



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 66

A93/24

OPINION OF LORD CUBIE

In the cause

FIONA DROUET AND OTHERS

Pursuers

against

BTO SOLICITORS LLP

Defenders

Pursuers: Elis KC; Jones Whyte

Defenders: Shand KC; Beale & Company Solicitors LLP

14 July 2026

Background

[1] This is an action arising from admitted negligence by the defenders who failed to lodge a summons for calling as a result of which, an action by the current pursuers became time barred against the then defender Angus Milligan. The defenders in this case accept that the failure was negligent, but assert that there was no loss sustained by any pursuer.

[2] The pursuers in this action raised proceedings seeking to persuade the court that it should exercise its discretion, to allow the action to nevertheless proceed. The

Lord Ordinary (*Drouet v Milligan* [2024] CSOH 32) did not allow the action to proceed other

than by the first pursuer Fiona Drouet in her capacity as the parent and guardian of the siblings of the deceased; quoad ultra, he granted decree of absolvitor.

[3] The Lord Ordinary described the arguments as finely balanced; one of the factors taken into account was the possibility of an action for professional negligence against the defenders about which the Lord Ordinary said "...it is difficult to imagine a more straightforward case of professional negligence..." (para [66]).

[4] The Lord Ordinary held that there were insufficiently cogent grounds in order to allow the claims to proceed: decree of absolvitor was granted, and he found the pursuers to be jointly and severally liable for the expenses of the defender Angus Milligan; these expenses have now been taxed by the auditor. The pursuers also incurred fees to those instructed to deal with the earlier action. Mr Milligan has sought to enforce payment of expenses.

[5] The enforcement of the award of expenses, triggered some incidental procedure in this case. The pursuers inter alia seek to recover that sum from the defenders by way of summary decree. The pursuers wish to recover from these defenders the actual sum due to be paid by them jointly and severally as a result of the unsuccessful action.

[6] In simple terms, the pursuers offer to prove that there is one contract between the pursuers and the defenders in relation to the provision of legal services. The initial conclusions in the summons were, as would be expected, one conclusion in relation to each pursuer.

[7] However, the pursuer considered that the individual conclusions were not apt in relation to recovering the expenses which they say are due to the defender in the original action and in relation to the sums due to be paid by them in respect of their own legal advisers. They accordingly seek to amend. This minute of amendment was prompted by

the defenders' note of argument in anticipation of a debate. The note argued, that the pursuers who, pending amendment, each only make claims for the damage suffered by them separately, fail to specify the amount of expenses incurred by them individually in respect of the preliminary proof on time bar. The defenders argued that each pursuer cannot individually sue for the whole of the liability in expenses, and the pursuers have failed to specify which proportion of such sums is each particular pursuer's share.

In response the pursuers now seek to add joint conclusions for the two sums said to be due by the pursuers as a group.

[8] The defenders oppose the allowance of the amendment, on the ground of incompetence and/or prescription. In the first instance they attack the mechanism by which the pursuers seek to recover the sums, arguing that the attempt to recover by the new conclusions sought to be introduced by the pursuers is incompetent.

[9] The minute of amendment of the pursuers seeks to add two new conclusions for payment by the defenders to the pursuers jointly. The new first conclusion is for the sum of the expenses for which the pursuers are jointly and severally liable to Angus Milligan arising from the preliminary proof for which they were found jointly and severally liable to Mr Milligan. The new second conclusion is made up of the expenses which the pursuers themselves incurred for running the preliminary proof and the fees expended in respect of the first summons which were rendered abortive by the defenders' failure.

[10] The balance of the minute of amendment proposes changes to the articles of condescendence, mainly to support the new conclusions and to also introduce averments in relation to the new first conclusion which would permit an application by the pursuers for an interim order in terms of section 47(2) of the Court of Session Act 1988.

Submissions for the pursuers

[11] It is submitted that the minute of amendment for the pursuers more clearly focuses the dispute between the parties. No issue is raised which ought to lead to the court exercising its discretion so as to refuse to receive the minute of amendment. The proposed amendment for the pursuers introduces no facts about which the defenders are not aware. The defenders have for a long time held both a copy of the closed record in the *Drouet v Milligan* action, and a copy of the detailed account of expenses incurred by Jones Whyte on behalf of the pursuers in respect of the preliminary proof. The minute of amendment is, the pursuers say, in essence a reformulation of part of the pursuers' case in relation to damages.

[12] In the pursuers' submission, it is common for more than one pursuer to seek a remedy in a single conclusion. It commonly occurs in claims for damages to property, or remedies in respect of a property where there are joint owners, whether that remedy is for implement or for damages, for breach of contract where the pursuers have suffered a single loss for failure in performance of a contract in which both (or more) of the pursuers are parties.

