

Pursuer

against

WSP UK LTD

Defender

Pursuer: MacColl KC, A Mckinlay; Brodies LLP
Defender: Barne KC, Blair; CMS Cameron McKenna, Nabarro & Olswang LLP

27 June 2025

Introduction

[1] This is the "downstream" action against WSP UK Ltd, referred to in my opinion of today's date in the action by Greater Glasgow Health Board (GGHB) against Multiplex Construction Europe Ltd (MPX) and another (CA80/24) (the principal action). That opinion should be referred to for a full account of the factual background and the legal principles in play, and requires to be read in conjunction with this one for a full understanding of the case. In this action, MPX concludes for (1) declarator that WSP is in breach of both its contract with, and its duty of care to, MPX and that it is liable in damages to MPX; (2) declarator that WSP has infringed the rights of Others (as that term is defined in the

Conditions of Contract) and is accordingly liable to indemnify MPX against "claims, proceedings, compensation and costs" payable arising out of such infringement; and (3) payment of damages of £23,380,407.80 in respect of the alleged atrium defects. It should be noted that whereas the principal action concerned only the cladding in the atrium, the declarators sought in this action relate to both that cladding and the external cladding. However, reflecting the position in the principal action, the preliminary proof before answer in this action was restricted to the sole question of whether or not MPX's claim against WSP in respect of the atrium cladding has prescribed.

[2] For the reasons stated in my opinion in CA80/2024, I have found that GGHB's claim against MPX in respect of the atrium cladding has prescribed under the Prescription and Limitation (Scotland) Act 1973, and that MPX is entitled to decree of absolvitor. Consequently, it follows that insofar as the present action is founded upon a breach of contract and breach of common law duty by WSP in respect of that cladding, WSP is likewise entitled to decree of absolvitor. However, lest my decision in the principal action turns out to be wrong, I will consider whether MPX's claim against WSP has in any event prescribed. It is also necessary to consider whether any claim under the indemnity has prescribed.

Date of service

[3] Service of the summons was effected on WSP on 6 December 2021[1]. As in the principal action, the prescriptive period is five years from the date when the obligation or obligations owed by WSP to MPX became enforceable, subject to any arguments open to

[1] This was the date agreed by joint minute, although the certificate of service in process gives a date of 3 December 2021. Nothing turns on the discrepancy.

MPX that the commencement of prescription was delayed by section 11(2) or (3) of the 1973 Act, or that its running was suspended by the operation of section 6(4).

The breach of contract/fault case

[4] MPX avers, in Article 14, that WSP was in breach of various obligations under the WSP contract and at common law in preparing a fire safety design strategy (FSDS) which was defective in respects detailed in Article 11; and, in Article 15, that it was in breach of those various obligations by approving and/or permitting and/or failing to prevent the use of non-compliant cladding panels.

The indemnity case

[5] MPX avers, in Article 18, that WSP is obliged to indemnify MPX under and in terms of Clause 80.1 of the Conditions of Contract forming part of the WSP contract. That clause is in the following terms.

> "80.1 [WSP] indemnifies [MPX] against claims, proceedings, compensation and costs payable arising out of an infringement by [WSP] of the rights of Others, except an infringement which arose out of the use by [WSP] of things provided by [MPX]."

The issues

[6] The issues in this action insofar as it relates to the breach of contract (and breach of duty) case are, as in the principal action: when did prescription begin to run (in particular, was its commencement postponed by either section 11(2) or 11(3) of the 1973 Act); and, was the running of prescription suspended through the operation of section 6(4). In that latter regard, MPX now relies on the collateral warranty granted by WSP in favour of GGHB in March 2011 and the statement of design compliance signed by WSP on 22 January 2015. As

described in my opinion in CA80/2024, by the collateral warranty WSP warranted and undertook to GGHB, among other things, that it had complied and would continue to comply with all the terms and obligations incumbent on it under its contract with MPX, and would complete its services in accordance with that contract; and that it had not and would not specify for use in relation to the project any products or materials not in conformity with relevant British or European standards. The statement of design compliance certified that the prepared design had been carried out with the requisite care and skill.

