FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 24
CA68/22

Lord President
Lord Malcolm
Lord Doherty

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD PRESIDENT

in the reclaiming motion

in the cause

LEGAL AND GENERAL ASSURANCE (PENSIONS MANAGEMENT) LIMITED

Pursuers and Respondents

against

THE FIRM OF HALLIDAY FRASER MUNRO

First Defenders and Reclaimers

and

FAIRHURST (formerly W A FAIRHURST & PARTNERS)

Second Defenders

and

STEWART MILNE GROUP LIMITED

Third Defenders

and

HALLIDAY FRASER MUNRO LIMITED

Fourth Defenders and Reclaimers

Pursuers and Respondents: MacColl KC, A McKinlay; Eversheds Sutherland (International) LLP
First and Fourth Defenders and Reclaimers: Borland KC, Manson; DAC Beachcroft (Scotland) LLP

27 August 2025

Introduction

[1] In this reclaiming motion (appeal) the first and fourth defenders, a firm of architects and the company which assumed the firm's liabilities, challenge the commercial judge's refusal to dismiss claims made against them by the respondents as beneficiaries of a collateral warranty. No evidence has been led, the case having come before the court at the stage of considering the relevance (legal validity) of the respondents' pleadings. In deciding whether the pleadings are relevant the commercial judge required, and this court requires, to proceed on the basis that the respondents will prove their averments of fact. The reclaimers contend that any liability they might owe to the respondents has been extinguished by operation of the short negative prescriptive period of five years.

[2] The respondents raised two actions in which they sought damages from the main contractors (the third defenders), the architects (the first and fourth defenders) and the engineers (the second defenders) for defects in a multi-storey office building in Aberdeen, known as Union Plaza. The building was constructed in 2008. The respondents are the second purchasers of it, having bought it in December 2013 from a company known as Union Plaza Limited Partnership ("UPLP").

[3] The respondents' title to sue is derived from collateral warranties they were granted at or about the time when they purchased the building. In a number of important respects matters have developed substantially since the cases were before the commercial judge for debate. The main contractors went into liquidation and decree was thereafter granted against them without opposition. The claims against the engineers are not before the Inner House; they have not appealed the judge's decision. The second of the actions settled shortly before the summar roll (substantive) hearing in the Inner House.

[4] We are thus concerned only with the claims directed by the respondents against the architects, Halliday Fraser Munro and their successors, Halliday Fraser Munro Limited in the remaining action. For convenience we shall refer to the firm and the company simply as the reclaimers, there being no material difference between their positions for the purposes of the reclaiming motion. As we shall explain, at a late stage in the appeal the respondents sought radically to alter their position on one of the key legal issues in the case.

[5] In various respects, which it is unnecessary for present purposes to set out in any detail, the respondents allege that the reclaimers failed in their duties under their appointments as architects by Stewart Milne Central Limited ("SMC"). In short, the respondents allege that the reclaimers failed to exercise the skill and care to be expected of reasonably competent architects. The design of the protective paint system and soffit insulation in the basement and deep basement fell within the scope of the services the reclaimers agreed to provide. They also had monitoring and inspection duties extending to those works. The respondents aver that the reclaimers are in breach of all their obligations, warranties and undertakings in their appointment and in the collateral warranty. The defects in the design of the protective paint system and soffit insulation are alleged to have arisen as a result of the reclaimers' breaches of their obligations, warranties and undertakings and also due to failures in their monitoring and inspection duties. They are said to have failed to carry out their design, monitoring and inspection responsibilities competently.

[6] In response to the pleaded defence of prescription, the respondents admitted in their pleadings that, on the factual hypothesis on which the action proceeded, *damnum* (damage) and *injuria* (wrongful act) had coincided more than 5 years before the proceedings were served on the reclaimers. That was the stance they adopted before the commercial judge and in their written submissions lodged for the summar roll hearing in the Inner House. The respondents

maintained, however, that they and the previous owners of the building had been induced by the reclaimers' words and conduct to refrain from making claims based on the alleged breaches of duty on the part of the reclaimers.

[7] In his oral submissions at the summar roll hearing senior counsel for the respondents sought to advance a new line of argument. The primary position now adopted was that the prescriptive period ran from the date of the collateral warranty. This meant that, according to the respondents, the claims made against the reclaimers in the summons based on the defective paint system had not prescribed since the summons was served within five years of the collateral warranty being granted. The claims concerning the design and installation of the soffit insulation were in a different position, having first been advanced more than five years after the date of the collateral warranty. In respect of the soffit insulation claims the respondents' position was that they had first become aware of these defects on receiving expert advice in August 2020 and further that they had been induced into error by representations made by the reclaimers in the collateral warranty that they had complied with their obligations under their appointment by SMC. The respondents' change of direction led to further procedure being necessary in the Inner House.

[8] There are essentially two questions of law now before this court: whether the respondents are precluded from relying on the collateral warranty granted by the reclaimers because it was entered into after they purchased the building, and whether the claims against the reclaimers have, in any event, prescribed by operation of the short negative prescriptive period of five years.

Factual Background

[9] The following brief account of the factual background is drawn from the averments in the respondents' pleadings. In 2006 SMC were the heritable proprietors of land at Union Wynd in Aberdeen. They entered into a construction contract for the development of Union Plaza with Stewart Milne Group Limited ("SMG") on 1 December 2006. SMG were appointed as the main contractors for the construction of the building.

[10] A certificate of practical completion was issued on 8 July 2008.

[11] Shortly thereafter (on 22 August 2008) SMC sold Union Plaza to UPLP, a company within the same group.

[12] A certificate of making good defects was issued on 13 December 2013. One week later, on 20 December 2013, UPLP sold the building to the respondents.

[13] The agreement entered into in 2007 between SMC and the reclaimers appointing the latter as consultants contained a provision (clause 9) obliging the reclaimers, on being requested to do so by SMC, to execute and deliver to any future purchaser (amongst others) a collateral warranty in the form set out in a schedule.

[14] On 6 January 2014 the reclaimers and the respondents entered into a collateral warranty agreement in the terms set out in the schedule to the appointment agreement. In summary, the collateral warranty provides that the respondents are deemed to have relied upon the reclaimers' skill and judgement on matters within the scope of the appointment and that the reclaimers had used all reasonable care and skill in the performance of their architectural services. It also states that the reclaimers shall owe no greater duties or obligations to the respondents than they owed to SMC.

[15] The respondents had been made aware before their purchase of Union Plaza that there was some water ingress caused by structural defects in the two basement levels containing the

car parks. They were advised that the problem had been rectified, but water ingress continued after the respondents' acquisition of the building. In or around May 2018, the respondents entered into an agreement with SMG for remedial works to be carried out. Further defects consequential on the water ingress were then discovered. There was premature degradation of the specialist paintwork in the basements; this was due to inherent defects in the design and application of the paint protection system. The cause of these defects became known to the respondents in November 2018 following the appointment of Jones Lang LaSalle to carry out investigations.

[16] A summons founding on the basement defects was served on 17 December 2018. The action sought to recover £350,000 for the costs of investigation of and remedial works to put right the paint protection defects. Separately, the respondents sought to recover £50,000 from SMG for repair costs arising from water ingress in the deep basement.