[13] In the case of co-owners of property or rights, it is normally regarded as compulsory for all co-owners to conjoin in an action: Stair Encyclopaedia Volume 18 paragraph 29.

In the case of damages by contracting parties there are circumstances where the contracting parties, all have an indivisible interest in the remedy and a single conclusion is competent.

The competency of such a joint conclusion is clear. Whether in a particular case any pursuers can justify a joint remedy resolves into a question of relevancy. Reference was made to the decision of the Lord Ordinary in *Tayside Contracts v Geddes* 2014 SLT 764; this case related to a joint committee, formed by the combining together of three local authorities, who sought damages from aggregate suppliers in respect of an alleged breach of

contract. The defenders sought dismissal of the action as incompetent, on the basis that the joint committee did not have an independent legal personality, and although the local authorities had been named in the instance, they were not designed separately, but rather as a collective entity. The Lord Ordinary determined that the action was not incompetent, saying:

“...[28] The result is that Tayside Contracts, though not having its own legal personality, can enter into contracts with third parties and carry out other acts in discharge of its functions, all as authorised by ss.56 and 57 of the 1973 Act. In these circumstances it makes sense that any litigation of the present kind should be framed in the name of the constituent councils acting together under the designation of Tayside Contracts. I see no difficulty with the three councils, on that basis, seeking payment of a single sum by way of damages, which will be payable to the joint committee and thereafter accounted for in the agreed manner. No individual council has any right to an identifiable share or part of the damages, but rather the whole sum is payable to the joint committee as the contracting party. I consider that all of this is implicit in and authorised by the relevant statutory provisions. It may be that Tayside Contracts can be thought of as ‘a legal entity’ similar to that described by Lord Keith of Avonholm in the context of a trade union in *Bonsor v Musicians Union* at [1956] A.C., pp.150ff. That said, if the suit was at the hand of the contracting third party, I doubt if the claim would be constrained to exclude diligence against the property of the member councils. Having decided that the action as framed is competent and appropriate, I shall repel the defenders’ first plea in law and put the case out for a hearing in terms of Rule of Court 47.12 in order to determine further procedure....”

[14] From that, the pursuers submitted that the indivisible nature of the sum sought justified the separate conclusion for this sum; the legislative background was not fundamental to the procedural point being made; that a single conclusion in relation to more than one pursuer was competent, depending on the circumstances. The defender should not be entitled to deprive the pursuers of the right to recover if they have to pay. The defender cannot hold the pursuers to some obligation to provide an artificial pro-rata calculation.

[15] The pursuers submitted, that the cases referred to by the defenders in their own note, were concerned with different questions, not the question of when and whether a conclusion with more than one pursuer suing jointly is competent.

[16] The case of *McNeil v NCB* 1966 SC 72 is concerned with the question of whether a tender lodged by defenders of a single sum in respect of a mother and daughter suing in one action but with separate conclusions, was an effective tender. In that case it was confirmed, that a tender for a single sum to cover the individual claims of relatives was not an effective tender. The claims were separate, and in order to be effective, a tender had to deal with each separate pursuer, because their claims were separate: (Lord Justice Clerk Grant at page 79).

[17] The case of *McGillivray v Davidson* 1993 SLT 693 was concerned with the question of when a conclusion against several defenders jointly and severally, was competent, and whether separate claims for damages by each pursuer required to be stated in separate conclusions, or whether they could be stated separately in one conclusion. The argument which the court had to deal with for the second question, was that the conclusion should either be a conclusion for payment to both pursuers, or in the form of a separate conclusion for each pursuer (page 695C). The Temporary Lord Ordinary's words at page 696 ought to be seen in that context. He was definitely not deciding and was not asked to decide that pursuers who have suffered a loss jointly cannot sue for it jointly.

[18] The defenders refer to *Boulting v Elias* 1990 SC 135, which looked at the competency of an action where the two pursuers had raised an action against one defender; on appeal it was held that the averments disclosed two separate contracts of employment, one with each pursuer on different terms, under which each was to be an employee of the defender in regard to a particular business which she wished to set up; (3) that each pursuer's claim had to be founded upon a separate act, which was the defender's breach of the contract to which

he or she was the other party; (4) that neither pursuer had a title to enforce the contract which was entered into by the other; and that neither had any interest in the other contract in the legal sense of that word; and, accordingly, (5) that the action was incompetent; in short, different parties could not accumulate their actions in one libel, unless they had connection with one another in the matters pursued for, or had been aggrieved by the same act. Two separate pursuers cannot conjoin in the same action in respect of separate and independent grounds of debt, and he stressed, that this was to be seen not as a matter of convenience, but as a rule. It is recognised that two or more pursuers may join together in the same action, each concluding for a separate sum of damages for himself while all found on the same facts and circumstances as establishing the defender's liability: *Armstrong v Paterson Bros* 1935 SC 464, per Lord President Clyde at p 467. In *Buchan v Thomson* 1976 SLT 42 at p 44, Lord Fraser acknowledged that this was competent, provided that two conditions were satisfied, firstly, that the grounds of action by each pursuer were identical and, secondly, that there was no material prejudice to the defenders by the pursuers combining in one action. (Lord Hope)

