



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 103

CA41/23

OPINION OF LORD RICHARDSON

In the cause

LEONARDO HOTEL MANAGEMENT (UK) LIMITED

Pursuer

against

GALLIFORD TRY BUILDING 2014 LIMITED

First Defender

and

BUILDING DESIGN PARTNERSHIP LIMITED

Second Defender

and

KINGSPAN INSULATION LIMITED

Third Party

Pursuer: T Young, White; Morton Fraser MacRoberts LLP

First Defender: MacColl KC; Clyde & Co LLP

Second Defender: Thomson KC, Hamilton; Kennedys

Third Party: Dean of Faculty, Y Middleton; Balfour and Manson LLP

20 October 2026

Introduction

[1] This case concerns a claim by the proprietor of the Leonardo Inn Hotel, Union Square, Aberdeen. It is a claim for alleged cladding defects arising at the hotel.

[2] The pursuer is the current tenant of the property. The first defender was the design and build contractor instructed by the landlord of the property, Union Square Developments Limited, in connection with its development. The second defender was the landlord's architect. The third party was the manufacturer of certain cladding panels which were used in the construction.

[3] I heard the case at debate in order to hear arguments being advanced by both defenders and the third party to the effect that the pursuer's claim had prescribed. The third party also argues that the second defender's case against it has prescribed. This was the second occasion that the case had been before me for debate. Some of the arguments at the first debate also related to prescription. My decision in the first debate is reported at [2024] CSOH 43.

[4] I allowed a second debate in the case on the motion of both defenders and the third party in light of three circumstances which had changed since the first debate. First, the third party had been convened to the action at the instance of the second defender. The second defender took this step following the publication of reports by the inquiry into the fire at Grenfell Tower. Second, as I note below, the pursuer's pleadings in respect of prescription have been developed to a degree. Finally, both the defenders and the third party contend that the law in respect of section 6(4) of the Prescription and Limitation (Scotland) Act 1973 has been further clarified by two decisions of the Inner House which were issued after the decision in the first debate: *Tilbury Douglas Construction Limited v Ove*

Arup and Partners Scotland Limited 2024 SC 383 and *Legal & General Assurance (Pensions Management) Limited v Halliday Fraser Munro* 2025 SLT 1151. It was contended that the latter case had also developed the law in relation to the proper construction of collateral warranties. Finally, it should be noted that the pursuer, although of the view that the case should proceed to a diet of proof before answer, did not oppose the fixing of a second debate.

Background

[5] As between the pursuer and the defenders, the basic facts remain as they were in the first debate.

[6] The landlord and the first defender entered into a building contract on 19 December 2006. The building contract was subsequently the subject of certain Minutes of Variation. The works undertaken by the first defender in terms of the building contract included the design and construction of a bus and railway station re-development together with a retail and leisure development. The latter included the design and construction of the hotel including, in particular for present purposes, the design and construction of the cladding of the various elevations of the property.

[7] On 11 January 2007, the landlord entered into a memorandum of agreement in relation to the appointment of the second defender. In terms of that agreement, the second defender undertook various obligations to the landlord including to provide architectural services in respect of the Union Square development and to carry out those services using:

“...the reasonable skill, care and diligence expected of an appropriately qualified and competent architect who is experienced in the provision of services of a similar size, scope and complexity [in relation to developments equivalent to the present development]...”.

On 22 July 2007, the landlord and the first and second defenders entered into a novation agreement in terms of which the first defender took over the second defender's appointment from the landlord.

[8] Subsequently, on 16 July 2008, the first defender granted a collateral warranty in favour of the pursuer. In terms of that warranty, the first defender undertook, among other things, to carry out and complete the development in conformity with the building contract.

On 22 July 2008, the second defender also granted a collateral warranty in favour of the pursuer. In terms of that warranty, the second defender undertook to the pursuer that it had duly performed and would continue so to perform its obligations under its appointment in respect of the development whether before or after the novation agreement.

[9] The collateral warranty granted by the first defender provided that, in the event of a breach, the first defender would be entitled, in any proceedings by the pursuer, to rely on any limitation and to raise the equivalent rights in defence of liability (excluding rights of set-off, retention and counterclaim) as it would have had against the landlord (see clause 1.4 of the warranty dated 16 July 2008, production no. 6/12). The warranty granted by the second defender provided that, excluding the second defender's rights of set-off, retention and counterclaim, the second defender would have no greater duties or obligations "in time or in nature" and would have no greater liabilities to the pursuer under the warranty than it owed under its appointment in respect of the development (see clause 2.2 of the warranty dated 22 July 2008, production no. 6/13).

[10] Practical completion of that part of the development which included the hotel was certified on 18 February 2009. The hotel was leased by the landlord to the pursuer by way of a lease dated 8 December 2009. In terms of that lease, the pursuer undertook a full repairing obligation: clause 3.7.1 of the lease obliged the pursuer:

“... to keep the Property in good and substantial repair and condition and tidy and clean and ... maintained to the reasonable satisfaction of the Landlords and in whole or in part, when necessary to rebuild, reinstate or renew the same irrespective of the cause of damage, destruction, deterioration or decay necessitating such repair, rebuilding, reinstatement or renewal as aforesaid. ...”

The pursuer’s obligations under the lease also included the following:

“To permit the Landlords or the Managing Agents or any of them with or without workmen and others at all reasonable times in a day (except in the case of emergency) upon giving to the Tenants not less than two Working Days’ prior notice thereof (except in the case of emergency) to enter upon the Property for the purpose of examining the state and condition thereof and, in case any defect, default or want of maintenance, repair, rebuilding, reinstatement, renewal or decoration or cleanliness shall appear for which the Tenants are liable under the obligations herein contained, upon notice thereof in writing being given to the Tenants, to cause the same to be made good, maintained, repaired, rebuilt, reinstated, renewed, decorated or cleaned in compliance with the said obligations within such reasonable period of time as is specified in the notice...” (clause 3.11)

[11] In the present proceedings, the pursuer alleges that the hotel’s cladding system is defective. The pursuer avers that the defects were caused, or at least materially contributed to, by breaches of the obligations owed to it by the defenders both as a matter of contract and in delict. The pursuer seeks the cost of the repair of the cladding which it contends it is obliged, under the lease, to carry out. The present proceedings were raised by the pursuer in February 2021. Both defenders and the third party argue that the pursuer’s case has prescribed.

The third party proceedings

[12] In the alternative, the second defender contends that insofar as the alleged cladding defects concern the incorporation into the works of a particular product, Kingspan Kooltherm K15 Insulation, this selection was made as a result of certain statements made by the third party in technical information published by it in a data sheet. The data sheet in

question was issued in May 2007. On this basis, the second defender seeks relief from the third party on the basis of fraudulent or negligent misstatement by the third party.

[13] For its part, the third party argues that any claim for relief against it by the second defender has also prescribed.

The pursuer's averments

[14] The pursuer's pleadings in respect of prescription are all contained in Article 14 of condescendence. The pursuer has revised its position since the first debate to a degree. The material parts of the pursuer's averments in respect of the application of sections 6 and 11 of the 1973 Act are in the following terms:

"With reference to the defenders' averments anent prescription, explained and averred that neither the Contractor's nor the Architect's Collateral Warranty contain any clause that provides for any period of contractual limitation equivalent to the conventional short negative prescriptive period of five years which would have applied to an equivalent claim by the Landlord. *Separatim*, entering the Lease was not loss, injury and damage for the purposes of sec. 11 (1) of the Prescription and Limitation (Scotland) Act 1973 (cap. 52) (the '1973 Act'). The pursuer did not incur wasted expenditure in doing so. The pursuer did not acquire ownership of an asset that was worth less than it expected. The Cladding Defects were latent defects. They were not visible defects requiring repair. The need to repair them was not inevitable from the point of entering the Lease. The pursuer did not suffer any actual loss for the purposes of prescription until those losses had or could reasonably have been discovered. The losses condescended upon were pure economic losses. Properly understood, a cause of action for pure economic loss does not accrue until that loss was known about or could reasonably have been discovered. As hereinafter condescended upon, that date (in respect of some but not all of the Cladding Defects) was not until around 16 December 2020. Further, the pursuer could not reasonably have discovered its loss at any earlier point. At the very least, the pursuer could not have discovered its loss until a point well within 5 years of the raising of the action (i.e., absolutely no earlier than 17 February 2016). *Separatim*, the pursuer did not in fact suffer loss, injury, and damage until it came under an obligation to repair the Cladding Defects. That obligation only arose when the state of disrepair arising from the Cladding Defects became known about. The discovery of the Cladding Defects was prompted by inspections of the Property conducted by the Landlord after the Grenfell tower fire on 14 June 2017. At the very earliest, the Landlord was aware of some (but not all) of the Cladding Defects around 18 September 2017. On or around that date, Wintech produced a report of a cladding survey conducted on the

Property. At the very earliest, the pursuer became aware of some (but not all) of the Cladding Defects around 16 December 2020 when they were informed about them by the Landlord following the Landlord's investigation."