[17] In August 2020 defects in the design and installation of the soffit insulation between the steel beams and the steel metal decking in the basement areas were identified. Missing or poorly installed insulation materials had resulted in the risk of exposure of the beams in the event of fire. The issues with the soffit insulation were due *inter alia* to design and inspection failures by the reclaimers. On 2 February 2021 the respondents introduced, by adjustment of their pleadings, claims based on defective design and installation of the soffit insulation.

[18] The respondents also identified issues with the superstructure of the building in October 2020. A separate summons was served in respect of the superstructure defects on 1 June 2021. This action was settled shortly before the reclaiming motions were due to be heard on the summar roll.

[19] The reclaimers defended the first action on a number of grounds. For present purposes it is sufficient to note only two of these. First, they contended that any breach of the collateral

warranty had not caused the respondents to suffer loss because they had purchased the building before the date of the collateral warranty. Secondly, any obligation on the part of the reclaimers to make reparation to the respondents had been extinguished by operation of the short negative prescription of five years.

[20] In answer to these lines of defence, the respondents averred that the fact that they had purchased the building before the collateral warranty was irrelevant. They contended that none of the claims had prescribed.

[21] In support of their position on prescription the respondents averred that one effect of a clause in the collateral warranty (clause 3.2) was to incorporate, by way of contractual limitation, the same prescriptive period as would have applied to any claim against the reclaimers by SMC. The respondents relied on section 6(4) of the Prescription and Limitation (Scotland) Act 1973: they, SMC and UPLP, had been induced by the reclaimers' words and conduct to refrain from making a relevant claim in relation to the breaches of duty founded upon in the action.

The collateral warranty agreement

[22] The recitals explain that SMC has appointed the reclaimers to carry out services under their appointment, that the respondents have entered into an agreement to buy the whole or part of the site and that SMC has entered into a construction contract for the construction of the project.

[23] By clause 2 the reclaimers acknowledge and warrant that they have been appointed and instructed by SMC as architects in connection with the project.

[24] Clause 3 provides as follows:

"**3 DUTY OF CARE**

3.1 Duty of Care

The [reclaimers acknowledge] … that the [respondents] shall be deemed to have relied upon the [reclaimers'] reasonable skill and judgement in respect of those matters relating to the Services which lie within the scope of the [reclaimers'] Appointment and that the [reclaimers have] used and shall use all reasonable skill and care in the performance of its services under the Appointment to be expected of a prudent, experienced, properly qualified and competent Architect with experience of carrying out services similar to the Services in connection with projects of a similar standard, size, scope, nature, complexity and value to the Project.

3.2 **No greater duties**

The [reclaimers] shall owe no greater duties or obligations to the [respondents] under the terms of this Agreement than [they] would have owed to the [respondents] had the [respondents] been named as the Client under the Appointment save that this Agreement shall continue in full force and effect notwithstanding the determination of the Appointment for any reason.

3.3 **No loss**

The [reclaimers] agree … that [they] will not be entitled to argue in defence or mitigation of any claim against [them] arising from this Agreement that any loss suffered or cost incurred by the [respondents] or any permitted assignee of the [respondents] is not recoverable from the [reclaimers] pursuant to this Agreement because that loss or cost has not been suffered or incurred by [SMC]."

[25] Clause 6 provides that the respondents are to have the right to assign the benefit of the collateral warranty on one occasion to any party purchasing the respondents' interest in the development and such assignee is to have the right to assign once to any party purchasing its interest; that the respondents shall not assert that any permitted assignee has suffered no loss; and that the reclaimers agree to enter into warranties in the same terms with any heritable creditor or tenant of the respondents. Clause 7 obliges the reclaimers to effect and maintain professional indemnity insurance for 12 years from the date of practical completion. By clause 12 it is agreed that the collateral warranty shall be governed and construed in accordance with Scots law and that the Scottish courts are to have exclusive jurisdiction.

The commercial judge

[26] On the issue of whether the respondents were entitled to recover damages under a collateral warranty granted after they purchased Union Plaza on 20 December 2013, the judge held that the collateral warranty could provide a basis for recovery. There was no reason why a person who became liable for the cost of repairing a defect in a building should not be entitled to sue for that cost provided he was the beneficiary of an appropriately worded collateral warranty granted by the person responsible for the defect (*Scottish Widows Services Ltd* v *Harmon/CRM Facades Ltd* [2010] CSOH 42; 2010 SLT 1102).

[27] In respect of the respondents' answer to the prescription defence, the only question at the stage of the debate was whether the action was bound to fail. The respondents were entitled to aver that the creditors in the reclaimers' obligations, whoever they were historically, had been induced to refrain from making a claim by reason that they did not have knowledge of such a claim. The respondents were entitled to rely on the words and conduct of the reclaimers showing that they had complied with their obligations under their appointment (*Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Ltd* [2011] CSIH 26; *Caledonian Railway Co* v *Chisholm* (1886) 13 R 773). The principle of equivalence in the context of collateral warranties meant that the respondents stood in the shoes of SMC and UPLP. The respondents were able to recover the type of loss they would have been entitled to had they been party to the contract appointing the reclaimers. That was the purpose of the collateral warranty, to prevent claims from falling into a black hole. The respondents relevantly offered to prove an erroneous belief on the part of the previous owners, as well as the respondents themselves, that the reclaimers had complied with their duties.

[28] For section 6(4) of the 1973 Act to apply, error on the part of a company such as the respondents should be accompanied by a specific mental state in one or more individuals which was capable of being attributed to the company (*Dryburgh* v *Scotts Media Tax Ltd* [2014] CSIH 45; 2014 SC 651), but this was an evidential matter. There need not be a conscious act of self-restraint by the creditor in not raising the claim. The protection afforded by section 6(4) extended to the period during which the creditor did nothing to enforce the obligation (*BP Exploration Co Ltd* v *Chevron* [2001] UKHL 50; 2002 SC (HL) 19). The respondents claimed that the relevant creditor at all material times was unaware of the existence of a right of action as a result of words or conduct of the reclaimers inducing the respondents and their predecessors erroneously to believe that the reclaimers had complied with their duties under their appointment. Time should not start running until the error was discovered.

[29] The words and conduct relied upon by the respondents were capable of being understood as a false representation by the reclaimers, giving rise to an erroneous belief on the part of the creditors that the reclaimers had complied with their obligations. The respondents had pled a relevant and specific case.

Procedure in the Inner House

[30] The grounds of appeal and the written submissions for the parties addressed the two arguments we have summarised: whether the commercial judge was correct to hold that it was immaterial that the collateral warranty post-dated the respondents' acquisition of the building and whether he was right to refuse to hold that the respondents' averments in support of a case based on section 6(4) of the 1973 Act were irrelevant. The respondents did not seek to argue that the terms of the collateral warranty were insufficient to incorporate by way of

contractual limitation the same prescriptive period as would have applied to a claim brought by SMC against the reclaimers.