[19] *Flanagan v Dempster Moore & Co* 1928 SC 308 related to a tender made in one sum to a number of pursuers. The court held that a tender was not effective, unless it offers a sum appropriated to that pursuer. The case arose because the tender as a whole, was not beaten, but certain discrete offers made were beaten; the case was described (at p 314) as an altogether exceptional case. But the point made by the pursuers is that again, the case did not assist in determination of whether such a single conclusion would be competent.

[20] Finally the pursuers looked at *Buchan v Thomson* 1976 SLT 42; in that case the court looked at the procedural issues arising from the attempt to serve a third party notice on a party already convened. The defender appeared to rely on the wording at page 44 where

the Lord Ordinary said "...Although all the claims arise from the one wrong each pursuer has a separate conclusion as he is bound to do...." The pursuers submitted, that this referred to the particular circumstances of the case, rather than stating a general principle.

[21] It was submitted that, in essence, the issue to consider in relation to whether a conclusion for the pursuers to sue jointly is appropriate, is whether there is a sufficient nexus between the pursuers to allow them to be regarded as having a joint interest in the remedy sought.

[22] The pursuers were all parties to the same contract with the defender. They all suffered loss, as a result of the same failure and breach of contract. They have all suffered losses. They have all suffered individual loss, in other words their own separate claims for loss of society. But the critical feature, was that they have also suffered losses for which they are jointly and severally liable. These circumstances clearly provide sufficient nexus in order to allow the pursuers to sue jointly for recovery of the loss for which they have suffered jointly and severally. Indeed it is not clear that it could properly be done any other way, where the joint and several liability exists for all of the pursuers and no payment has as yet been made. Each could be liable for the whole; absent actual payment, the apportionment cannot be done. The issue identified in the case law was the indivisibility of the loss. A joint conclusion may be necessary if the remedy being pursued is indivisible.

Prescription

[23] The pursuers submitted that there was no merit in the argument, that the two new conclusions cannot be pursued because of prescription. The claim after the proposed amendment would still be a claim for the damage suffered by the pursuers in their individual capacity. In the closed record as it stands, each pursuer has averred that he or

she has suffered the loss of the relevant expenses. The claims would still depend on a breach of duty and breach of contract in the same manner, as relied on before amendment. The obligation relied upon remained the obligation to make reparation for the averred failure and breach of contract. It is the obligation to make reparation, which the defenders must show has prescribed. The only change brought about by the amendment, is that part of the damages for each pursuer is in the circumstances sought jointly with the other pursuers. The obligation under both contract and delict remains the same: that is to make reparation for the failure to lodge the summons for calling. That obligation was founded on by all pursuers in their individual capacity at the time of raising the current action. Whether those damages are sought separately or jointly is not relevant to the issue of prescription.

[24] The original summons was clearly raised by the pursuers as individuals and it is that capacity in which they continue to seek damages. The original summons was clearly a “relevant claim” for the purposes of the obligation to make reparation referred to above. The question of whether some of the damage is suffered by each pursuer separately or jointly with others is a matter which can be adjusted or amended. Prescription has already been interrupted for the liability to make reparation, which would allow recovery of reparation for losses suffered by the pursuers in their individual capacity whether suffered jointly or separately.

Defenders’ submissions

[25] The defenders oppose this motion on the ground that the effect of the pursuers’ minute of amendment would be to introduce two new conclusions which are incompetent and which seek to introduce incompetent claims into the action.

[26] It was submitted, that the pursuers are six individuals who sue the defenders for damages alleged to arise from breach of contract and/or negligence on the part of the defenders. (While the defenders purported not to understand, if this was one contract or six different contracts, disputing that the pursuers “were all parties to the same contract with the defenders.” submitting that the pursuers have no averments to support this assertion, or that any contract that each had with the defenders were so linked that they stood or fell together. They do not have averments of fact to support a case whereby there existed between themselves and the defenders a contract the terms of which were such that one pursuer may enforce on behalf of any other pursuer contractual obligations owed by the defenders to that other pursuer. The pursuers confirmed that the basis of the action is as averred in statement 8 of the condescendence, averring that it was a term:

“...express or implied of the Defender's contract to provide legal services to the Pursuers that the Defender would provide the services to the standard of a solicitor of suitable experience to carry out the instructions acting with ordinary skill and ordinary care. The Defenders also owed a concurrent duty of care to the Pursuers to similar effect....”)