[15] In respect of section 11(3), the pursuer's pleadings were as follows:

"Esto the pursuer did suffer loss, injury and damage for the purpose of sec. 11 (1) of the 1973 Act more than 5 years prior to the raising of this action, which is denied, explained and averred that the pursuer was not aware, and could not with reasonable diligence have become aware, of having suffered such loss, injury and damage until, at the earliest, 16 December 2020. Reference is made to sec. 11 (3) of the 1973 Act."

[16] In respect of section 6(4), the pursuer averred as follows in respect of the first defender:

"Separatim, and in any event, the Landlord was induced to refrain from making any claim for reparation in respect of the Cladding Defects against the first defender between practical completion of the Works in February 2009 and around 18 September 2017. The pursuer was induced to refrain from making any claim for reparation in respect of the Cladding Defects against the first defender between entering the Lease in December 2009 and around 16 December 2020. This was due to errors induced by all of the first defender's conduct (including both acts and omissions) hereinafter condescended upon under and in terms of sec. 6 (4) of the 1973 Act. Accordingly, these periods do not fall to be reckoned as part of any prescriptive period in respect of either the Landlord or the pursuer. In particular, the Cladding Defects were physically concealed by the first defender in the course of the Works by covering them up with other materials as the Works progressed. This was a positive act by the first defender (or its subcontractors for whom it is responsible) that was likely to, and did in fact, conceal the existence of the Cladding Defects from the Landlord. In addition, the first defender was under contractual duties to identify and report defects in the Works such as the Cladding Defects to the Landlord and Sweett as the Employer's Agent. Reference is made to Clauses 2.5.6 and 5.3.1, and the 'Management of the Works', 'Quality Standards / Control', and 'Building and Accommodation Requirements' sections of the Employer's Requirements in the Building Contract. Without prejudice to that generality, the first defender was expressly obliged to report any defects in the existing construction to Sweett as Employer's Agent without delay and obtain instructions before proceeding with the work. The first defender omitted to advise, inform, or otherwise draw the Landlord and/or Sweett's attention to the Cladding Defects. That omission contained an implied representation that no such defects existed. Further, the pursuer is unaware of any sums outstanding under the Building Contract. In the circumstances, it is believed and averred that the first defender continued to apply for payments under the Building Contract. Those payments could not have been properly claimed in respect of that part of the Works comprising the Cladding Defects. In applying for payment, the first defender impliedly represented that the

Works had been properly done. The Landlord had no reason to suspect that was not the case. Further, and in any event, in the Contractor's Collateral Warranty, the first defender warranted to the pursuer *inter alia* that they had carried out and completed the Development in conformity with the Building Contract; complied with, observed, and performed the obligations of the Contractor in the Building Contract. Reference is made to Clause 1.1 – 1.4 of the Contractor's Collateral Warranty. In warranting to the pursuer they had complied with their obligations when in fact they had not done so, the pursuer was induced to believe that the first defender had complied with its obligations and that no defects such as the Cladding Defects existed in the Property. The granting of the Contractor's Collateral Warranty combined with the first defender's physical concealment of the Cladding Defects by covering them up with other elements of the Works as hereinbefore condescended upon was likely to, and did in fact, conceal the existence of the Cladding Defects from the pursuer. By all of these omissions and acts, the first defender represented to, and induced a belief in, both the pursuer, and the Landlord, that they had each complied with their obligations and that no defects such as the Cladding Defects existed in the Property (or at the very least materially contributed to the concealment of the Cladding Defects from the pursuer and Landlord). That was an error. As a result of that error, both the Landlord and the pursuer refrained from making any claim for reparation against the first defender. In particular, neither the Landlord nor the pursuer had any actual knowledge, or means of knowing, of the existence of the Cladding Defects as a direct result of the first defender's actions. The first defender's entire course of conduct combined to effectively conceal them from the Landlord and pursuer."

[17] Finally, the pursuer made the following averments in respect of section 6(4) in relation to the second defender:

"*Separatim*, and in any event, the Landlords *et separatim* the first defender were induced to refrain from making any claim for reparation against the second defender until around 18 September 2017. The pursuer was also induced to refrain from making any claim for reparation in respect of the defects hereinbefore condescended upon against the second defender between entering the Lease in December 2010 and around 16 December 2020. This was due to an error induced by the conduct of the second defender (including both acts and omissions) as hereinafter condescended upon under and in terms of sec. 6 (4) of the 1973 Act. Accordingly, that period does not fall to be reckoned as part of the prescriptive period. In particular, the second defender was under contractual duties to identify and report defects in the Works such as the Cladding Defects to *inter alios* the Landlord and first defender. It was also under a duty to visit the Works and verify that the Works were being executed generally according to the designs and specifications and otherwise in accordance with good practice and report to the Landlord once a month. Reference is made to, Clause 9.2, 9.4, 11.4, 13.2, 16, 37.3 and Paragraphs 7, 27, 34, 35, 49, 51, 53, 82 and 91 of Part 2 of Part 1 of the Schedule to the Architect's Appointment; Clauses 7.1 – 7.3 of the Architect's Novation Agreement. The second defender omitted to advise, inform, or otherwise draw the Landlord and/or the first defender's attention to the Cladding Defects. Further, in the course of verifying the Works, the second defender

permitted the first defender to proceed with elements of the Works that physically concealed the Cladding Defects. Further, the pursuer is unaware of any sums being outstanding to any of the defenders under the various agreements hereinbefore condescended upon. In the circumstances, it is believed and averred that they each claimed payment of the substantial remuneration due to them under each of the relevant Appointments. Further, in the Architect's Collateral Warranty, the second defender warranted to the pursuer that they had duly performed and observed all of the terms of the relevant Appointment. Reference is made to Clause 2.1 of the Architect's Collateral Warranties. In representing to the pursuer they had complied with their obligations when in fact they had not done so, the pursuer was induced to believe that they had complied with their obligations and no defects such as the Cladding Defects existed in the Property. By these omissions and acts, the second defender represented to, and induced a belief in, the pursuer, the Landlord, and the first defender that they had complied with their obligations and that no defects such as the Cladding Defects existed in the Property (or at the very least materially contributed to the concealment of the Cladding Defects from the pursuer and Landlord). That was an error. As a result of that error, the pursuer, the Landlords, and the first defender refrained from making any claim for reparation against the second defender in respect of the Cladding Defects. In particular, neither the Landlord nor the pursuer had any actual knowledge, or means of knowing, of the existence of the Cladding Defects as a direct result of the second defender's actions. The second defender's entire course of conduct combined to effectively conceal them from the Landlord and pursuer."