[31] As we have mentioned, in the course of his oral submissions at the summar roll hearing, senior counsel for the respondents sought for the first time to develop a new line of argument. He now submitted that clauses 3.1 and 3.2 of the collateral warranty were insufficient to incorporate the prescriptive period which would have applied to a claim against the reclaimers by SMC. The new argument was that the language of clause 3.2 merely stated that the scope of the duties owed by the reclaimers was not enlarged or expanded by the collateral warranty. It did not do more than that. It said nothing about the duration of the reclaimers' liabilities to the respondents or the timescales within which they could be enforced. The position was fundamentally different to that in *British Overseas Bank* v *Stewart Milne Group* [2019] CSIH 47; 2020 SC 24 where there had been a specific provision entitling the contractor to rely, in a question with the beneficiary of the collateral warranty, on any defence it would have had against the original employer.

[32] Since the reclaimers had not had notice of the new argument and in view of its possible importance, we requested further written submissions on it and put the case out for a further short hearing. At the outset of the hearing we allowed the respondents' pleadings to be amended to reflect the new line of argument.

Argument 1: no recoverable loss because the collateral warranty was entered into after the reclaimers bought Union Plaza

[33] It is convenient to deal first with the reclaimers' argument based on the date of the collateral warranty. It will be recalled that the collateral warranty post-dated the respondents'

purchase of Union Plaza on 20 December 2013. The collateral warranty was signed on 6 January 2014.

Reclaimers' submissions

[34] The respondents sustained loss at the time when they bought the building; at that point they became burdened with a defective building with a reduced value. Loss occurred at that stage. Any breach of the collateral warranty did not cause (indeed could not cause) the respondents to suffer loss. The respondents had already sustained the loss by the time the contractual obligations or promises in the collateral warranty were created and took effect and were, on the hypothesis on which the respondents' case proceeded, breached. Loss could not relevantly pre-date the existence of the obligations or promises said to have been breached (*Davies* v *Bridgend County Borough Council* [2024] UKSC 15; [2025] AC 434). To have a relevant claim for damages for breach of contract, the loss complained of must have been caused by the breach. If the respondents would have suffered the loss apart from the breach, they were not entitled to damages for loss which they would always have sustained. The respondents could not prove that but for the reclaimers' breach of contract their loss would not have occurred. The principle of "but for" causation applied in the absence of any agreement to contrary effect; there was no such agreement. On the admitted facts the respondents would have suffered loss anyway, regardless of the post-dated collateral warranty.

[35] The purpose of the collateral warranty was to create a contractual link between entities who would otherwise have no such connection. It did not provide a guarantee against or an indemnity in respect of losses occurring before it was entered into.

[36] The commercial judge erred in failing to apply the normal rules of breach and causation. He erred in failing to hold that the respondents suffered loss when they purchased a defective

building. He erred in failing to hold that an alleged breach of the collateral warranty entered into in January 2014 could not have caused the respondents to suffer the loss they had sustained on 20 December 2013. For these reasons the action insofar as directed against the reclaimers was irrelevant and should be dismissed.

Respondents' submissions

[37] The collateral warranty refers to the respondents being deemed to have relied upon the reclaimers' performance of their obligations under their appointment with SMC. Reliance is often a pre-requisite for claims based upon delict, but was not required for a claim based upon contract or promise (Keating, *Construction Contracts* (11th ed 2020), para [6.042]; *George Fischer Holding Ltd* v *Multi Design Consultants Ltd* (1998) 61 ConLR 85; *Scottish Widows Services Ltd*, *supra*).

[38] The collateral warranty refers to the respondents being deemed to have relied upon the reclaimers' performance of their obligations under their appointment with SMC (Clause 3.1). The language of the collateral warranty was intended to give rise to a liability on the part of the reclaimers to the respondents in circumstances such as the present, regardless of when the respondents acquired their interest in the defective building. The date of signature of the collateral warranty by the reclaimers did not prevent the respondents from relying on it post-purchase for breach of the collateral warranty.

[39] Even if there was a requirement for reliance, this was met on the facts of the case. The reclaimers were obliged to grant a collateral warranty to subsequent purchasers; it was a condition of the respondents' purchase that UPLP would use reasonable endeavours to procure fresh warranties in favour of the respondents or, failing which, to assign the existing warranties granted in favour of UPLP. The respondents accordingly completed the purchase on the basis

that they had a legal entitlement, which was enforceable against UPLP, to receive rights of action against the reclaimers, whether by way of fresh grant or assignation of existing warranty rights held by UPLP. In these circumstances, the respondents did rely upon the existence of the rights which they acquired under the reclaimers' collateral warranty.

Argument 1: analysis and decision

[40] The scope and effect of the collateral warranty fall to be determined by the normal rules and principles of contractual interpretation. The purpose of a collateral warranty is to provide a right of action between parties who, under standard legal structures used in construction contracts and professional appointments, would not otherwise be in a contractual relationship (*Scottish Widows Services Ltd* v *Harmon/CRM Facades Ltd (in liquidation)* [2010] CSOH 42; 2010 SLT 1102, para [17]; *British Overseas Bank* v *Stewart Milne Group* [2019] CSIH 47; 2020 SC 24, para [12]). In *Scottish Widows Services Ltd* the commercial judge (Lord Drummond Young) explained the purpose of collateral warranties in the construction industry. He said this at paragraph [17]:

> "In delict such economic loss will generally not be recoverable by any person other than the original owner of the building or its assignee…, but there is no such limitation on recoverability in contract. In delict the right to sue is based on the existence of a duty of care together with breach of that duty and resulting loss caused to the person to whom the duty is owed. In contract, on the other hand, the right to sue is based on the existence of a contractual obligation and breach of that obligation, and the restrictions that limit the existence of a duty of care do not apply; the contract creates the duty. Consequently there is no reason that any person who becomes liable for the cost of repairing a defect in a building should not be entitled to sue for the cost provided that he is the beneficiary of a collateral warranty granted by the person responsible for the defect."

[41] In paragraph [18] Lord Drummond Young continued as follows:

> "If a collateral warranty has been granted in favour of the person who is ultimately liable for the cost of repair, that person can in my opinion raise an action against the

> granter of the warranty in order to recover the cost of repair, provided that the collateral warranty is in terms that are habile to cover that cost. That, it seems to me, accords with the fundamental purpose of such a warranty, namely to provide a right of action to a person who is liable to suffer loss as a result of defective performance of a building contract or a contract for professional services in connection with a building project."