[27] The defenders argue that as a matter of law, the claim of each pursuer in the action calls for an individual and independent assessment of damages for that pursuer in the event of them succeeding on liability, and accordingly requires an individual conclusion for each such pursuer. They referred to a number of authorities already referred to above to support at proposition MacPhail's: *Sheriff Court Practice*, paragraph 4.45.

[28] The defenders recognised that in certain circumstances multiple pursuers can sue in one action. As stated in MacPhail at paragraph 4.47, long standing case law provides that surviving relatives, who wish to sue for damages arising from a death, must sue together in one action, in order to enable the court to consider their claims as interrelated family claims.

[29] The defenders submitted, however that, where it is competent for two or more pursuers to sue in one action, there must be separate conclusions for each pursuer if damages are sought.

[30] The defenders looked at the pursuers' reliance on the case of *Tayside Contracts v Geddes* 2014 SLT 764 in support of their contention that it is competent (and relevant) for them to sue in the one action with single conclusions for damages for the group as a whole.

[31] *Tayside Contracts* was a case in which a joint committee formed by a combination of three local authorities, sought damages in respect of an alleged breach of contract. They concluded for payment of a single sum. The joint committee pursuer had been formed pursuant to section 57(1) of the Local Government (Scotland) Act 1973, which provides:

“...For the purpose of discharging any functions of a local authority in pursuance of arrangements made under section 56 of this Act... (b) two or more local authorities may appoint a joint committee of those authorities....”

[32] The defenders had moved for the action to be dismissed as incompetent on the basis that the joint committee did not have an independent legal personality. In holding that the action was competent the Lord Ordinary stated (at page 767 L to 768 B):

“...The law has mechanisms for permitting voluntary associations, trade unions, and trusts, none of which have a separate legal personality, to sue and be sued in respect of debts owed to or by such bodies. Such are sometimes called quasi-corporations, for example, see Professor TB Smith's Short Commentary at pp.272ff. (Professor Smith speaks of the legislature intervening 'for their regulation and assistance'). Why should the same not apply to direct labour trading organisations such as *Tayside Contracts*? And if so, what is wrong with the action being raised in the name of the three constituent councils acting in combination for the recovery of a single sum payable to the body with whom the defender contracted?...”

[33] In their submissions, the pursuers narrated that any damages payable by the defenders to the joint committee would thereafter be accounted for in accordance with the financial arrangements agreed between the councils (page 768 E - F). The court held that a joint committee formed under section 57(1) of the 1973 Act, though not having its own legal

personality, could enter into contracts with third parties and carry out other acts in the discharge of its functions, all as authorised by sections 56 and 57 of the 1973 Act. That being so the Lord Ordinary held (at page 768 J - L) that:

“...I see no difficulty with the three councils on that basis , seeking payment of a single sum by way of damages, which will be payable to the joint committee and thereafter accounted for in the agreed manner... I consider that all of this is implicit in and authorised by the relevant statutory provisions....”

[34] So, the defenders submit, the circumstances in *Tayside Contracts* could be distinguished from the present case, because in that case, Parliament had legislated for the pursuer to be formed as a single entity, and for it to trade with third parties as such; there clearly existed financial agreements between the constituent councils. The circumstances of that case were very far removed from those in the present case. The defenders submitted, that the incompetence of what the pursuers in the present case seek to do, was emphasised by the fact that it was only by reason of legislation that the constituent councils who formed the joint committee pursuer in *Tayside Contracts* were able to sue in one action with a single conclusion.

[35] The pursuers had made reference to the Stair Memorial Encyclopaedia on the Law of Scotland, Volume 18, paragraph 29, but the passage relied upon appeared in a section of the Encyclopaedia which was headed “Co-ownership” and all the cases referred to in it related to co-ownership of property. So, the defenders assert, none of the cases supported the proposition, that multiple pursuers can conclude for a single sum by way of damages.

[36] In identifying that, the issue to consider as to whether a conclusion for pursuers to sue jointly is appropriate is whether there is sufficient nexus between the pursuers to allow them to be regarded, as having a joint interest in the remedy sought. They argued that here the pursuers were all parties to the same contract with the defenders, and all suffered loss as

a result of the same failure and breach of contract, the pursuers approached the matter in the wrong way.