The second defender's pleadings

[18] At the outset of the debate, the second defender's pleadings on the issue of time bar in respect of its claim against the third party are contained in Answer 14 and are as follows:

"To the extent that the quinquennium applicable to the claim against the Third Party *prima facie* expired prior to the service of the Third-Party Notice in June 2025 (which is denied), the Third Party's misrepresentations upon which the Second Defender relied subsisted until at least 5 November 2020 when its representatives made an opening statement and submission to the Grenfell Tower Inquiry acknowledging, amongst other matters, 'process shortcomings' related to product marketing during the period 2005 to 2014. Indeed, on proper analysis, the Second Defender did not know and could not, with reasonable diligence, have known the true position about K15 and the Third Party's misrepresentations with regard to the fire performance of that product until the final conclusions and reports of the Grenfell Tower Inquiry were issued in September 2024. Reference is made to section 11(2) of the 1973 Act. *Separatim* and in any event, the misrepresentations by the Third Party relied upon amounted to fraud *et separatim* error induced by words or conduct of the Third Party that induced the Second Defender to refrain from making a relevant claim or seeking relief from the Third Party for the period from the making of those misrepresentations up until the final reporting by the Grenfell Tower Inquiry in 2024

as condescended upon. The Second Defender did not know of, and could not, with reasonable diligence, have discovered, the fraud or error induced by the Third Party's words or conduct until the misrepresentations were revealed in that final reporting. Even if the Second Defender could, with reasonable diligence, have discovered the true state of affairs earlier than 2024 (which is denied), the earliest date by which, on any view, it could have become so aware was 5 November 2020 as averred aforesaid. Reference is made to section 6(4)(a)(i) and (ii) of the 1973 Act."

[19] On the morning of the second day of the debate, the second defender sought to amend its answers to address calls which had been placed on it by the third party. Senior counsel admitted, candidly, that the amendment ought to have been made at an earlier point. The Dean of Faculty opposed the amendment and submitted that the third party would be prejudiced because it required to answer the amendment. The Dean of Faculty submitted, further, however that the amendment did not undermine his argument. In the event, in order to enable the debate to proceed, I allowed the amendment but noted in the minute of proceedings that the third party's position was reserved as were all questions of expenses. The amendment added the following passage to the second defender's

Answer 14:

"With reference to the Third Party's averments anent the Wintech report, once that report was sent to the Second Defender, and the First Defender (by the landlord) the First Defender responded in October 2017, in terms which included comments from the Second Defender, to the effect (so far as relevant to the matters now raised by the Third Party) that the Third Party's Kingspan K15 product was compliant with applicable regulations and the Non-Domestic Technical Handbook. In that respect, the Second Defender's comments proceeded upon the basis that it continued to place reliance upon the Third Party's BBA Certificate, and continuing misrepresentations regarding the suitability of its K15 product. The First Defender thereafter provided a report from Atelier Ten (a copy of which is produced herewith and referred to for its terms which are held to be incorporated herein for the sake of brevity) by email to the landlord on 9th January 2018, into which the Second Defender was copied. The Atelier Ten report also concluded that the Third Party's K15 product was compliant. No claim was in fact made against the Second Defender until the citation in this case was received on 19th February 2021. In the circumstances, the Second Defender did not know and could not with reasonable diligence have known of the fact that it faced any potential claim."

Challenges to the pursuer's case

The first defender's arguments

[20] The first defender's primary position was that I should grant decree of absolvitor, which failing I should dismiss the pursuer's case against them.

[21] Senior counsel made submissions under four headings: the collateral warranty; section 11(1) of the 1973 Act; section 11(3) of the 1973 Act; and section 6(4) of the 1973 Act.

The collateral warranty

[22] Under this heading, senior counsel challenged the relevancy of the averment, quoted above at [14], that the first defender's collateral warranty did not contain any clause which provided for a period of contractual limitation equivalent to quinquennial prescription that would have applied to an equivalent claim by the landlord. This averment was irrelevant as a matter of law.

[23] This was simply a question of contractual construction. Wording which was equivalent to the first defender's warranty had been considered by the Inner House in *British Overseas Bank Nominees Limited v Stewart Milne Group Limited* 2020 SC 24 at paragraph 24 where the court was considering clause 3.1 of the warranty in that case. In construing that clause, the court had concluded that it was intended to place the parties to the warranty in an equivalent position to the parties to the building contract. Specifically, the contractor was to have the same rights of defence under the warranty against the beneficiary as it would have had under the building contract against the employer. The court's construction of this wording in *British Overseas Bank* had been endorsed by a differently constituted Inner House in *Legal & General Assurance* (at paragraphs 65 and 66). This endorsement was not undermined by the fact that in *Legal & General Assurance*, the court had doubted what were

characterised as the *obiter* references made in *British Overseas Bank* to the “fundamental principle of equivalence” (*Legal & General Assurance*, paragraphs 69 to 72).

[24] Senior counsel accepted that the first defender’s warranty did not contain a clause akin to the one relied on in *British Overseas Bank* which provided for an equivalence between the obligations of the contractor to the employer under the building contract and to the beneficiary under the warranty. However, it was clear from the analysis in *Legal & General Assurance* that it was a clause providing for equivalent rights of defence which was of significance.

[25] Accordingly, properly construed, the pursuer’s averment was irrelevant and, properly construed, the first defender’s warranty did provide the first defender with a period of contractual limitation.

Section 11(1)

[26] Under this heading, senior counsel challenged the relevancy of the pursuer’s averments in Article 14 (at [14] above) in which the pursuer asserted that, because the cladding defects were pure economic loss, “[t]he pursuer did not suffer any actual loss for the purposes of prescription until those losses had or could reasonably have been discovered.”

[27] The pursuer’s claims against the first defender were subject to short negative prescription as provided for by section 6 of the 1973 Act. As such, the pursuer’s claims would fall to be extinguished if they had subsisted for a continuous period of five years without a relevant claim having been made. For present purposes, section 6(3) of the 1973 Act specified that, for obligations such as those that the pursuer was seeking to enforce, the starting point for this period was the date on which the obligation became enforceable.

[28] Section 11(1) of the 1973 Act, as it applies in the present action prior to amendment by the Prescription (Scotland) Act 2018, provided as follows:

“Subject to subsections (2) and (3) below; any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.”

[29] In the context of a claim for breach of an obligation by a contractor arising out of a construction contract, it will normally be the case that the claim will have been enforceable at the latest by the date of practical completion (*Huntaven Properties Limited v Hunter Construction (Aberdeen) Limited and others* [2017] CSOH 57 at paragraph 65). In the present case, the pursuer had suffered a loss at the point at which it had entered into the lease and had become liable to repair the cladding defects. Senior counsel submitted that the issue could be tested simply by asking the following question: if, as soon as the lease was concluded, the pursuer had known everything that was currently known, could it have brought the present claim? The answer was clearly yes.

Section 11(3)

[30] Section 11(3), again as it applies in the present case, provided a saving provision:

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

Under this heading, the first defender challenged the pursuer’s averments relating to its awareness of loss – see [15] above.

[31] As a preliminary point, senior counsel noted that these averments related only to the pursuer and not to the landlord. If the first defender was correct in relation to the proper construction of the collateral warranty (see above), then the pursuer's averments in respect of section 11(3) were of no effect because they did not address the position of the landlord. The pursuer sued on the basis of the collateral warranty. The landlord's claim against the first defender would have been enforceable at practical completion and a claim had not been raised within five years. On this basis, the pursuer's averments in relation to section 11(3) which related only to the pursuer's own awareness, even if relevant, could not assist it.

[32] The approach to be taken to this provision was the subject of judicial consideration by the UK Supreme Court in *David T Morrison & Co Limited (t/a Gael Home Interiors) v ICL Plastics Limited* 2014 SC (UKSC) 222 and *Gordon's Trustees v Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287. In particular, the first defender founded upon the judgment of Lord Hodge in *Gordon's Trustees* at paragraphs 21 and 22.

[33] The first defender relied upon the application of this line of authority by the Inner House in *Tilbury Douglas* at paragraph 40:

"Standing the decisions in *Gordon's Trs v Campbell Riddell Breeze Paterson LLP* and *WPH Developments Ltd v Young and Gault LLP*, on the face of it the prescriptive clock started ticking as at the date of the contract. In line with the construction of sec 11(3) upheld by the majority in *Morrison (David T) & Co Ltd (t/a Gael Home Interiors) v ICL Plastics Ltd*, even in cases involving financial loss the provision does not postpone the five-year period until the creditor knows or ought to know that something has gone wrong or that he has suffered a detriment. Once he is aware of whatever it is that constitutes loss, injury or damage caused by the wrongful act or omission, here the making of the fixed-price contract with EHDL for the enabling works, he has five years to raise an action. (Any harshness which this may cause has now been mitigated by legislation, but it has only recently come into force.)..."