[42] The reclaimers argued that the respondents could not have sustained any loss due to breach of the collateral warranty because the loss had already occurred by the date when they purchased Union Plaza, which was then in a damaged condition; the collateral warranty had not existed at the time when the building had been damaged and loss could not therefore be attributable to a breach of the collateral warranty. This argument fails to give effect to the clear terms and underlying purpose of the collateral warranty. As is made clear by clause 3.1, the reclaimers warranted to the respondents that they had performed their duties as architects under their appointment by SMC with reasonable skill and care; in effect, they undertook or promised that they had done so. The respondents offer to prove that the reclaimers failed to fulfil their promise. Should the respondents succeed in proving that there had been such a failure it follows that the reclaimers would have failed to carry out the undertaking they gave to the respondents by clause 3.1. As Stuart-Smith LJ observed in *Toppan Holdings Ltd* v *Simply Construct (UK) LLP* [2022] EWCA Civ 823; [2022] Bus LR 1079 at paras 107 - 108, the normal meaning of the verb to warrant is to provide a promise about a fact, circumstance or outcome. In its ordinary English meaning the word "warranty" denotes a binding promise (*Oscar Chess Ltd* v *Williams* [1957] 1 WLR 370, Lord Denning LJ at 374). If the warranted fact, circumstance or outcome turns out not to be true, the person who warranted that it was true will be liable for breach of their promise in warranting it. When these fundamental features of a warranty are borne in mind it becomes clear that the fact that the collateral warranty in the present case post-dated the respondents' acquisition of the building has no bearing on the issue as to

whether the reclaimers fulfilled their contractual obligation or promise given under and in terms of the collateral warranty. The respondents offer to prove that the promise that the reclaimers had exercised reasonable care and skill in carrying out their duties as architects was broken. The language and purpose of clause 3.1 make clear that the parties' intention was that the reclaimers should be liable to the respondents for any failure to use reasonable skill and care under their appointment notwithstanding that the collateral warranty was entered into after the respondents acquired ownership of Union Plaza. Any other interpretation would deny meaningful effect to the collateral warranty and to clause 3.1 in particular.

[43] The respondents aver that the reclaimers have breached the promises that they made in the collateral warranty. Had the reclaimers fulfilled those promises, the respondents would not have had to incur investigation and remedial costs to remedy the defects in the building. It follows in our view that those costs are a loss caused by the reclaimers' breach of the collateral warranty (*Scottish Widows Services Ltd, supra*, Lord Drummond Young at para [29]). The reclaimers' approach would result in that loss falling into a legal "black hole" - an outcome which the collateral warranty was intended to prevent.

[44] For these reasons we have no hesitation in rejecting the reclaimers' first argument.

Argument 2: properly construed, the collateral warranty does not incorporate the prescriptive period which would have applied to a claim by SMC against the reclaimers

Reclaimers' submissions

[45] There was no material difference between the terms of the collateral warranty in *British Overseas Bank, supra,* and those in the present case. In particular, the "no greater duties" provisions in both contracts were essentially the same. This court was bound to follow *British Overseas Bank* in which it was held that the "no greater duties" provision was sufficient in itself

to incorporate a contractual time-bar corresponding to the conventional prescriptive period. Such a clause went not just to the scope of the duties or obligations owed by the contractor or consultant; it also encompassed the duration of those duties or obligations. Clause 3.2 of the collateral warranty in the present case was essentially identical to clause 2.3 in *British Overseas Bank*. The use of the word "obligations" in clause 3.2 added further weight to the reclaimers' argument. That clause incorporated not just the scope and nature of the obligations, but also the defences on which the granter of the collateral warranty would have been able to rely in a claim by SMC (the saving provision in section 6(4) of the 1973 Act was not carried forward, however).

[46] The decisions in the English cases of *Safeway Stores* v *Interserve Project Services* [2005] EWHC 3085 (TCC); 105 ConLR 60 and *Swansea Stadium Mgt Co Ltd* v *Swansea C & CC* [2018] EWHC 2192 (TCC); [2019] PNLR 4 were indistinguishable from the present case.

[47] A collateral warranty should normally be subject to the same time bar as would have been applied to the contract between the employer and the granter of the warranty (*British Overseas Bank*, para [27]). The principle of equivalence suffused the court's reasoning in that decision. The court recognised that the underlying commercial purpose of collateral warranties was of fundamental importance when construing their terms. That purpose was to provide the purchaser with rights against the contractor or consultant which were equivalent to those enjoyed by the employer and also to provide the consultant or contractor with the same defences as they would originally have had against a claim by the employer.

[48] The result of applying these principles in the circumstances of the present case was that the time-bar had expired before the warranty came into effect because more than five years had elapsed from the date of practical completion. It followed that the claim in the summons had prescribed.

Respondents' submissions

[49] Any collateral warranty should be construed in accordance with the usual rules on the interpretation of contracts. The existence or non-existence of a contractual limitation period should be determined by consideration of the language used in the collateral warranty. It followed that there was no general rule that a claim arising from a breach of collateral warranty was subject to contractual limitation having the same end date as the prescriptive period which would have applied to a claim brought by the employer under the construction contract or the appointment. In the circumstances of the present dispute, there was nothing in the terms of the collateral warranty granted by the reclaimers, including clauses 3.1 and 3.2, which required any claim under the collateral warranty to be brought before the end of the prescriptive period that would have applied to a claim brought against the reclaimers by the employers.

[50] Absent an express contractual limitation provision, the grant of a collateral warranty resulted in a fresh prescriptive period; this had the practical result that the period during which the granter might competently be sued was extended.

[51] The importance of drafting any contractual limitation provision with care was well-known in the construction industry. Clauses which have incorporated "no greater liability" wording have tended to have the result that the equivalent prescriptive period that would have applied to a claim by the employer is imported (e.g. *Safeway Stores* v *Interserve Project Services*, *supra*). No such language was contained in the collateral warranty in the present action. The respondents were not aware of any authority in support of there being a default position, or similar, whereby parties to a collateral warranty were presumed to have intended to import the same prescriptive period as would have applied in a claim by the employer against the granter of the collateral warranty. Rather, the existence and scope of any

contractual limitation provision remained a matter for negotiation between the parties. As with any other contract, the court should not seek to rewrite the parties' bargain and should look primarily to the words used by the parties.

[52] The decision in *British Overseas Bank, supra,* turned upon the wording used in that particular collateral warranty. The outcome hinged on the terms of clause 3.1 providing that the contractor was entitled to rely on any defence it would have had against the original employer. The "no greater duty" clause was not determinative. Any more general observations, such as those identifying a principle of equivalence or suggesting that a collateral warranty should normally be subject to the same time-bar as applied in the original contract, were *obiter* (incidental) and should be disapproved.

[53] The high point of the reclaimers' argument was the provision in clause 3.2 that it owes "no greater duty" than if the respondents had been named as the client under the reclaimers' appointment.

[54] The word "duties" in clause 3.2 was concerned with the nature and scope of the obligations giving rise to any liability. The purpose of clause 3.2 was to ensure that, in providing the collateral warranty, the reclaimers were not agreeing to some more onerous obligation than they had under their appointment, or that they would have owed to the respondents had the respondents been the employer.

[55] The "no greater duties" wording did not provide, either expressly or by implication, that any rights of defence such as prescription, which the reclaimers may have been able to advance in a claim by the employer, should be capable of being advanced in a claim by the respondents.

[56] A collateral warranty which was more generous in terms of the time in which a claim can be brought (e.g. without any contractual limitation provision) was no doubt preferred by recipients of warranties, such as purchasers and funders. The availability of a collateral

warranty in those terms could, in principle, increase the value of a property or project. The party granting a collateral warranty, or undertaking to do so in the future on pre-agreed terms, would no doubt seek to negotiate for as much protection as possible. This was a matter of balancing commercial interests and risks in relation to contractual arrangements freely entered into.