[7] The issue in relation to the indemnity claim is simply, when did prescription begin to run. There is also an issue between the parties as to whether the indemnity is engaged at all, but strictly speaking that issue falls outwith the scope of the preliminary proof.

Decision

The breach of contract case

When did prescription begin to run?

[8] The earliest date on which an application for payment was made in relation to the allegedly non-conforming cladding in the atrium was 23 November 2012, when Clad (UK) Ltd submitted an application for the Signi installed in the cores. Contrary to the position adopted in its pleadings and its note of argument, MPX now accepts that there was a concurrence of *injuria* and *damnum* by December 2012, when it first made payment for a non-conforming material, and so, absent any argument available to MPX by virtue of section 11(2) or 11(3) of the 1973 Act, the prescriptive clock began to tick in November or, at the latest, December 2012. (Although there was more than one product installed in the atrium, paid for on different dates, MPX do not contend for "salami slicing" of the claim, ie, that different prescriptive periods should apply to different products). It follows that unless

MPX can invoke either section 11(2) or (3) to delay the commencement of prescription, or section 6(4) to suspend it, MPX's claim had prescribed by December 2017.

Does section 11(2) apply?

[9] The commencement of prescription may be postponed by section 11(2), which, as it applies to this action, provides that where as a result of a continuing act, neglect or default, loss, injury or damage has occurred before the cessation of that act, neglect or default, the loss, injury or damage is deemed to have occurred on the date when the act, neglect or default ceased.

[10] MPX avers in Article 21 of condescendence that WSP's breaches of contract and common law duty insofar as they occurred before January 2015 were continuing breaches in terms of section 11(2) at least until the date of practical completion. It further contends that those averments should be taken *pro veritate* and that it is entitled to be given the opportunity to prove, at a future proof on the merits, that there were continuing breaches.

[11] On that latter point, I disagree. The purpose and scope of the preliminary proof is to determine whether MPX's claim against WSP has prescribed or not. To decide that, it is necessary to determine when prescription began to run; and to determine that, the court must deal with the section 11(2) argument.

[12] As is submitted on behalf of WSP, there is a difference between a continuing duty, a continuing breach and a completed breach with continuing effects: see *Johnston* v *Scottish Ministers* 2006 SCLR 5, para [17]; *John G Sibbald & Son Ltd* v *Douglas Johnston* [2014] CSOH 94, para [8]; *Warren James (Jewellers) Ltd* v *Overgate GP Ltd* [2010] CSOH 57, para [57]. Here, the breaches complained of are two-fold, namely, first, that WSP prepared a defective FSDS, and, second, that it approved the use of defective products in the atrium. Even if the

contract was breached more than once in that latter regard (by approval of more than one drawing providing for the defective products) on any view the breach or breaches were completed by the time of the purchase and installation of the products. In general, in the absence of express instructions to do so, the design responsibilities of an architect (and, by parity of reasoning, of a fire consultant) do not include a continuing duty to review its design or supervise the works, unless something occurs to make it necessary or prudent for a reasonably competent architect to do so: *Jackson & Powell* (9th ed), paragraphs 9-025; *New Islington and Hackney Housing Association Ltd* v *Pollard Thomas & Edwards Ltd* [2001] PNLR 20, Dyson J at para [14]. Although MPX relies on paragraph 3.26 of the WSP Scope of Services, which required WSP to undertake regular inspections of the Works and provide reports as required by MPX, it does not aver that WSP was required to undertake an inspection of the ACMs as they were being installed, far less aver that inspections undertaken after their installation should have identified their presence. Nor does MPX aver that there were any breaches by WSP in the post-installation period, or circumstances that might have given rise to a duty on WSP to revisit what had been installed.

[13] Consequently, MPX has neither averred, nor proved, that any breach by WSP was one which continued beyond installation. I therefore conclude that section 11(2) did not delay the commencement of the prescriptive period.