Senior counsel also referred to the opinion of Lord Braid in *Greater Glasgow Health Board v Multiplex Construction Europe Limited and others* [2025] CSOH 56 (at paragraphs 121, 132 and 133) applying this approach.

[34] Senior counsel submitted that the pursuer's entry into a fixed price enabling works contract in *Tilbury Douglas* was analogous to the pursuer's entry into a lease in the present case. As soon as the lease was concluded, the pursuer became subject to the repairing obligation, and it was the cost of fulfilling that obligation which the pursuer sued for in the present proceedings. The pursuer was clearly aware of having entered into the lease and, therefore, for the purposes of section 11(3), the prescriptive period started.

Section 6(4)

[35] Section 6(4) of the 1973 Act provides:

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

- (a) any period during which by reason of—
 - (i) fraud on the part of the debtor or any person acting on his behalf, or
 - (ii) error induced by words or conduct of the debtor or any person acting on his behalf,
 the creditor was induced to refrain from making a relevant claim in relation to the obligation, and
- (b) any period during which the original creditor (while he is the creditor) was under legal disability,

shall not be reckoned as, or as part of, the prescriptive period:

Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph.”

[36] Founding on *BP Exploration Operating Company Limited v Chevron Transport (Scotland)* 2002 SC (HL) 19 per Lord Hope at paragraphs 27, 29 to 32, per Lord Clyde at paragraphs 66 and 68 and per Lord Millett at paragraphs 102 to 109, the first defender submitted that, in order to rely on section 6(4) a creditor required to establish three things:

- (1) an error induced by words or conduct by the debtor (or someone on their behalf);

- (2) that the error induced the creditor to refrain from making a relevant claim in relation to the obligation in question; and
- (3) the period during which the creditor was so induced.

[37] The first defender submitted that the correct approach to section 6(4) in the context of defects claims arising out of a construction contract had been set out by Lord Malcolm in *Tilbury Douglas* at paragraph 61:

““The judge held ... that Tilbury were entitled to rely on sec 6(4) in relation to all their pleaded grounds of complaint, including art 7.1 of the condensation, ‘by discounting the period up until the end of November 2014 as part of the prescriptive period.’ It would therefore appear that the view was that Tilbury were induced into error from at least the date of entering into the contract with EHDL, presumably on the basis that they were relying on Arup having provided a sound design. As noted above, sec 6(4) requires words or conduct on the part of Arup which led Tilbury into an error as to their remedies which meant that they did not make a relevant claim against Arup. Once problems were discovered, the issue of fraud or error operating on the mind of the company might arise. However it is doubtful whether the subsection is aimed at conduct as everyday as providing services and accepting payment therefor. If merely tendering a design or sending an invoice in respect of what turns out to be defective work is sufficient for the purposes of section 6(4), not many prescriptive periods will commence. *Rowan Timber Supplies (Scotland) Ltd v Scottish Water Business Stream Ltd* relied on by counsel for Tilbury concerned invoices sent for services which were not received – a very different kind of case.”

[38] The first defender also relied on observations which the court had made when refusing permission to appeal its decision to the UK Supreme Court. The court’s attention had been directed towards paragraph 61 of its opinion:

“The passage criticised is of secondary importance, but in any event there is no merit in the applicant’s criticism of it. It cannot have been Parliament’s intention that s6(4) would operate in circumstances where a defender has merely made an assertion to the effect that he has performed his obligations or has not been negligent. That would run contrary to the entire purpose of the statute, which is, as a matter of generality, to prevent the bringing of stale claims.” (at paragraph 5 of the statement of reasons)

[39] The first defender submitted that, while strictly *obiter*, Lord Malcolm’s views in *Tilbury Douglas* had been confirmed in the subsequent case of *Legal & General Assurance* (at

paragraphs 89 and 93) and had been applied in *Greater Glasgow Health Board* (at paragraphs 138 to 139). In light of this clear statement, arguments such as those advanced by the pursuer based on the law which preceded the 1973 Act or based on earlier case law should be disregarded. In effect, the pursuer was seeking to argue that *Tilbury Douglas* was wrongly decided. That was plainly not appropriate in a debate in the Outer House. The court should follow the approach adopted by Lord Braid in *Greater Glasgow Health Board* (at paragraphs 138 to 139).

[40] Senior counsel submitted that Lord Malcolm's views in *Tilbury Douglas* specifically in relation to building contract cases, like the present, set out the correct approach to how section 6(4) ought to be applied. In this regard, senior counsel submitted that it was of particular significance that the line of authority post-dated the *David T Morrison* case, following which section 6(4) had acquired a much greater importance.

[41] In this regard, senior counsel submitted that Lord Sandison's approach in *Batchelor v Opel Automobile GmbH* [2025] CSOH 93 at paragraphs 163 to 165 was not consistent with this line of authority. His Lordship's view was that there was no warrant in the wording of section 6(4) for limiting the sort of conduct which might qualify as inducing an error. That was not consistent with the approach of Lord Malcolm in *Tilbury Douglas*.

[42] It was apparent from the pursuer's pleadings (at [16]), that the pursuer relied on four aspects of the first defender's conduct: first, the concealment of the alleged defects during the course of the contract works; second, the first defender's duty, in terms of the contract, to identify defects in the contract works; third, the first defender's applications for payment under the contract; and, finally, the first defender's grant of a collateral warranty to the pursuer.

[43] All of these aspects were of the “everyday” nature – providing services and accepting payment therefor – referred to by Lord Malcolm in *Tilbury Douglas* and subsequently endorsed in *Legal & General Assurance*. In relation to the pursuer’s reliance on the grant of a collateral warranty, this had been specifically rejected by Inner House in *Legal & General Assurance* (at paragraph 89). The court’s reasoning was that it was circular and illogical for a pursuer suing on the basis of breach of an obligation to rely upon that same obligation as the reason why the pursuer refrained from making a claim. Senior counsel submitted that the same reasoning applied to the contractual provisions relied upon by the pursuer in the present case.

[44] In support of his argument, senior counsel drew my attention to the passages in both *Tilbury Douglas* and *Legal & General Assurance* underlining that this construction of section 6(4) was consistent with the underlying policy of the 1973 Act to prevent the bringing of stale claims.

Conclusion

[45] For completeness, senior counsel submitted that no separate issues arose in respect of the pursuer’s alternative case based on delict.

[46] Accordingly, for these reasons, the pursuer had not pled a relevant defence to the application of prescription. It followed that the first defender was entitled to decree of absolvitor which failing, the case ought to be dismissed.

The second defender’s arguments

[47] The second defender made the same motion as the first, seeking decree of absolvitor, which failing, decree of dismissal. The second defender likewise divided its submissions

into the same four chapters. Separately, the second defender challenged a particular averment made by the pursuer in Article 14.

The collateral warranty

[48] Senior counsel noted that, somewhat surprisingly perhaps, the wording of the second defender's collateral warranty was not identical to that granted by the first defender. Although worded differently from the provisions considered by the court in *British Overseas Bank*, senior counsel submitted that the wording of clause 2.2 (see [9]) achieved the same twin purposes of: first, providing that the second defender owed no greater duty to the pursuer than to its original employer; and, second, of providing that the second defender had equivalent rights of defence under the warranty as it had under its appointment. In this regard, senior counsel drew particular attention to the phrase "in time" contained in clause 2.2.

[49] On this basis, senior counsel adopted the submissions made on behalf of the first defender.

Section 11(1) and 11(3)

[50] In respect of the arguments advanced under these headings, senior counsel essentially adopted the submissions made on behalf of the first defender.

Section 6(4)

[51] By way of introductory observation, senior counsel submitted the issue for the court was essentially one of statutory construction. As such, it was necessary to consider the statutory scheme created by the 1973 Act in its totality. The twin purposes of the act were to

prevent the bringing of stale claims and to establish legal certainty. Viewed against this background, it could be seen that section 6(4) represented an exception and ought to be construed accordingly.