[57] The summons was served on the reclaimers on 17 December 2018, within five years of the collateral warranty having been granted. There was accordingly no question of any obligation to make reparation in respect of the breach of contract founded upon in the summons having prescribed. The respondents' averments at article 22A anent design and installation of the soffit insulation were introduced by way of adjustment on 2 February 2021. The respondents accepted in article 37 of condescendence that no relevant claim in relation to that issue had been made prior to 2 February 2021. In relation to the soffit insulation issue only, the reclaimers' obligation to make reparation had *prima facie* prescribed. The respondents therefore required to rely upon one or more of the saving provisions in the 1973 Act. A relevant case for reliance upon sections 6(4) and 11(3) of the 1973 Act had been pled. In the context of prescription (as opposed to contractual limitation) of the soffit insulation breach, the conduct by the reclaimers founded upon by the respondents as having induced it into error was the grant of the collateral warranty.

Argument 2: analysis and decision

British Overseas Bank v *Stewart Milne Group*

[58] In *British Overseas Bank* v *Stewart Milne Group* [2019] CSIH 47; 2020 SC 24 the Inner House held (the court's opinion being delivered by Lord Drummond Young) that the terms of a collateral warranty entered into between a design and build contractor and a purchaser of a

retail development made it clear that the liabilities undertaken by the contractor to the purchaser were to be equivalent to, but no greater than, the contractor's liabilities under the building contract. The intention of the clause in the collateral warranty entitling the contractor to rely upon the same rights in defence of liability as it would have had against the employer was to incorporate those defences into the relationship between the contractor and the purchaser, including incorporation of a conventional limitation period that corresponded to the statutory period of prescription applying to any claim under the design and build contract. This was deemed central to the purpose of the collateral warranty (*British Overseas Bank,* para [12]).

[59] The collateral warranty in *British Overseas Bank* contained the following provision:

> "2.3 The Contractor shall have no greater duty to the Beneficiary under this Agreement than it would have had if the Beneficiary had been named as the employer under the Building Contract".

[60] Clause 3, headed "Limitation of Liability", was in the following terms:

> "3.1 The Contractor shall be entitled in any action or proceedings by the Beneficiary to rely on any limitation in the Building Contract and to raise the equivalent rights in defence of liability as it would have against the Employer under the Building Contract (other than counterclaim, set-off or to state a defence of no loss or a different loss has been suffered by the Employer than the Beneficiary).
>
> 3.2 No action or proceedings for any breach of this Agreement shall be commenced against the Contractor after the expiry of 12 years from the date of issue of the final statement of practical completion or the equivalent under the Building Contract."

[61] The court began its contractual construction analysis in paragraph [6]. Under reference to a number of well-known cases setting out the principles of contractual interpretation, including *Rainy Sky SA* v *Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 and *Wood* v *Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173, the court observed that the fundamental issue turned on the construction of the collateral warranty. A collateral warranty was a contract

in its own right, distinct from (although dependent on) the building contract to which it related. Consequently, the terms of a collateral warranty should be construed in the same way as contracts generally.

[62] In paragraph [7] the court stated that the contractual provisions had to be construed in accordance with the objective intention of the parties: the intention that reasonable persons would have had in the parties' position had they possessed the same background knowledge. It was also appropriate to rely on commercial common sense. The exercise of construction should be both purposive and contextual. Determining the purposes of the contractual provisions in a collateral warranty "will obviously turn on the wording used". The underlying commercial purpose of a collateral warranty was important. The fundamental purpose of the collateral warranty was to place the beneficiary and the contractor in an equivalent position to the original developer and the contractor, not to extend the obligations of the contractor to the beneficiary of the collateral warranty beyond those undertaken to the original developer.

[63] We have no difficulty with the court's rehearsal of the standard approach to the construction of commercial contracts; essentially this depends on interpreting the language chosen by the parties in the context in which the contract was entered into. As Stuart-Smith LJ put it in *Toppan Holdings Ltd* v *Simply Construct (UK) LLP* [2022] EWCA Civ 823; [2022] Bus LR 1079 at paragraph 104, when construing a commercial contract, such as a collateral warranty, the court seeks the objective meaning of the language used by the parties in its documentary and commercial context. If the language of the contract is unambiguous the court must apply it. But if there are two possible interpretations the court is entitled to prefer the interpretation which is consistent with business common sense as at the date of the contract and to reject the other.

[64] In paragraph [23] the court examined the terms of clause 2.3. It observed that the clear intention was that the liabilities undertaken by the defender under the collateral warranty were to be equivalent to, but no greater than, the defender's liabilities under the building contract. The collateral warranty was designed to place the beneficiary in the same position as if it were the employer under the building contract, and thus to avoid the risk that loss would fall into a "black hole" because of the absence of any relationship between the contractor and the beneficiary. The intention was not to place the beneficiary in a more favourable position than the original employer. We observe that in these passages the court was employing the notion of equivalence to refer to the scope of the duties and obligations owed by the defender to the beneficiary under the collateral warranty. Such duties and obligations were not to extend further than the duties and obligations owed to the original employer; they were to be equivalent to the original duties and obligations. Clause 2.3 made this clear.

[65] In paragraph [24] the court considered the terms of clause 3.1 and 3.2. It recognised that these provisions went further than clause 2.3 because they ensured that defences that would be available to the contractor against a claim by the employer were to be available in defence of a claim by the beneficiary of the collateral warranty. Construed objectively, the intention was to place the parties to the collateral warranty "in an equivalent position" to that of the employer and contractor under the design and build contract. That meant that the beneficiary was to obtain the same rights that the employer had against the defender, but subject to the defences and limitations that the defender would have had against the employer. In this section of its judgment the court was speaking of equivalence in a different sense to that used in paragraph [23] where it had considered equivalence of duties and obligations owed by the contractor. Instead in paragraph [24] the context was one of equivalence of defences. The purpose of clause 3.1 was to provide for the equivalence of defences. The purpose of clause 2.3

was different; it was to make clear that the scope of the duties to be owed by the contractor to the beneficiary did not extend beyond those owed to the original employer.

[66] From these passages, in which the court examined the two critical clauses in the contract, it can be seen that the fundamental basis of the decision in *British Overseas Bank, supra,* lay in the proper construction of clauses 2.3 and 3.1 of the collateral warranty. The *ratio* (the court's reasoning for its decision) of the case depended on that analysis. By those clauses the parties agreed on two distinct points: first, that the defender's duties and obligations to the beneficiary of the collateral warranty should not be greater than those it owed to the employer; and second, that the defender should be entitled to rely, in a question with the beneficiary, on the same defences it would have been entitled to rely on against the employer.

[67] In other parts of its judgment the court made a number of more general observations; these were clearly *obiter* (incidental) in nature as they were not central to the court's reasoning, which as we have explained turned on construction of the critical clauses in the collateral warranty.

[68] In paragraph [12] the court stated that equivalence "require[d]" not merely that the beneficiary should have the same affirmative rights of action as the original employer; it also "require[d]" that those rights of action should be subject to the same qualifications, limitations and defences as were available to the contractor in respect of the original building contract. With respect, this involves a *non sequitur*. It does not follow from the fact that the parties have agreed that there should be equivalence of duties and obligations that they must also be taken to have agreed that there should be equivalence of defences. The parties to a collateral warranty may provide for equivalence of duties, but decide that there should not be equivalence of defences. That is a matter for them.