[37] But there was no authority for that proposition. As stated in MacPhail's: *Sheriff Court Practice*, 4th Edition at paragraph 4.45:

“...Two or more pursuers injured by the same wrong of the same defender and claiming on the same grounds of action may join in one action, each claiming as an individual, in a separate crave, a separate sum of damages. They require however to have been aggrieved by the same act of the defender or to have a community of interest in the matter....”

[38] The defenders returned to *Boulting v Elias* 1990 SC 135; even where there exist circumstances such that it is competent for two or more pursuers to sue in the one action, they still require each to claim as an individual in a separate crave, a separate sum of damages. No authority to the contrary has been cited.

[39] It was submitted ,that as the proposed new conclusions, sought to introduce incompetent claims into the action that the amendment does not meet the requirements of Rule of Court 24.1, and that the motion to amend, should be refused. Reference was made to MacPhail's: *Sheriff Court Practice*, 4th Edition Chapter 10 paragraph 10.05.

Prescription

[40] The defenders submitted, that the proposed amendment related to an alleged obligation to pay to a group of persons (the pursuers) a single sum of money in respect of damages said to be owed to the group as a single body. The pursuers in the unamended action do not sue as a single body. They sue as individuals, each for their own alleged loss. If the pursuers require to sue as a group for a single sum in order to make good their claims in respect of each of the alleged losses to which proposed new conclusions 1 and 2 relate, the proposed new claims are made by the pursuers as a group rather than as individuals.

Accordingly, if the amendment were given effect to the pursuers, in respect of each of proposed new conclusions 1 and 2, they would be suing in respect of those conclusions in a different capacity from that in which they sue in the existing action. Any right that the pursuers may have had to sue as a single body has prescribed in terms of section 6 of the David Johnston, *Prescription and limitation of Actions*, 2nd Edition; *Tecjet Limited v Keir Construction Limited* [2024], SLT 1 168; *Dunlop v McGowans* 1980 SC (HL) 73.

[41] An obligation owed to a group *qua* group, is a different obligation from that owed to an individual, as an individual. In the unamended pleadings, each of the pursuers founds on obligations said to be owed to each of them as individuals. By the minute of amendment the pursuers sue in respect of an obligation allegedly owed to a group rather than to individuals. That alleged obligation owed to the group *qua* group, now founded on by the pursuers has prescribed.

[42] An amendment which seeks to introduce an obligation that has prescribed does not meet the requirements of Rule of Court 24.1. In any event, as stated in David Johnston on *Prescription and Limitation* 32nd Edition at paragraph 22.21 on page 415:

“...allowing pleadings relating to a non-existent (because prescribed) obligation to enter the record does not affect the fact that there is still no obligation. In clear cases therefore, it seems that the Court should refuse such amendments at the time the motion is made either for receipt of the minute of amendment or for amendment in terms of the minute of amendment....”

[43] For this further reason also, it is submitted, that the motion to amend should be refused.

Basis for decision

[44] It is argued, that it is not competent to have one conclusion for all pursuers in relation to the any element of the damages claimed. It is said that neither authority nor

textbook supports the pursuers' proposition; I do not regard the absence of authority as determinative; such circumstances will be rare, but are not excluded simply by reason of the rarity; it is function of a smaller jurisdiction, that the law may develop slowly, as there are limited opportunities for the law to develop.

[45] The pursuers had made reference to the Stair Memorial Encyclopaedia on the Law of Scotland, Volume 18, paragraph 29; the passage relied upon appeared in a section of the Encyclopaedia which was headed "Co-ownership" and all the cases referred to in related to co-ownership of property. So, the defenders assert, none of the cases supported the proposition that multiple pursuers can conclude for a single sum by way of damages; but such a decision depends on the nature of the damages.

[46] The defenders rely on the passage in MacPhail Chapter 4.45, quoted at para [37] to support their position.

[47] That passage deals with the conventional action, where each pursuer will have a different, sometimes a very different, and discrete claim for injury loss or damage; in that context the need for separate self-contained claims is intelligible, both in principle and logic. But I do not take that passage to necessarily restrict the terms of any crave or conclusion, depending on the particular circumstances of the case.

[48] The defenders referred for support for the proposition in MacPhail to the case of *Boulting v Elias* submitting, that this case made clear that, even where there existed circumstances such that it is competent for two or more pursuers to sue in the one action, each pursuer still requires to claim, as an individual, in a separate conclusion, a separate sum of damages. But the circumstances in *Boulting* were of two pursuers seeking to sue on the basis of two discrete contracts; and the loss or damages claimed was different and discrete for each pursuer. It is not relevant to the circumstances in respect of this case.