[52] He submitted further that the court ought to test the competing constructions of section 6(4). As had been highlighted in *Legal & General Assurance*, the pursuer's construction was circular and so broad that it would have the result of significantly interfering with the running of prescriptive periods. By contrast, the defenders' construction, which adopted the language of Lord Malcolm in *Tilbury Douglas*, required the conduct of the debtor to go beyond the "everyday". The decision in the case of *Rowan Timber Supplies (Scotland) Limited v Scottish Water Business Stream Limited* [2011] CSIH 26 was consistent with this approach. The facts in that case had been very unusual – an invoice rendered by a credible creditor who had, in fact, carried out no services. This approach would result in a construction of section 6(4)(a)(ii) which was consistent with the provision relating to fraud – section 6(4)(a)(i). That could be contrasted with the present case where essentially the pursuer's averments simply amounted to a complaint of inadequate performance by both defenders.

The second defender's attack on the pursuer's averments

[53] The second defender challenged one part of the pursuer's averments in respect of section 6(4) on the grounds that the pursuer had not given fair notice of its case. The second defender's particular criticism focussed on the passage of the averments in Article 14 (see [17]) which began by referring to the second defender's obligations to identify and report defects in the works and culminated in the following two sentences:

“The second defender omitted to advise, inform, or otherwise draw the Landlord and/or the first defender’s attention to the Cladding Defects. Further, in the course of verifying the Works, the second defender permitted the first defender to proceed with elements of the Works that physically concealed the Cladding Defects. ... The second defender’s entire course of conduct combined to effectively conceal them from the Landlord and pursuer.”

[54] Senior counsel submitted that the pursuer had not properly set out what it was that the second defender ought to have done to verify the works and, therefore, on what basis it could be said that the second defender had “permitted” the first defender to conceal the Cladding Defects. This, in turn, meant that the pursuer had not given fair notice of the course of conduct it founded on in respect of the second defender.

The third party’s arguments

[55] In relation to the pursuer’s case, the third party adopted the submissions made by the second defender.

[56] The Dean of Faculty submitted that the principal problem with the pursuer’s arguments was that they ignored *stare decisis*. Two decisions of the UK Supreme Court – *David T Morrison & Co Limited* and *Gordon’s Trustees* – had been authoritatively interpreted by two decisions of the Inner House – *Tilbury Douglas* and *Legal & General Assurance*. One could not argue, in the Outer House, that the Inner House decisions were *per incuriam* (*Baker v The Queen* [1975] AC 774 at 788 G to 789 A per Lord Diplock). The Dean accepted that it was open to the pursuer to argue that parts of either Inner House decision were *obiter*. However, he emphasised that the *ratio* in *Legal & General Assurance* clearly related to the reliance by the pursuer, in that case, on the collateral warranty granted by the defender. Also, in relation to Lord Malcolm’s observations about “everyday” conduct in *Tilbury Douglas* (at paragraph 61), these had been referred to again both in the decision on

permission to appeal (at paragraph 5) and then again in *Legal & General Assurance* (at paragraph 93).

[57] The Dean of Faculty also noted that, as regards the third party, there could be no question that the use of Kingspan products in the design had been concealed. The pursuer expressly averred that K15 Kingspan insulation boards were incorporated in the cladding works (Articles 12.1 to 12.3 and 12.9)

The pursuer's response

The collateral warranties

[58] In the context of collateral warranties, counsel for the pursuer highlighted the distinction which was drawn in *Legal and General Assurance* between, first, clauses which provided that the granter of the warranty would owe no greater duty to the beneficiary than that which was owed under the original appointment; and, second, clauses which provided that the granter was entitled to raise equivalent rights of defence against the beneficiary to those which it would have had against the original employer (see paragraphs 75 and 76). In *British Overseas Bank*, the warranty under consideration contained both types of clauses and, on that basis, it was held that the parties had intended that the granter of the collateral warranty should be entitled to rely upon any prescription defence open to it under the original appointment (paragraphs 23 and 24 together with paragraph 66 of *Legal & General Assurance*). By contrast, in *Legal & General Assurance*, the warranty did not contain the second type of clause, and, as a result, the court concluded that the parties had not intended that the same prescriptive period would apply to both the original appointment and to the warranty.

[59] In the present case, counsel for the pursuer noted that the first defender's warranty contained the second type of clause but not the first; whereas in the second defender's warranty the position was reversed. On the basis of *Legal & General Assurance*, the pursuer submitted that the second defender's warranty could not be construed so as to import the prescriptive period under the original appointment.

[60] In respect of the first defender, counsel for the pursuer pointed to the fact that in terms of clause 5(a) of the warranty, the first defender was obliged to maintain professional indemnity insurance for a period of 12 years after the date of practical completion. The warranty also contained an express 12 year contractual time bar (at clause 11). Counsel for the pursuer submitted that these provisions were not consistent with an intention by the parties that the prescriptive period applicable to the original building contract would apply to the warranty (see *Legal & General Assurance* at paragraph 79).

Section 11(1)

[61] The pursuer formally adopted and repeated the arguments advanced on this point during the first debate (see paragraph 32 of my decision in the first debate). These were to the effect that entry into the lease did not, in itself, constitute loss because, at that point in time, loss was not inevitable.

[62] However, counsel for the pursuer did accept that the averments in Article 14 to the effect that, as the losses sustained were purely economic, the pursuer's cause of action only accrued, for the purposes of section 11(1), when those losses were or reasonably could have been discovered, were not relevant. The pursuer had made those averments in light of certain remarks made in the judgment of the UK Supreme Court in *BDW Trading Limited v URS Corporation Limited* [2025] 2 WLR 1095 (at paragraphs 75 and 76 per Lords Hamblen and

Burrows JJSC). Counsel for the pursuer recognised that, on the basis of current authority, the court would be bound to conclude that these averments ought not to be admitted to probation but the pursuer wished to preserve its right to argue the point if the case went further.

Section 11(3)

[63] In respect of section 11(3), the pursuer's primary position was simple – this issue had been determined by the court in the first debate. The *Tilbury Douglas* decision bore to be an application of the authorities which had been considered by the court at that hearing.

[64] Counsel for the pursuer submitted further that, in any event, the distinction between the present case and *Tilbury Douglas* was the nature of the contracts involved. In *Tilbury Douglas*, the pursuer's losses were inevitable once it had entered into a fixed price contract on the basis of the advice provided by the defender. In the present case, it was not solely entry into the lease which constituted the loss. The nature of a repairing obligation required knowledge of the defect that required to be repaired.

[65] For completeness, counsel accepted that the pursuer advanced no case seeking to engage the provisions of section 11(3) in respect of the prescriptive periods which applied to either the original building contract or the second defender's appointment.

Section 6(4)

[66] Counsel for the pursuer submitted that this was the most important part of the argument. The starting point for the construction of section 6(4) had to be an understanding of not only how this exception fitted into the statutory scheme for short negative prescription but also how short negative prescription itself related to long negative

prescription. It was clearly correct that part of the policy lying behind the 1973 Act was the promotion of legal certainty but the provisions of the act required to be considered as a whole. It was submitted that legal certainty was achieved primarily through 10 year positive prescription and 20 year negative prescription (Johnston, *Prescription and Limitation* (2nd ed), paragraph 1.62). This distinction explained why the 1973 Act provided exceptions to the running of short negative prescription – sections 11(3) and 6(4) – but there were no exceptions to long negative prescription.

[67] Viewed from this perspective, it followed that section 6(4) ought to be given a broad interpretation to ensure that a creditor who was not in a condition to sue was not penalised. Consistently with that starting point, the language of the subsection did not restrict the type of conduct on the part of the debtor which induced the error on the part of the creditor. The language also made clear that the test was subjective. The statute contained no reference to “everyday conduct” (*cf* *Tilbury Douglas* at paragraph 61). The pursuer submitted that section 6(4) was apt to apply to situations in which there was an asymmetry of information and the creditor was relying on the debtor. This meant that it was particularly applicable in the context of defects in buildings.