[69] In paragraph [16] the court stated that because of the importance of time-bar provisions to contractors and designers, it was of the opinion that a collateral warranty should "normally" be subject to the same time-bar as applied to the original building contract. By the same time-bar the court explained that it meant a time-bar that had effect on the same date as would have applied under the original building contract. The court could not "conceive of any policy reason to the contrary". The court then stated that it was obviously possible for the parties to a collateral warranty to agree on a different time-bar from that under the building contract, subject to the mandatory nature of the statutory law of prescription, but "in construing contractual provisions the norm must, we think, be that the same time-bar should apply to all the potential liabilities of the contractor and the design team".

[70] For our part, we do not consider that there is as a matter of law any "normal" rule or principle amounting to a presumption or default position governing the time-bar in collateral warranties. The matter depends on what the parties have agreed in the particular collateral warranty. In our opinion, there is no principled reason why the defences that would have been available under the original contract should automatically be imported into the collateral warranty in the absence of specific provision to that effect. As Bailey, *Construction Law* (4th ed 2024), vol II, para 12.155 observes, "The liability of the provider of a collateral warranty may be limited by express terms."

[71] It is important to recall that a collateral warranty is a commercial contract. As the authors of *Keating, Construction Contracts* (12th ed 2024) observe at para 6-042, "These contracts have in law all the manifestations and requirements of ordinary contracts and in principle they have no special features." A contractual warranty will usually be the product of negotiations between parties whose interests will often conflict (see e.g. the observations of Lord Kingarth delivering the opinion of the court in *Glasgow Airport* v *Kirkman & Bradford* [2007] CSIH 47;

2007 SC 742, at para [10]). The employer or developer will often be motivated to ensure the provision of collateral warranties to prospective subsequent purchasers containing generous terms so as to maximise the marketability of the development. They may wish to ensure that subsequent purchasers are not subject to the same time-bar as would have applied under the original building contract, particularly if many years have elapsed since completion of the project, and even more so if the original time-bar has expired. The granter of a collateral warranty may wish to achieve the very opposite outcome. The beneficiary is likely to favour an extended time-bar. In other words, the granter may seek in negotiations to restrict its liabilities, the beneficiary to have them extended. In view of this commercial *realpolitik*, we can see no scope for any presumption or default rule to the effect that the collateral warranty should "normally" be subject to the same time-bar as applied to the original contract.

[72] Similarly, the reference in paragraph [22] to "the fundamental basic principle of equivalence" and in paragraph [23] to "[t]he principle of equivalence" were not central to the court's reasoning. We note that no authority is given for the existence of any such principle. With respect, we do not consider that any such stand-alone principle exists. There is no over-arching principle of equivalence which falls to be applied in the exercise of construing a collateral warranty. To speak of such a principle risks deflecting attention from the core exercise of focussing on the objective meaning of the language used in the collateral warranty, understood in its context.

The nature of a collateral warranty

[73] It is important to bear in mind the essential nature of a collateral warranty. The UK Supreme Court provided important guidance on this in *Abbey Healthcare (Mill Hill) Ltd* v *Augusta 2008 LLP* [2024] UKSC 23; [2024] 4 All ER 905 (the *Toppan Holdings* case; the parties'

names having changed since the case had been in the Court of Appeal). Lord Hamblen (with whom Lord Briggs, Lady Rose, Lord Richards and Lady Simler agreed) explained at paragraph 66 that in a collateral warranty there was no promise to carry out any construction operations for the beneficiary; merely a promise to the beneficiary that the construction operations to be carried out for someone else under the building contract would be performed. A collateral warranty was a derivative agreement, separate from but referable to the underlying building contract.

[74] Stuart-Smith LJ made a similar point in the Court of Appeal at paragraph 109 where he observed that a liability for breach of a collateral warranty was conceptually different from a liability for breach of direct obligations owed in respect of the underlying state of affairs: it rested simply upon the fact that the warrantor's promise is found to be broken. Liability was based solely upon the fact that the granter of the collateral warranty had warranted a state of affairs which had proved to be untrue. These *dicta* (statements) elucidate the basic principle that a collateral warranty is a promise given by the granter to the beneficiary that obligations owed by the granter under a different contract (such as a building contract or an appointment of consultants) have been or will be fulfilled.

The terms of the Collateral Warranty Agreement

[75] Turning then to the terms of the collateral warranty in the present case, we consider the construction of it to be straightforward. Clause 3.1 provides that the respondents shall be deemed to have relied on the reclaimers having carried out their duties under their original appointment with reasonable skill and care. Clause 3.2 makes clear that the reclaimers shall have no greater duty or obligation to the respondents than they owed to the employer under their original appointment. Neither clause says or implies anything about the preservation or

importation of defences. The clauses address equivalence of duties; they do not deal with equivalence of defences. Where a clause of a contract is said to create a time-bar it must be clear and unambiguous (*Northern & Shell Plc* v *John Laing Construction Ltd* [2003] EWCA Civ 1035; 90 ConLR 26, para 46). The reclaimers' argument that clause 3.2 encompasses the duration of the duties or obligations incumbent on the reclaimers is untenable. Duration of liabilities is simply not covered in clause 3 at all, either expressly or by implication. The reference to no greater "obligations" adds nothing of substance to the clause. One cannot sensibly read into the use of that word an intention that the usual rules on prescription were to be abrogated. In context the terms "duties or obligations" in clause 3.2 are concerned with the nature and scope of the obligations to be owed by the reclaimers to the respondents. The purpose of the clause was to make clear that the reclaimers were not to be subject to any more onerous obligations than they had under the appointment.

[76] It is notable that the collateral warranty contains no provision similar to clause 3.1 in *British Overseas Bank, supra,* in which it was expressly provided that the contractor was to be entitled to raise the equivalent rights in defence of liability as it would have had against the employer under the building contract. The absence of any such express provision is significant. It was not the objective intention of the parties to provide that any rights to redress for breach of the collateral warranty should be extinguished or become unenforceable at the same time as the employer's rights to redress for breach of the appointment were extinguished. There is nothing to suggest that the parties were not content that the normal statutory scheme under the Prescription and Limitation (Scotland) Act 1973 should apply to obligations arising under the collateral warranty.

[77] It is of interest to note that the leading practitioners' textbooks recognise the importance of contracting parties giving specific attention to the issue of time-bar when drafting collateral warranties.

[78] For example, *Hudson's Building and Engineering Contracts* (14th ed 2022) states, at paragraph [1-250(6)]:

> "A cause of action on a collateral warranty may be the subject of a special express time limit, whose meaning will fall to be construed on normal contractual principles. If there is no express time limit, a collateral warranty in the common form, which refers to an underlying contract with the original Employer for the project, and promises that the warrantor has complied and will in future comply with its obligations in that underlying contract, will need to be construed carefully. In that case, the warranty may (in respect of breaches before the collateral warranty existed, and subsisting when the collateral warranty was made) create a series of fresh causes of action at the date of the warranty. Breaches of the underlying contract subsequent to the agreement of the collateral warranty will normally create a cause of action under the warranty at the same time."