Does section 11(3) apply?

[14] MPX submits that it is entitled to rely upon section 11(3) of the 1973 Act to postpone the start of the prescriptive period until it received Mr McCracken's initial advice on 21 January 2021; it was only then that it became aware of the relevant loss, namely the liability to GGHB. However, since MPX also now accepts that the relevant loss was incurred

by around December 2012, when it incurred wasted costs to JDP and Clad UK in relation to cladding products which it is alleged did not meet the requirements of the Building Contract, and since MPX was aware that it had incurred those costs, there is no basis, standing the current state of the authorities (referred to in my opinion in CA80/2024) upon which it can rely on section 11(3) to delay the commencement of the running of prescription.

[15] Consequently, the prescriptive period commenced, at the latest, in December 2012, meaning that MPX's claim against WSP will have prescribed unless it is entitled to rely on section 6(4), to which I now turn.

Does section 6(4) apply?

[16] Subject to what I say below about payment, MPX relies on three matters as having engaged section 6(4): that WSP sought and obtained payment for its services; the collateral warranty provided in favour of GGHB; and the statement of design compliance. In relation to the first of these, payment for services, MPX advanced that submission only in the event of the court rejecting its submission in the principal action that the provision of everyday services, and claiming payment therefor, could not provide a basis for engaging section 6(4). Since I have upheld that submission, the MPX submission need not be considered, but, for completeness, the provision of services by WSP (including their assigning a status to a drawing or drawings) and the claiming of payment for those services were, in the context of the contract between MPX and WSP, routine occurrences which could not, viewed objectively, have induced error such as to engage section 6(4). In any event, the evidence was insufficient to establish that those services, or the claiming of payment, led to any error on the part of anyone within MPX which induced it to refrain from making a claim. The

evidence from Mr Fernie and Mr Murray, relied upon by MPX, is merely to the general effect that MPX would have relied upon the expertise of the design teams, including WSP.

The collateral warranty

[17] MPX submits that in the collateral warranty, to which it was party, WSP represented that it had complied and would continue to comply with its obligations, and that although the warranties were primarily for GGHB's benefit, MPX took comfort that WSP would carry out its work in a way that was compliant with the contractual requirements placed on it. Under reference to *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Ltd* [2011] CSIH 26, it is said that there is no reason in principle why a representation made in advance of a service being provided cannot induce error on the part of the recipient of the service.

[18] WSP points out that the warranty was granted between January and March 2011 and, as such, it pre-dates construction work on QEUH. It argues that an undertaking to exercise reasonable care in the performance of one's duties given to a third party in advance of the project commencing cannot amount to a representation that the works were in fact completed with reasonable care, and *a fortiori* cannot amount to an inducement not to make a claim.

[19] Whether or not a representation made by the debtor before the obligation in question came into existence might in some circumstances induce error on the part of the recipient of the service, I do not consider that the collateral warranty relied upon here, viewed objectively, could reasonably have induced an error in the mind of MPX that construction works and design services carried out after the date of the warranty had in fact been concluded to a particular standard, not least as the warranty was primarily for the benefit of

GGHB. It is hard to see how a somewhat tautologous contractual obligation to comply with contractual obligations could induce the sort of error envisaged by section 6(4); were that the case, then section 6(4) could apply in virtually every case. It would also be conceptually somewhat curious if the prescriptive period could be suspended before it had even started to run. It is true that *Rowan,* above, does on one view suggest that a representation made in advance of an obligation arising might in some circumstances induce a section 6(4) error, in that the Inner House found to be "unduly restrictive" an argument that conduct inducing the creditor to refrain from making a claim must, logically, be conduct which post-dates the coming into existence of the obligation. However, the facts in that case were unusual (and far removed from those here) inasmuch as it was averred that there had been a series of charges issued by Scottish Water for services which had not in fact been provided, which the pursuers had paid, and the alleged obligation was one of repetition. The court's observations were made in the context of holding that the pursuer's averments were suitable for proof. Further, what the Lord President (Hamilton) actually said, at para [18] was:

> "It will in the end be for the respondents to prove what in fact induced them to refrain from making their several claims earlier than they did. But it would be within the scope of their averments to seek to establish that the periodical and repeated issuing of charges (carrying the implication that the sums charged were due) induced them to refrain from pursuing a claim for repetition of a sum earlier charged and paid. It may also be that, looking at each transaction distinctly, the implicit representation contained in the notice was such that it not only induced payment but also subsequently induced the error which in turn induced the respondents to refrain from making a relevant claim in repetition."

That falls far short of holding, as a generality, that a single representation made before an obligation has come into existence is capable of inducing an error under section 6(4).

[20] In any event, the evidence in the present case did no more than establish that had the warranty not been provided, that may have prompted further inquiries, but that is nothing to the point. Further, no evidence was led which established that the warranty had in fact

induced an error either in MPX's corporate mind or on the part of any person acting as its agent as to the conformity of the cladding in the atrium. It was signed on behalf of MPX by Timothy Bicknell, who was not a witness; and Mr Ballingall, the managing director of MPX at the material time, did not speak to it.

[21] Accordingly, the provision of the collateral warranty did not engage section 6(4).

The statement of design compliance

[22] MPX submits that while it was not aware of any issues as regards the cladding prior to receipt of the statement of design compliance, the statement provided a sense of comfort that WSP had designed in accordance with its obligations and that if it had failed to provide a certificate, that would have prompted further investigation. The fact that WSP was contractually obliged to provide it did not prevent it from having induced error. In context, the certificate was plainly referring to WSP's full scope of design services. The provision of such a certificate was not within the scope of "everyday" conduct addressed in *Tilbury Douglas Construction Ltd* v *Ove Arup and Partners Scotland Ltd* 2024 SLT 811.

[23] WSP submits that since the document was one which WSP was obliged to provide, and it was produced as part of the contractual machinery, then it fell into the same category as an application for payment. Furthermore, it was no more than an expression of confidence in the WSP prepared design, which was insufficient to suspend the prescriptive clock. There was no evidence that the document induced in MPX's corporate mind a specific error as to the scope of its remedies, nor that it induced a specific error that the installed ACMs were compliant with the FSDS.

[24] Again, I prefer WSP's submissions. The statement of compliance was something which WSP had to provide in order to receive payment. As such, it was, in the context of this

contract, both an everyday occurrence and a mere statement of confidence in WSP's design. As with the collateral warranty, it is nothing to the point that had it not been provided, questions would have been asked. It was plain from the evidence that the provision of the statement of compliance was essentially no more than a tick-box exercise.

[25] In any event, as with the warranty, none of the witnesses spoke to having been induced into error as to the composition of the atrium cladding materials. Mr Fernie, for example, said that he understood the statements of design compliance as the consultants confirming their designs were in compliance with the contractual requirements, but that falls far short of his being induced into error, at the time, as a result of the statement. Similarly, Mr Wales said that MPX "took comfort" from the statements, which showed that the consultants and subcontractors had taken due diligence in carrying out their works, but such generic comfort again is insufficient to establish corporate error on the part of MPX in relation to the atrium cladding. This evidence illustrates the "scattergun" approach MPX took towards the statements. In other words, MPX took comfort from the statements as a whole, rather than place reliance on any particular statement. The evidence merely underlines that no real thought was given by anyone as to which particular consultant (if any of them) had the contractual responsibility to approve the materials, which undermines the argument that either the WSP (or for that matter the NA) statement induced an error in the mind of MPX which induced it to refrain from making a claim.

[26] Accordingly, the provision of the collateral warranty did not engage section 6(4).

[27] For all of these reasons, WSP did not induce an error in the mind of MPX such as to induce it to refrain from raising proceedings against WSP, and MPX is unable to rely on section 6(4) so as to suspend the running of prescription.