[68] Counsel highlighted that the deliberate or reckless concealment of a defect by a builder in the course of works had been cited by Johnston as an obvious instance of fraud for the purposes of section 6(4)(a)(i). Counsel was careful to point out that the pursuer did not either allege or aver fraud in the present case. However, he noted that Johnston had opined that, in the case of a negligent or careless failure by the builder it would be open to the creditor to argue that this conduct fell within the scope of error induced by the debtor in terms of section 6(4)(a)(ii) (see paragraph 6.118). From the position of the creditor, counsel

submitted that it would be strange if the same conduct which would be sufficient for the purposes of section 6(4)(a)(i) would be insufficient for the purposes of section 6(4)(a)(ii)

[69] In terms of the common law principles underlying section 6(4), counsel for the pursuer submitted that the 1973 Act had not altered the underlying common law principles of the law of prescription (*Highlands & Islands Airports Limited v Shetland Islands Council* 2015 SC 588 at paragraph 13). He also pointed to the reference by the Inner House in *Legal & General Assurance* (at paragraph 88) to the nineteenth century case of *Caledonian Railway Co v Chisholm* 1886 13R 773 at 766. Counsel noted that *Caledonian Railway Co* had been referred to repeatedly in case law on the 1973 Act. Counsel submitted that the facts of that case were illustrative – while in a contractual relationship, the defender had supplied sacks to the pursuer to enable grain to be carried on the pursuer’s railway. In the course of a subsequent dispute between the parties which had arisen out of a claim by the defender for lost sacks, the pursuer discovered that, during the currency of the contract, the defender had been using the railway to send empty sacks which were not intended for use by the pursuer. The pursuer then sought to claim the costs for the carriage of these empty sacks and was met with a plea of prescription under the Triennial Prescription Act 1579 (c 83). In rejecting the plea of prescription, Lord President Inglis explained:

“Now, it appears to me that that case as stated is one to which the statute does not apply. The statute is intended to prevent creditors from delaying bringing forward a certain class of actions enumerated in the statute. It contains, in the first place, an order or direction that all such actions be pursued within three years, and if the creditor fail to comply with that enactment, then he is to be subjected in this penalty, that he shall have no action unless he prove it by the writ or oath of the defender. Now, that undoubtedly implies that there is negligence upon the part of the creditor, that he ought to have pursued his action sooner, and that he ought not to have allowed the three years to elapse. But how is that possible in the case of these pursuers if their statements be true? By the false pretences of the defender they were prevented from discovering that they were carrying sacks free for which they were entitled to charge. And the defender was in the full knowledge of that and failed to disclose it. To apply the statute to a case of that kind, it appears to me, would not

only be entirely unjust, but would be entirely against the meaning of the statute. The statute assumes that the creditor is in a condition to sue, and it is because of his failure to sue—because of his negligence in putting off the making of his claim—that the statute imposes the penalty upon him. It is clear to my mind, therefore, that wherever a case of this kind can be made, that the failure to sue is due to the conduct of the defender (whether it amount to fraud or not), to concealment on the part of the defender, or to the bringing forth of pretences which are false in fact, whether fraudulent or not, the pursuer cannot be visited by the penalty of the statute, because there is no negligence upon his part, but the sole cause of the delay in bringing forward his claim and raising the action is the conduct of the defender.” (at 776)

[70] Counsel emphasised that Lord President Inglis had attached significance to the fact that the pursuer’s failure to bring a claim had been caused by the conduct of the defender whether fraudulent or not. This was echoed in the structure of section 6(4)(a)(i) and (ii). In this regard, counsel pointed to the concurring judgment of Lord Shand (at 777). Counsel also referred to the case of *Inglis v Smith* 1916 SC 581 at 588 per Lord Guthrie.

[71] Counsel for the pursuer noted that in his speech in *BP Exploration*, Lord Hope had, in construing section 6(4), made express reference to *Caledonian Railway Co*. His Lordship was considering whether the wording “to refrain from making a relevant claim” in section 6(4)(a) required a creditor to know that he or she had a claim and then, consciously, to refrain from advancing it. His Lordship took the view it did not:

“[31] But to read the word in this way in this context would be to open the door to the risk of the very injustice which the subsection was designed to avoid. It would mean that time would run against a person whose reason for not making a relevant claim was not that he was stopping himself from making it, as a matter of conscious and deliberate decision on his part, but that he was wholly unaware of the obligation because its existence was being concealed from him by the debtor's fraud. That was the position of the pursuers in *Caledonian Railway Co v Chisholm*, where it was held that it would be unjust for the statute to be applied against them. Departing in this respect only from para 93 of the report by the Scottish Law Commission, sec 6(4) does not mention the problem of concealment. But it is not hard to see that, where the existence of the obligation or of the identity of the debtor is concealed from the creditor, the effect of the concealment is that he is not in a position to enforce it. If these facts are concealed from him by the debtor's fraud, or by error which has been induced by the debtor's words or conduct, the ordinary use of language would seem to be enough to entitle one to say in that context that what has happened is that the debtor's conduct has induced the creditor to refrain from making the claim.”

Counsel also referred to the speech of Lord Clyde at paragraphs 65 and 66.

[72] Counsel also referred to *Rowan Timber*. In particular, he highlighted that the debtor's conduct in that case – the issuing of a series of charge notices for water and sewerage services – had pre-dated the coming into existence of any obligation on the part of the debtor to repay sums wrongly paid to them by the creditor in respect of each charge notice. In these circumstances, the Inner House had rejected the debtor's argument that, for the purposes of section 6(4), the conduct relied upon required to be separate from and post-date the acts which had brought into existence the obligation in question (at paragraph 18).

[73] Counsel drew attention to the construction of "conduct of the debtor" by Lady Paton in *Heather Capital Limited (in liquidation) v Levy & McRae* 2017 SLT 376:

"[63] 'Conduct' is not defined in the 1973 Act. The approach to s.6(4) adopted by the courts suggests that the word should not be construed in a narrow or restrictive way.... Adopting that approach, it is my opinion that relevant conduct in the context of prescription may be active or passive. It may involve positive action, but equally, in certain circumstances, it may involve a silence or a lack of action. The conduct need not be deliberate, or blameworthy, or careless, or be carried out with any particular motive such as deception or concealment.... The conduct does not have to constitute a crime or a breach of duty (whether contractual or delictual or fiduciary).... The conduct does not require to be the sole cause of the error....

[64] It follows from the above that the relevant question, in my opinion, is simply whether any conduct on the part of the solicitors concerned, viewed objectively, induced or contributed to inducing some or all of the error as defined above, with the result that HC refrained (in the broad sense explained in *BP Exploration*) from making any claim against the solicitors."

[74] Counsel also referred to: *Dryburgh v Scotts Media Tax* 2014 SC 651 at paragraphs 15, 18 and 21.

[75] Counsel noted that there had been no discussion of this line of authority in *Tilbury Douglas*. Insofar as it was argued that the decision in *Tilbury Douglas* conflicted with it, it was open to the court to follow it in preference to *Tilbury Douglas* on the grounds that the

court in that case had not purported to overrule the earlier authorities (*Baker v The Queen* at 788D-E).

[76] In relation to the decision in *Tilbury Douglas* itself, counsel for the pursuer submitted that, as a starting point, it was important to remember that the case had been decided after proof. The pursuer had failed to prove that it was labouring under any error which meant that it did not make a claim against the defender (paragraphs 52 to 55). He noted that this was in the context of the pursuer's awareness that concerns were being expressed about the defender's design (see paragraphs 52 and 66). From this starting point, the decision of the Inner House was unremarkable. He submitted that paragraph 61 of Lord Malcolm's judgment, which was founded on by the defenders (see [37]), had to be read in light of this. There was no reference to the existing line of case law on which the pursuer relied. Counsel submitted it could not seriously be suggested that Lord Malcolm was seeking to cast doubt on case law to which his Lordship had not referred.

[77] As to *Legal & General Assurance*, counsel accepted that the Inner House's conclusion, contained in paragraph 89 of the judgment, rejecting the pursuer's averments that it had been induced into error by representations contained in a collateral warranty, formed part of the *ratio decidendi* and was binding on the court. Albeit counsel noted that paragraph 89 contained neither reference to nor analysis of the line of authorities to which he had referred. He submitted further that the reference to *Tilbury Douglas* in paragraph 93 of the judgment was clearly *obiter*.