The decision reiterated that different parties could not “...accumulate their actions in one libel...” unless they had connection with one another in the matters pursued for, or had been aggrieved by the same act “.... Two separate pursuers cannot conjoin in the same action in respect of separate and independent grounds of debt;...”: that can hardly be regarded as controversial.

[49] It is recognised, that two or more pursuers may join together in the same action, each concluding for a separate sum of damages for himself while all found on the same facts and circumstances as establishing the defender's liability: (*Armstrong v Paterson Bros* 1935 SC 464, per Lord President Clyde at p 467).

[50] That rule is so well established as to not require any tracing of its development. The question for this court, is whether that vehicle, for having more than one pursuer claim in the same action for losses arising out of the same wrong, provides a bar to a single conclusion in relation to a loss sustained by the pursuers as a group, distinct from the individual losses alleged to have been sustained.

[51] It is helpful to trace the development of the authorities to which I was referred; the starting point is *Lawson v Leith and Newcastle Steam Packet Company* (1850) 13 D 175; that case dealt with a part owner suing for losses after the destruction of a vessel; the case was concerned with the title to sue of the part owner; the court held that a part owner can sue; the court's approach is worth recording.

[52] The Lord Justice Clerk (Hope) said at p 178:

“...The defenders plead, that the pursuer has no title to sue the action, on the ground that part-owners cannot sue separately. I think it important, at the outset, to state, that while this was pleaded as a general rule, yet Mr Marshall candidly admitted that it could not be universal—for he admitted, that if one owner had discharged his claim, the other would have a title to sue such an action. Now, such an exception must rest on the injustice which would be done if the rule were of absolute and peremptory application in all such cases. And equally I hold, that whenever the rule

contended for, if it really exists, would operate unjustly, it cannot obtain. The fact on which this summons is founded, is the destruction of the property of which there were part-owners, and, by that destruction, the sort of bond which united them together is entirely destroyed in regard to this claim - although it might have subsisted in regard to any contract or adventure, respecting the vessel, on which any claim still existed...."

[53] Lord Cockburn said at p 182:

"...Suppose there had been sixty-four owners, and that sixty-three of them concurred in the action, but that one refused, could the plea of want of title be maintained in such a case? The mind would revolt from such a judgment, as inconsistent with justice and common sense...."

[54] Each emphasises, in considering the procedural route to be taken, that there is a role for justice and common sense. That must be right – in that procedure should be the servant not the master.

[55] *Harkes v Mowat* (1862) 24 D 701 at page 703 was cited as authority for the proposition that combined claims require separate conclusions for each pursuer; the Lord Justice Clerk (Lord Glencorse) said (emphasis added):

"...The other point is one of considerable importance. I think the two pursuers are entitled to issues under this summons, for this reason, that it concludes for damages to each separately arising out of one wrong. Now the fact of the wrong being single is a justification of the two claims being in one libel; but the fact that the injury of each pursuer is separate, makes it necessary that the conclusions should apply to each pursuer separately, as those of this summons do. I think this view is supported by the important case of *Revey*, 11th March 1841 (3 D. 888). Though the Inner-House did not decide this point, it was disposed of by Lord Fullerton. There is in the present summons only one conclusion, but the claims of damages are separately stated. I see no objection to this; but it is clear that the pursuers must take separate issues...."

[56] Again, the decision identifies as the critical point, the fact that the injury of each pursuer is separate, making a separate conclusion necessary. Again, that accords with common sense, but says nothing about the situation where there is an indivisible loss sustained.

[57] *Flanagan v Dempster Moore & co Ltd* 1928 SC 308 dealt with a tender which offered a single sum, which was then apportioned with a particular sum to each pursuer. The issue arose about whether it was a proper tender; the court held that on the construction of the tender adopted by the Lord Ordinary, and accepted by the parties, that it was invalid; in a case with a plurality of pursuers, it was incompetent to tender a lump sum (although the Inner House appear to have viewed the tender as being valid because of the apportionment, but proceeded in the basis of the parties agreed construction).

[58] But the Inner House observations included the following at p 312 where the Lord President Clyde said:

“...[It] is not, in my opinion, possible to make a valid lump-sum tender to a plurality of pursuers in such an action. The pursuers do not conclude for a lump sum which they may allocate or dispute about among themselves; on the contrary, each pursuer claims the specific amount of compensation to which he conceives himself to be entitled in respect of the loss of solace and support which he individually has suffered through the death of husband or wife, father or mother, son or daughter, as the case may be....”

[59] That seems to anticipate the possibility of the pursuers, in particular circumstances concluding for a lump sum. As we shall see, that logic is followed in *Tayside*, where in the particular circumstances the pursers did conclude for a lump sum.