[28] It should be noted that I have reached my view in relation both to the collateral warranty and the statement of design compliance without finding it necessary to make any finding as to the scope of WSP's contractual and delictual obligations. I would have reached the same view regardless of whether WSP owed MPX any duty in relation to the approval of documents on Aconex, or not.

Reasonable diligence

[29] For completeness, I will consider the position in relation to the reasonable diligence proviso to section 6(4). On the assumption that WSP did induce error in the mind of MPX which induced it to refrain from court action, when could MPX, with reasonable diligence, have discovered that error? That must be assessed by asking what the prudent person carrying on business of the type operated by MPX would do (*Glasgow City Council* v *VFS Financial Services Ltd* [2022] SC 133, Lord President (Carloway) at [57]). (Note that in this action, WSP did not advance the argument advanced by JDP in the downstream action against it, that MPX had actual knowledge by 2 August 2018, doubtless because of its confidence in the strength of its position that the error should have been discovered before that date. I will therefore not address the issue of actual knowledge in this opinion.)

[30] While there are arguments available to WSP on the evidence that MPX could with reasonable diligence have discovered its error at an earlier date – for example, at completion, when it was under an obligation to deliver an accurate O&M Manual to GGHB – the lines of battle drawn between the parties to this action focus the dispute on whether MPX could with reasonable diligence have discovered that non-compliant cladding had been installed as part of the post-Grenfell investigations in 2017, failing which as part of MPX's atrium investigations from March 2018. MPX submits that there was no failure by MPX to use

reasonable diligence during those periods of time and that, at GGHB's request, the 2017 review dealt only with the external cladding. Further, if MPX failed to use reasonable diligence in not considering the atrium in the immediate aftermath of Grenfell, it should follow that GGHB also failed to use reasonable diligence at that time. MPX could not have ascertained the position sooner than it did, in 2021.

[31] Dealing with the submission about the extent of the 2017 review first, whether GGHB exercised reasonable diligence at that time is fundamentally irrelevant to the question whether, in a question with WSP, MPX did so. Further, this is only a live question if it is assumed, not only that MPX was induced into error by WSP, but that GGHB was induced into error by MPX and that its claim has not prescribed, which involves also assuming that it did not fail to use reasonable diligence. This submission therefore takes MPX nowhere. The fact is that both MPX and GGHB were or ought to have been aware in 2017 that the atrium was to be treated as an external space. That GGHB requested that the review deal only with the external cladding therefore does not avail MPX in a question with WSP.

[32] WSP argues that information about the ACMs which had been installed in the atrium ought to have been readily identifiable on Zutec, ie from the O&M Manual, in which event MPX could with reasonable diligence have discovered the fire classification of the ACMs almost immediately after Grenfell, proposing a date of 1 August 2017. Alternatively, it argues that any error must have ceased to have effect by, at the latest, the point at which MPX's investigations had confirmed that the cladding included Alucobond PE, Etalbond PE and Larson Signi PE and had the information necessary to understand the characteristics of those products. That was on 23 March 2018, when Fergus Shaw was emailed that information and reported it to Julie Mayer. It was also around that time that MPX informed its insurers.

[33] Insofar as MPX's position is that it did not know and could not have known of the true position until 2021, that may be the date by which it had the facts necessary to establish a *prima facie* case, but it is not the date on which it had information such that it could no longer be said to be operating under induced error. It is the latter date which triggers the resumption of the running of the prescriptive period: *Glasgow City Council*, paras [52] and [53].

[34] I consider that WSP's contention with regard to the O&M manual is well made, and that with reasonable diligence MPX could have discovered its error by 1 August 2017. Even if that is wrong (and JDP adopted a slightly more cautious argument, also building in time for MPX to take expert opinion) the error could have been discovered by the end of 2017, and even if that is wrong, 23 March 2018 would, on any view of the evidence, be the last date by which MPX could, with reasonable diligence, have discovered any error under which it was operating due to any representation by WSP.