[78] When the pursuer's pleadings were considered against the background of the law, counsel submitted that they set out a relevant basis for inquiry. Counsel stressed that it was necessary to consider all of the aspects of the defenders' conduct as a course of conduct which induced an error on the part of the pursuer.

The second defender's attack on the pursuer's averments

[79] Counsel for the pursuer submitted that the specific criticisms made by the second defender in respect of the pursuer's pleadings (at [53]) were without merit. In relation to the pursuer's averments concerning the second defender's obligations to verify the works, the pursuer had made averments concerning the second defender's duties under its appointment both to identify and report defects and to verify that the works were being carried out according to the design and specifications. The averments criticised by the second defender clearly followed on from these earlier averments and had to be read in that context. The pursuer's averment was that the second defender had "permitted" the first defender to proceed with works which concealed the defects simply insofar as the second defender did not stop this from happening.

Challenges to the second defender's case

The third party's arguments

[80] The second defender's claim against the third party proceeded on the basis of the third party's alleged misrepresentation, whether fraudulent or negligent, in relation to the third party's product which had caused the second defender to incorporate that product into the works (Answer 13.3 for the second defender). As a result, it was clear that *damnum* and *iniuria* must have occurred, at the latest by practical completion of the works in 2009. This meant that the relevance of the second defender's claim depended on it successfully invoking the exception contained in either section 11(2) or section 6(4) of the 1973 Act.

Section 11(2)

[81] The third party submitted that section 11(2) applies in cases where: (a) loss, injury or damage has been suffered as a result of a “continuing” act, neglect or default; and (b) the loss, injury or damage occurred before cessation of the act, neglect or default. In such cases, section 11(2) deems the loss, injury or damage to have occurred on the date of cessation, and postpones the commencement of the prescriptive period until that date.

[82] The Dean of Faculty submitted that the phrase “act, neglect or default” in section 11(2) ought to be construed as meaning the creditor’s cause of action. This construction followed from the scheme of the act. Section 6 referred to the extinction of obligations and, in particular, section 6(3) provided for the starting point for the running of the prescriptive period as being the date on which the obligation became enforceable. Section 11 concerned obligations to make reparation and, accordingly, the references to act, neglect and default in that section required to be understood as referring to the cause of action which created the obligation to make reparation. This construction had been adopted repeatedly in the case law (*AMN Group Limited v Gilcomston North Limited* 2008 SLT 835 at paragraph 33; *David T Morrison & Co Limited* at paragraph 23; and *Gordon’s Trustees* at paragraph 17).

[83] On this basis, the Dean of Faculty submitted that, in construing section 11(2), in order for an act, neglect or default to be “continuing”, the cause of action required to be of a continuous nature. In this regard, it was necessary to distinguish between an act which was continuing, on the one hand, and a completed act which had ongoing effects, on the other (see *Warren James (Jewellers) Limited v Overgate GP Limited* [2010] CSOH 57, Lord Glennie at paragraph 5; *John G Sibbald & Son Limited v Douglas Johnston & Anr* [2014] CSOH 94,

Lord Tyre at paragraph 8). It was only the former which engaged section 11(2). The second defender's case fell into the latter category.

[84] Looking at misrepresentation, the Dean of Faculty submitted that, on the basis of the decision of the UK Supreme Court in *Cramaso LLP v Viscount Reidhaven's Trustees* 2014 SC (UKSC) 121, a misrepresentation can be regarded as having a continuing potency up to the point that it is acted upon. At that point, the act is complete (see paragraphs 16 and 23 (per Lord Reed); 62 and 63 (per Lord Toulson)).

[85] The Dean of Faculty submitted that, in this regard, Lord Sandison's decision in *Mackie v Mercedes-Benz Group AG & others* [2025] CSOH 94 was wrongly decided. His Lordship had concluded, on the basis of *Cramaso*, that, for the purposes of section 11(2) a misrepresentation had a continuing effect until the point that it was withdrawn, lapsed or the representee discovered the truth. At that point, it would no longer be reasonable for the representee to rely upon the representation.

[86] The Dean contended that Lord Sandison's analysis failed fully to take account of the fact that the phrase "act, neglect or default" in section 11(2) meant the creditor's cause of action. His Lordship had recognised this in attaching significance to the reasonable reliance of the representee. This was relevant because reasonable reliance was a necessary component in establishing a cause of action based on misrepresentation. However, according to the Dean of Faculty, Lord Sandison appeared not to have taken account of the fact that, once a misrepresentation had been acted upon by the representee, there was no longer any reasonable reliance. In the present case, once the K15 panels were incorporated into the building, there was no longer any reliance by anyone on any statements by the third party.

[87] On this basis, properly analysed, section 11(2) could not properly be relied upon by the second defender.

Section 6(4)

[88] This part of the third party's arguments turned on a report which had been prepared by Wintech following an inspection of the building in 2017. The second defender admitted receiving the report in 2017 but, following an amendment made on the morning of the second day of the debate (see above at [19]), made various averments in explanation.

[89] The third party submitted that the content of this report made it clear to the second defender that in order for cladding to comply with the relevant regulations it was necessary to demonstrate that the entire cladding system had been assessed according to the BR135 (Fire Performance of External Thermal Insulation for Walls of Multi-storey Buildings) acceptance criteria, which could be demonstrated by the BS 8414:1 cladding test. Having received this report, the second defender had actual knowledge of this fact. Accordingly, from receipt of the Wintech report, the second defender could no longer argue, on the basis of section 6(4), that it was in error as to the extent to which the third party's K15 product was in compliance (see *BP Exploration* at paragraph 109; and *Glasgow City Council v VFS Financial Services Limited* 2022 SC 133 at paragraphs 52, 55 and 56).

[90] In the alternative, if the third party required to rely on reasonable diligence, once the second defender had received the Wintech Report the second defender had sufficient knowledge to prompt it to embark upon the preliminaries to a court action (see *Glasgow City Council* at paragraph 57). This was, in effect, what had been done by the defenders in obtaining the Atelier 10 report. In any event, the Atelier 10 report was not a representation

by the third party. There was no averment by the second defender that the third party had continued to make the representation which was founded upon.

The second defender's response

Section 11(2)

[91] Senior counsel for the second defender submitted that the issue for the court was a straightforward one of statutory construction. Section 11(2) could be contrasted with section 11(1). The latter provision provided that an obligation to make reparation became enforceable for the purposes of section 6 on the date when loss, injury or damage occurred. Section 11(2) dealt with the situation in which loss, injury or damage had occurred but the act, neglect or default was continuing. The section provided that time did not start to run until the cessation of the act, neglect or default.

[92] In relation to the authorities relied upon by the third party, senior counsel submitted that *David T Morrison and Gordon's Trustees* were not relevant to the argument as they did not consider section 11(2). The *Warren James (Jewellers)* decision concerned a situation in which there was no continuing act, neglect or default. In the present case, the second defender expressly averred that the obligation was a continuing one.

[93] In *Cramaso*, the issue in the case was whether a representation made to one party could be relied upon by a third party which was not in existence at the time that the representation was made. The conclusion of the UK Supreme Court was that it was wrong to regard a representation as having come to an end after it was made. Instead, the maker of the representation had a continuing responsibility in respect of the accuracy of the statement. That analysis was sufficient to enable the court to find in favour of the third party in that case. Senior counsel for the second defender submitted that there was no rule

of law that once a misrepresentation had caused loss, the maker of the statement was released from its continuing obligations in respect of that statement.

Section 6(4)

[94] The primary argument advanced by the third party was that the second defender had actual knowledge based upon the Wintech report. Senior counsel submitted that it was necessary to bear in mind, when assessing the third party's argument, that the second defender's case was based on a fraudulent misrepresentation by the third party that the K15 insulation board passed the BS 8414:1 test. Against this background, senior counsel submitted that the suggestion that the Wintech report provided the second defender with actual knowledge of the third party's misrepresentation did not bear scrutiny. He pointed out that paragraph 6.1 of the Wintech report went no further than recommending that clarification was sought from a fire consultant as to the suitability of the third party's products with regard to compliance with building regulations. On this basis, it could not be sensibly suggested that the second defender had actual knowledge that it was in error as to the third party's misrepresentation.