[60] *McNeil v NCB* 1966 SC 72 was again concerned with the question of whether a tender lodged by defenders of a single sum (in respect of a mother and daughter suing in one action, but with separate conclusions) was an effective tender. In that case, it was confirmed that a tender for a single sum to cover the individual claims of relatives was not an effective tender. The claims were separate and, in order to be effective, a tender had to deal with each separate pursuer, because their claims were separate: that is sound in logic and consistent with the decision in *Flanagan*. But again, it is of no assistance in informing the court about the competence of a single conclusion in relation to an indivisible loss.

[61] The defenders had placed reliance on *Buchan v Thomson* and in particular the observation at p 44 where Lord Fraser said "...Although all the claims arise from the one wrong, each pursuer has a separate conclusion, as he is bound to do...." Reference was made to *Harkes* as authority for that proposition.

[62] Lord Fraser went on to say at pp 44/45:

"...Although all the claims will normally be tried together, each will be adjudicated upon separately, by a separate issue in the case of a jury trial, or after separate consideration by the judge at a proof. It is possible that a defence might be sustained against one pursuer and not against another, for example, a defence of *volenti non fit injuria* might be sustained against only one pursuer, or a defence that one pursuer had discharged his claim might be sustained against him but not against the others. Having regard to all these points of separation between the claims, counsel for the pursuers in my opinion was well founded in saying that where several pursuers join in a single process, as they have done in the present case, the process is used by them as a convenient procedure to house a number of separate claims which are, from many points of view, properly regarded as separate actions...."

[63] The decision reflected the various points of separation which existed; the procedure was considered to be a convenient vehicle for all claims, although properly regarded as separate actions. Again, it seems to me that the wording used does not exclude the possibility of an indivisible or inseparable claim by a multitude of pursuers being sought in one conclusion.

[64] The case leading up to *Tayside*, does not preclude or prohibit a single conclusion; *Tayside* involved a joint committee of three local authorities who pooled resources to purchase aggregates. A dispute arose; using the vehicle of the joint committee, the local authorities sued for damages. The defenders sought to challenge the pursuers title to sue.

In repelling the defenders' challenge, the Lord Ordinary said:

"...[28] The result is that Tayside Contracts, though not having its own legal personality, can enter into contracts with third parties and carry out other acts in discharge of its functions, all as authorised by ss.56 and 57 of the 1973 Act. In these circumstances it makes sense that any litigation of the present kind should be framed in the name of the constituent councils acting together under the designation of

Tayside Contracts. I see no difficulty with the three councils, on that basis, seeking payment of a single sum by way of damages, which will be payable to the joint committee and thereafter accounted for in the agreed manner. No individual council has any right to an identifiable share or part of the damages, but rather the whole sum is payable to the joint committee as the contracting party. I consider that all of this is implicit in and authorised by the relevant statutory provisions. It may be that Tayside Contracts can be thought of as 'a legal entity' similar to that described by Lord Keith of Avonholm in the context of a trade union in *Bonsor v Musicians Union* at [1956] A.C., pp.150ff. That said, if the suit was at the hand of the contracting third party, I doubt if the claim would be constrained to exclude diligence against the property of the member councils...."

[65] I take from this, that there are circumstances in which a joint claim may be made; the circumstance in which such a joint conclusion may be apt will be limited. In the instant case, the pursuers seek payment of a single sum by way of damages, which relates to the sums due to the defenders from the earlier proceedings and a single sum representing sums due to their solicitors in relation to the costs incurred. Effectively no individual pursuer has any right to an identifiable share or part of the damages covered by these conclusions, but rather the whole sum is payable to defray the losses sustained.

[66] I do not regard *Tayside Contracts* as determining, that a *sine qua non* of such a conclusion must be the existence of a statutory basis. In *Tayside Contracts*, the legislative foundation allowed the court to identify, that the nature of the claim could be articulated through one conclusion. The law accordingly recognises that in certain circumstances, pursuers can sue for sums due in one conclusion if there is a unity in doing so.

[67] I did consider whether the difficulties which might arise in tendering, provide a bar to the conclusion to be added. The defenders pointed to authorities involving tenders, arguing that these showed, that a joint conclusion was precluded (*McNeil v NCB, Flanagan v Moore*); in fact these are authorities to the effect that the tender must match the conclusion(s), that a single tender to a number of pursuers must break down the sums in accordance with the separate conclusions. I consider that tender procedure is more flexible

than contended for. The days in which a tender has to be explicit, unqualified and unconditional are, I consider, gone; the pragmatism of the Lord Ordinary in *Ferguson v McLennan Salmon Co Limited* 1990 SC 45 is to be preferred; so long as a tender is in clear and unambiguous terms which it is open to the other side to accept, it will be a valid tender. Such a tender could be constructed, whatever the terms of the conclusions.