Winward Fearon, Collateral Warranties (2nd ed 2002) states:

> Para [6.101]: "A cause of action cannot arise until there is a party who can sue and a party who can be sued: *Reeves v Butcher* [[1981] 2 QB 509]. It follows that even though a collateral warranty does not seek to create any greater liability than the original contractual arrangement, the execution of the warranty may operate to extend the limitation period…Those giving collateral warranties therefore should be careful to abridge the limitation period".
>
> Para [6.111]: "For reasons set out above, it is important for a party before entering into a collateral warranty to consider whether or not the document will extend the limitation period beyond the period created by the principal contract. If there is such an extension, then this can be provided for in the collateral warranty by an express condition abridging the new limitation period to correspond with the original period. Such conditions are valid: *Atlantic Shipping and Trading Co v Louis Dreyfus* & *Co*. [[1922] 2 AC 250]"
>
> Para [9.23]: "Consideration should always be given by the draftsman of a warranty to the position in relation to limitation."

It is notable that the appendices to *Winward Fearon* contain a number of forms of collateral warranties issued by organisations involved in the construction industry, such as the Royal Incorporation of Architects in Scotland, the Royal Institute of Chartered Surveyors and the

British Property Federation. All of these contain model clauses providing that no action or proceedings for breach of the collateral warranty shall be commenced against the contractor after the expiry of a number of years (left blank in the form) from the date of practical completion.

[79] It will be recalled that the date of practical completion was 8 July 2008. The collateral warranty was entered into on 6 January 2014. If the reclaimers' approach is correct the five-year prescriptive period had already operated to extinguish any liability that the reclaimers might have had to the respondents before the collateral warranty became effective. A reasonable person having the same background knowledge as the reclaimers and respondents at the time the collateral warranty was entered into would not have been likely to understand that the collateral warranty was effectively meaningless so far as the respondents were concerned since they would derive no benefit or advantage from it. If the collateral warranty granted no meaningful benefit to the respondents, it is difficult to make sense of clause 6; this envisaged that the respondents were entitled in the future to assign their rights under the collateral warranty. The same can be said of clause 7; this obliged the reclaimers to maintain professional indemnity insurance for a period of 12 years after practical completion. Both these clauses clearly envisaged that the collateral warranty would confer benefits and impose obligations for a number of years into the future. On the reclaimers' approach the collateral warranty never created any meaningful benefit for anyone and could never be enforced.

Two English decisions

[80] We can deal fairly briefly with two first-instance English cases cited to us. Each depended on the particular terms of the collateral warranty in issue. In *Safeway Stores* v

Interserve Project Services [2005] EWHC 3085 (TCC); 105 ConLR 60 clause 3.3 of the collateral warranty provided (para 37):

> "The Contractor shall owe no duty or have any liability under this deed which are greater or of longer duration than that which it owes to the Developer under the Building Contract."

Unsurprisingly, it was held that the clause had the effect that the contractor was entitled to the same right of equitable set-off in a question with the beneficiary as it would have had against the developer. The purpose of the clause was to restrict the contractor's liability to the beneficiary to its equivalent liability to the developer under the building contract (paragraph 51). The words "or have any liability" were critical. The word "liability" does not appear in clause 3.2 of the collateral warranty in the present case.

[81] In *Swansea Stadium Mgt Co Ltd* v *Swansea C & CC* [2018] EWHC 2192 (TCC); [2019] PNLR 4 the decision again turned on the judge's construction of the collateral warranty. It provided *inter alia* that the contractor owed a duty to the beneficiary in the carrying out of its duties under the building contract. There was a proviso that the contractor was to have no greater liability than it would have had if the beneficiary had been named as joint employer under the building contract. Founding on *Northern & Shell, supra*, O'Farrell J held that the intention of the parties was that the collateral warranty should have retrospective effect and that any breach of it was actionable from the date on which the relevant breach of duty under the building contract occurred even though that was prior to the effective date of the collateral warranty. As Stuart-Smith LJ pointed out in *Toppan Holdings* (paragraph 88), it is clear from *Northern & Shell* that a contract is not necessarily effective on or from the date upon which it was concluded; the proper meaning depends on its terms. The collateral warranty in the present case is in materially different terms to those considered in *Swansea Stadium Mgt Co Ltd*. In particular, it does not contain a provision that the contractor shall have no greater liability

than it would have had if the beneficiary had been named as joint employer with the employer under the building contract. At paragraph 53 the judge rejected the argument that the proviso was concerned with the nature and scope of the obligations giving rise to liability, but did not extend to cover the duration of any duty or the timing of any claim. She held that the reference to the claimant's position being as if it had been named as joint employer was a clear indication that the parties intended the claimant to stand in the shoes of the employer and that the warrantor's liability to the claimant was intended to be coterminous with its liability to the employer under the building contract. With respect to the judge, we are not convinced by this aspect of her reasoning. We consider that the purpose of the proviso was simply to make clear that the warrantor was to have no more extensive liability to the beneficiary than it would have had to the employer under the building contract. To that extent we agree with the judge that the beneficiary could be said to "stand in the shoes" of the employer as the judge put it. To go further than that and to say that the purpose of the proviso was to make a claim by the beneficiary for breach of the collateral warranty subject to the same time-bar as would have applied in a claim by the employer for breach of the building contract reads too much into the provision.

Conclusion on interpretation

[82] In the final analysis the collateral warranty in the present case is a clear example of a distinct contract creating its own rights and obligations. It amounts simply to a promise by the reclaimers to the respondents that they have used (and will continue to use) all reasonable skill in the performance of their services under their appointment by SMC. The collateral warranty contains nothing to suggest that the intention of the parties was to make it subject to the same period of prescription as would have applied between SMC and the reclaimers under the

appointment. There is nothing in the surrounding context pointing to that being the parties' common intention. Since there is no contractual limitation provision, the earliest possible date for commencement of the five-year short negative prescriptive period would be 6 January 2014, the date when the collateral warranty was granted. That is the earliest date on which the collateral warranty could have been breached. The summons was served on the reclaimers on 17 December 2018. That was within five years of the collateral warranty having been granted. It follows that the obligation to make reparation in respect of breach of the collateral warranty has not prescribed.

The soffit insulation

[83] The respondents' averments in article 22A of condescendence concerning design and installation of the soffit insulation were introduced by adjustment of the pleadings on 2 February 2021. The respondents admit that no relevant claim in relation to that issue had been made prior to 2 February 2021. They accept that in relation to the soffit insulation issue only, any obligation incumbent on the reclaimers to make reparation has *prima facie* prescribed. The respondents therefore seek to rely upon two of the saving provisions in the 1973 Act: sections 6(4) and 11(3).

[84] The respondents aver in article 37 that the defects relating to the soffits were first identified by John Aitken in the course of an inspection of the building for the purpose of preparing a report in connection with this action. Mr Aitken's inspection was on 20 and 21 July 2020. He advised the respondents of the defects relating to the soffits in a draft report dated August 2020. Prior to that date, the respondents were not aware of having suffered any loss or damage relating to the soffits. The respondents aver that they could not with reasonable diligence have been aware of this loss or damage any sooner. They therefore contend that

under section 11(3) of the 1973 Act the obligation to make reparation did not become enforceable until August 2020 with the result that the five-year short negative prescription did not start to run until then. The reclaimers did not challenge the relevance of these averments.