[35] Whether any or all of those dates would have been sufficient to prevent the claim from prescribing turns on when any error was found to have been induced. If error was induced by the provision of the collateral warranty (which pre-dated the concurrence of *iniuria* and *damnum*), prescription would not begin to run until 1 August 2017 at the earliest, or 23 March 2018 at the latest, and the action would have been raised within the prescriptive period whichever date is taken. If, on the other hand, the error was induced only by the statement of design compliance provided in January 2015, by that time prescription had already been running for 2 years and 1 month, with the consequence that MPX had 2 years and 11 months within which to serve a court action, that is, by July 2020 at the earliest or February 2021 at the latest. On that hypothesis, too, it matters not which date is taken as the

recommencement of prescription, since in all cases, the claim would already have prescribed when the action was eventually served in December 2021.

The indemnity claim

[36] Leaving aside for the moment the question of whether the indemnity is engaged at all (WSP argue that it is not, because it is not said to have infringed the rights of "Others"), WSP submits that the indemnity is an indemnity against liability and that since any claim by GGHB against Multiplex accrued (as I have found) at practical completion in January 2015, the prescriptive period in respect of any claim under the indemnity against WSP also ran from that date and has now prescribed. MPX submits in reply that WSP's obligations to indemnify MPX did not arise until, at the earliest, MPX was subject to claims or proceedings from which it might require an indemnity; alternatively, that they will only be triggered if and when MPX is found liable to pay compensation or costs to GGHB; and that, either way, WSP's obligations to indemnify MPX have not prescribed.

[37] Parties are agreed that the point at which an indemnity becomes enforceable is a matter of contractual interpretation: *Scott Lithgow Ltd* v *The Secretary of State for Defence* 1989 SC (HL) 9. *Keating on NEC Contracts (Second Ed)* at 20-03 leaves open the question of whether the Clause 80 indemnity is one against liability, or a general indemnity.

[38] There is a discussion of the conflicting case law and the difference between a liability indemnity and a so-called general indemnity in *The Mayor and Commonalty and Citizens of the City of London* v *Reeve and Company Limited & Ors* [2000] EWHC Technology 138 (25 February, 2000). In that case His Honour Judge Hicks QC had regard to the width of the words used in the clause under consideration, in coming to the view that the clause provided a general indemnity. So, too, here, it seems to me that the reference to

"proceedings", "costs" and "compensation" payable is suggestive of the indemnity becoming enforceable only at the point when liability has been established, rather than at an earlier date. It is significant that the clause refers to "proceedings" rather than to "liabilities", which is, at the very least, a pointer that the indemnity does not bite before proceedings are raised which is sufficient for MPX for present purposes. Further, it would be odd if the parties' intention had been that one of them had to pursue a claim under the indemnity clause for costs incurred in defending an action before an action had even been raised, or before the extent of it was known. For that reason, I do not consider that a claim under the indemnity has prescribed.

[39] As regards whether the indemnity is engaged at all, it seems to me that WSP's submission that it is not, which is supported by the passage in Keating referred to above, is correct. However, that is a question for another day, since the relevance of the averments about Clause 80 is not a matter in issue in the preliminary proof on prescription.

Disposal

[40] Although WSP seeks decree of absolvitor (*quoad* the atrium cladding only) in respect that MPX is to be assoilzied from the GGHB action, it is not clear to me that that is necessarily appropriate standing MPX's construction of the indemnity, which it maintains entitles it to recover expenses from WSP, notwithstanding that WSP was successful in the GGHB action. While it is undoubtedly entitled to have its third plea-in-law sustained *quoad* the atrium cladding, it is less clear to me that it is entitled to have its fourth plea sustained at this stage. I will therefore put the case out by order to discuss the precise terms of the order to be issued in light of my opinions in this, and the principal action, and to discuss further procedure in this action. In the meantime, those advising MPX may wish to reflect whether

there might not be considerable force in the argument that the indemnity is simply not engaged, since if that argument were accepted as (or found to be) correct, absolvitor would indeed fall to be granted