[68] In this case, the pursuers find themselves (through no fault of their own, on one view) facing payment of a sum of expenses; that sum has not been broken down to apply a particular sum to each pursuer. The court in the earlier action saw fit to group the pursuers together and to make an order against them as one group for the purposes of an award of expenses. This was intelligible and appropriate. Their interest and liability were indivisible in that context. How can it not be appropriate to allow the same group to now seek recover the same sum as part of a larger claim against the defenders who, the pursuers say, were responsible for that loss?

[69] The claims made by the pursuers in relation to the new conclusions are not some contrived device or some opportunistic claim. It is in relation to the first new conclusion, a direct consequence of this court making an award against the pursuers as a group, they having been unsuccessful in an action which was raised as a result of the failure to raise proceedings timeously. The pursuers are not casting about for some mechanism to increase the scope of an award of damages; they are rather seeking that the court recognise a practical and appropriate mechanism for a loss the pursuers claim to have already sustained.

[70] The critical feature is, that the pursuers aver that they have suffered losses for which they are jointly and severally liable. These circumstances clearly provide sufficient nexus to allow the pursuers to sue jointly for recovery of the loss which they have suffered jointly

and severally. Indeed it is not clear that it could properly be done any other way, where the joint and several liability exists for all of the pursuers and no payment has as yet been made. Each could be liable for the whole; absent actual payment, the apportionment cannot be done. Their claim in relation to the elements of the claim contained in the new conclusions which the pursuers seek to add are indivisible and inseparable.

[71] If the defenders were correct about their approach, it would be impossible for the pursuers ever to recover their expenses unless they embarked upon some artificial, and on the face of it, pointless attribution of parts of the expenses to each pursuer. The Law of Scotland is, I suggest, flexible enough to recognise, that in the particular circumstances of this case, the pursuers' approach is the appropriate route to recover the sums. (*Ferguson v McLennan Salmon Co Ltd* 1990 SC 45), is a good example of the inherent flexibility and the need for evolution and development). The alternative is an unattractive inflexibility, where a claim may founder entirely on procedural grounds, because of an inability to provide some precise breakdown or pro rata analysis. Accordingly, I find that the minute of amendment provides for a remedy which is both competent and relevant.

Prescription

[72] I can deal with the matter briefly. The issue of prescription arises not from the capacity in which parties sue, but whether a relevant claim has been made. It is recognised that brief even irrelevant actions can be sufficient to be a relevant claim. There is no change to the nature of the case, the allegations of negligence etc remain the same - as was said in MacPhail:

“...10.36 The court, in considering whether to exercise its discretion to allow amendment, has regard to the object of the relevant statutory provision as to time-bar. In *Greenhorn v J. Smart (Contractors) Ltd* it was observed that if the

pursuer's case as amended were allowed to proceed the defenders would be deprived of the protection which they were intended to enjoy under the relevant provision, the clear policy of which was to protect defenders against stale claims which after the passage of time would be difficult to investigate and resist. On the other hand, an action in relation to a claim to which section 6(1) of the Prescription and Limitation (Scotland) Act 1973 applies may be extensively amended after the expiry of the five-year period, so long as the obligation remains the same, its expression or the grounds for it may be altered...

...10.37 The sum sued for may be increased, and any necessary averments to support the new figure added, by amendment after the expiry of a timelimit. If the amendment is one which is necessary for determining in the existing action the real question in controversy between the parties, the question whether it should be allowed is a matter for the discretion of the court in all the circumstances of the particular case. If objection is to be taken to an amendment on the ground of time-bar and a plea is set out to this effect in the answers, the appropriate way of dealing with the matter is for the court to decide, as a matter of discretion, whether or not to allow the amendment, including the allegedly time-barred averments, at the time when it is dealing with the motion to amend the record..."

[73] The basis for the argument, is that the pursuers are seeking this sum as a group, distinguishing them from the conclusions sought as individuals, so they are thereby transformed from one legal entity into another; I do not agree. The basis of the case remains identical; the only charge is in the vehicle of recovery of a discrete part of the claim, one in which the claims of the pursuers are indivisible or inseparable.

[74] There is no merit in the prescription argument; that matter remains for the discretion of the court and I exercise it in favour of the pursuers.

[75] Accordingly I allow the minute of amendment of the pursuers to be received and allow the closed record to be opened up and amended in terms of the minute of amendment and answers. The pursuers have conceded the expenses of the amendment procedure, but not those relating to the argument over competency. I will accordingly reserve these expenses meantime.