[85] The respondents also aver that they were induced into error by the representations by SMG and the reclaimers in their respective collateral warranties that they had complied with their obligations under their respective appointments by SMC. They aver that this error induced them to refrain from making a claim in relation to the soffits. In these circumstances, the respondents rely on section 6(4) of the 1973 Act[1]. The reclaimers submitted that these averments were irrelevant.

[86] Section 6(4) provides as follows:

> "In the computation of a prescriptive period in relation to any obligation for the purposes of this section-
>
> (a) any period during which by reason of-
>
> (i) fraud on the part of the debtor or any person acting on his behalf, or
>
> (ii) error induced by words or conduct of the debtor or any person acting on his behalf,
>
> the creditor was induced to refrain from making a relevant claim in relation to the obligation, …
>
> 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."

[87] In *Tilbury Douglas Construction* v *Ove Arup* [2024] CSIH 15; 2024 SC 383 the Inner House explained that in order to rely on section 6(4) it was necessary for the creditor to show that the reason he did not make a claim was that he was misled by the debtor's fraud or because of an error induced by the debtor. The debtor must lead the creditor to believe something different

[1] Section 6(4) was prospectively amended by section 4 of the Prescription (Scotland) Act 2018. There was no suggestion that the amended version was of any relevance for the present case.

from the truth (Lord Malcolm, delivering the opinion of the court at [59], citing *BP Exploration Co Ltd* v *Chevron* [2001] UKHL 50; 2002 SC (HL) 19, Lord Hope at paragraph 33; Lord Clyde at paragraph 65).

[88] The basic purpose of section 6(4)(a)(ii) is that in 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, any period during which such words or conduct had the effect of preventing the creditor from making a claim should be left out of account. The basis of the principle can be seen, for example, in the opinion of Lord President Inglis in *Caledonian Railway Co* v *Chisholm* 1886 13R 773, 776 where he said that it would be "entirely unjust" to apply the Triennial Prescription Act (1579, c 83) in a case in which by false pretences the debtor had prevented the creditor from discovering that it was carrying cargo for which it was entitled to charge. Lord Shand made similar observations at page 777 where he referred to the creditor being deceived by the debtor and having been deprived of the power of making a charge. In *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Ltd* [2011] CSIH 26 the Lord President (Hamilton) stated at paragraph [10] that there could be little doubt that in framing the provision which was ultimately enacted as section 6(4) the Scottish Law Commission in its Report on *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot Law Com No 15, 1970) had in mind the observations made by the judges in *Caledonian Railway Co* v *Chisholm*.

[89] The pleaded circumstances of the present case do not involve inducement of an error of that nature. The respondents' case under section 6(4) is that they were induced into error by representations in the collateral warranty that the reclaimers had complied with their obligations under their appointment. They allege that the error induced them to refrain from making a claim in relation to the soffits. This approach is flawed. The respondents' claim is

based on breach of the collateral warranty. It is circular and illogical to contend that the provisions which are alleged to have been breached have themselves led the respondents to refrain from making a claim. It makes no sense to assert that section 6(4) can operate in circumstances where the creditor has merely asserted that it has performed its contractual obligations or has not been negligent. The averments in support of the section 6(4) saving provision are irrelevant and will be refused probation.

The respondents' other averments on section 6(4)

[90] The respondents in their pleadings at article 37 of condescendence make the following averments in the claim relating to the protective paint system:

> "The Employer, UPLP and the pursuer were induced by HFM's words and conduct to refrain from making a relevant claim in relation to the breaches of duty founded upon in the present action. The relevant words and conduct included: (a) HFM's performance of its obligations under the HFM Appointment; (b) without prejudice to the foregoing generality, HFM's duties of monitoring and inspection under the HFM Appointment; (c) HFM's requests for payment for work done under the HFM Appointment; (d) HFM's certification of sums as payable to SMGL under the Construction Contract; (e) HFM's certification of practical completion on 8 July 2008; (f) the issuing by HFM of the CMGD on 13 December 2013; and (g) the issuing of the HFM Collateral Warranty in January 2014 including, without prejudice to the foregoing generality, the warranty in clause 3 that HFM had complied with all of its obligations under the HFM Appointment. The Employer, UPLP and the pursuer relied upon HFM's words and conduct in refraining from raising a relevant claim."

[91] The reclaimers argued on a number of grounds that these averments were irrelevant. In broad summary, the matters relied on in paragraphs (a) to (f) were all matters in respect of which the reclaimers were either performing their obligations in compliance with their appointment or issuing documentation under it. The matters at (a) to (f) were nothing more than the provision of services and requests for payment. Such matters were not sufficient to constitute words and conduct for the purposes of section 6(4). The respondents had not

identified the natural person or persons in whose mind the error was supposedly created. The matters referred to were not directed at UPLP or the respondents.

[92] Ultimately, senior counsel for the respondents' position was that if his primary argument on construction of the collateral warranty was sustained, these averments became redundant and he would be content for them to be deleted. Since we have held that the respondents' principal argument is well-founded, we shall refuse probation to these averments.

[93] We would add that had we required to consider the relevance of these averments, we would have been minded to hold that they were irrelevant, essentially for the same reasons as we have already given in relation to the reliance sought to be placed on section 6(4) in the context of the alleged defects in the soffit insulation. As Lord Malcolm observed in *Tilbury Douglas* at [61] it is doubtful whether section 6(4) is aimed at conduct as everyday as providing services and accepting payment therefor. Lord Malcolm added that if merely tendering a design or sending an invoice in respect of what turns out to be defective work is sufficient for the purposes of section 6(4), not many prescriptive periods will commence. These observations are equally apt here.

Disposal

[94] We shall give effect to our decision by refusing the reclaiming motion and adhering to the commercial judge's interlocutors of 12 December 2023.

[95] We will in addition exclude from probation the respondents' averments in article 37 from "Esto the HFM Collateral Warranty has that effect…" to "…identified the defects which form the basis for this action." We will also exclude from probation the respondents' averments at the end of article 37 from "The pursuer was also induced into error…" to "… from making a claim in relation to the soffits" and the reference to section 6(4) in the final sentence. We will

sustain the reclaimers' first plea-in-law to the extent of excluding from probation the averments referred to.

[96] We will repel the reclaimers' third plea-in-law and their fourth plea except insofar as it relates to the claim for the soffit defects.

[97] In answer 37 for the reclaimers we will exclude from probation all the averments in paragraph (iii) except the final sentence and all the averments in paragraphs (iv) and (v). We will exclude from probation the averments in paragraph (vi) from "HFM has done nothing to induce…" to "…no reliance was therefore placed on the same."

[98] We will sustain the respondents' fifth plea-in-law to the extent of excluding from probation the averments to which we have referred.

[99] We have already reserved all questions of expenses arising from the amendment procedure in the Inner House. We will reserve all other questions of expenses.