[95] On the issue of whether and, if so, when the second defender could, with the exercise of reasonable diligence, have discovered the third party's fraud, senior counsel submitted that based on the second defender's pleadings it could not be said that the second defender was bound to fail. The assessment of the exercise of reasonable diligence was, in the words of Lord Glennie in *Heather Capital*, essentially a value judgment which should seldom, if ever, be made without hearing evidence (at paragraph 100).

Decision

Challenges to the pursuer's case

The collateral warranties

[96] The question for the court to determine is whether the provisions of the collateral warranty agreements granted by each of the defenders have the effect of enabling either of the defenders to rely on defences based on the law of prescription as it applied to claims made under the original contract and appointment respectively by the original employer – the landlord. Following the recent decision of the Inner House in *Legal & General Assurance*, it is clear that the answer to this question is to be determined by a straightforward exercise of contractual construction carried out in accordance with familiar principles – see paragraphs 63 and 70. Importantly, the Inner House stressed this exercise was to be carried out by reference to the terms actually agreed between the parties rather than in accordance with any “principle of equivalence” (see paragraphs 70 and 72). Furthermore, *Legal & General Assurance* also provides authoritative guidance on the approach to be taken to certain clauses which commonly occur in collateral warranties.

[97] The first defender relied upon the clause 1.4(i) in its warranty:

“In the event of any breach of this warranty:

- (i) ... the Contractor [the first defender] shall be entitled in any action or proceedings by the Beneficiary [the pursuer] to rely on any limitation in the Contract and to raise the equivalent rights in defence of liability excluding rights of set-off, retention and counterclaim as it would have against the employer under the Contract had the Beneficiary been named as employer thereunder.”

[98] For its part, the second defender relied on clause 2.2 in its warranty:

“2... In the event of any breach of this Agreement:

- ...
 - 2.2 subject to clause 8.2 but excluding the Consultant’s [the second defender] rights of set-off, retention and counterclaim, the Consultant shall owe no greater duties or obligations in time or in nature and

shall have no greater liabilities hereunder to the Beneficiary [the pursuer] than the Consultant owes under the Appointment Agreement...”

[99] In relation to the first defender, the Inner House has considered wording which was essentially identical to clause 1.4(i) in both *British Overseas Bank* (at paragraph 24) and then again in *Legal & General Assurance* (at paragraphs 65 and 76). In *British Overseas Bank*, the court construed this wording as being designed to place the parties to the warranty in an equivalent position to the parties to the contract by providing that the contractor should have the same rights of defence under the warranty as it had under the original building contract. In *Legal & Assurance*, the court attached particular significance to the fact that the warranty which it was considering did not contain a clause providing for equivalent rights of defence under the warranty. In the absence of such a clause, the court concluded:

“The absence of 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 became 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... [1973 Act] should apply to obligations arising under the collateral warranty.” (paragraph 76)

[100] In light of this authority, I consider that the first defender’s submissions in respect of its collateral warranty are correct. On the basis of clause 1.4(i), objectively construed, it is clear that the parties intended that the first defender was to be entitled to raise equivalent rights of defence under the collateral warranty as to those it had under the building contract. On a plain reading, I see no basis for excluding from the scope of the clause rights to raise defences based on the application of the law of prescription to the original building contract.

[101] I am not persuaded by the pursuer’s argument to the contrary. The pursuer drew attention to both the obligation on the contractor to maintain professional indemnity insurance for a period of 12 years (in clause 5(a)) and a contractual time limit of 12 years

from the date of practical completion in which any claim against the first defender was to be commenced (in clause 11). The pursuer's argument was essentially that these provisions indicated that the parties had intended to create a set of time bars under the collateral warranty which were separate from those which applied to the original building contract.

[102] I do not consider that there is any tension between clause 1.4(i) and the two clauses referred to by the pursuer. The first provides the pursuer with the ability to raise, in relation to claims under the collateral warranty, the equivalent rights of defence which it would have under the building contract. Clause 11 provides for a contractual long stop date of 12 years after practical completion by which any claims require to have been raised and clause 5(a) requires insurance to be maintained for this same period. As the lengthy arguments I have heard in this case in relation to both section 11(3) and 6(4) demonstrate, at the time the collateral warranty was entered into, it could not have been guaranteed that all claims under the original building contract would automatically have prescribed within five years of practical completion. (This would seem particularly true when one bears in mind that the first defender's collateral warranty pre-dates by some years the decision of the UK Supreme Court in *David T Morrison* which undoubtedly changed the understanding of, in particular, section 11(3)). In these circumstances, one can understand the value in having made provision for a long stop date.

[103] I note, as was pointed out by the pursuer, that in *Legal & General Assurance*, the court referred to a provision similar to clause 5(a) as being supportive of its conclusion that the parties had not intended the prescriptive period under the original building contract to apply to claims under the warranty (at paragraph 79). However, I do not regard this passing reference to be of particular moment. First, it was made in the context of a warranty which, unlike the first defender's, did not contain a clause providing for equivalent rights of

defence – which was a significant point of distinction for the court. Second, the court made the reference having noted that, again unlike the present case, the collateral warranty had not been entered into until more than five years after the date of practical completion.

Finally, I note that the collateral warranty under consideration in *British Overseas Bank* also contained a contractual time bar equivalent to clause 11 (see clause 3.2 noted at paragraph 24). The existence of this provision did not prevent the court in that case from concluding that the parties had intended that the equivalent prescriptive periods to those applicable under the original building contract ought also to apply to claims under the warranty. Further, no criticism of this was made by the court in *Legal & General Assurance*.

[104] The position of the second defender is different insofar as the critical wording of the critical clause – clause 2.2 – does not directly mirror those clauses which were considered by the Inner House in *British Overseas Bank* and *Legal & General Assurance*.

[105] The pursuer sought to argue that clause 2.2 did no more than provide that the second defender was to owe the pursuer no greater obligation under the collateral warranty than it owed under the original appointment. As such, the pursuer sought to argue that clause 2.2 was equivalent to the clause which the court had considered in *Legal & General Assurance* and found not to relate to the equivalence of defences (see paragraph 75).

[106] I disagree with the pursuer's arguments for two reasons based on the language of clause 2.2.

[107] First, it appears from the opening words of the clause that its scope goes beyond dealing solely with the granter's obligations to the beneficiary. The reference to the second defender's rights of set-off, retention and counterclaim indicate that the clause is providing for the second defender's position with regard to both its obligations to and its rights of defence against the pursuer. The implication of the reference to the express exclusion of the

second defender's defensive rights of set-off, retention and counterclaim, is that otherwise these rights of defence under the original appointment would require to be considered in determining that the second defender had no greater liability under the warranty than it did under the original appointment. This construction is consistent with an intention that the second defender would also be entitled to rely, as against the pursuer, on defences arising from the law of prescription as it applied to the original appointment.

[108] That intention is, in my view, confirmed by the reference in clause 2.2 to the second defender's duties and obligations to the pursuer being no greater "in time" than those owed under the original appointment. The second defender relying on the prescriptive period which applied under the original appointment as against the pursuer in relation to a claim under the warranty would seem entirely in accordance with the intention of the parties as expressed in this wording.

[109] In light of my conclusions in respect of both of the defenders' collateral warranties, I agree with the defenders' argument that the pursuer's averment in Article 14 to the effect that neither warranty provides for a period of contractual limitation equivalent to the prescriptive period which applied to claims against them under the original contract and appointment respectively is irrelevant (see [14]).

Section 11(1)

[110] Having heard submissions, there are two issues in dispute to be resolved under this heading.

[111] The position of the defenders and third party is straightforward: this loss occurred at the point at which the pursuer entered into the lease. Accordingly, in terms of section 11(1), the pursuer's claim was enforceable at that point and, therefore, the prescriptive period

began to run. This approach is consistent with the approach to section 11(1) set down by the UK Supreme Court in *David T Morrison* (at paragraph 25) and *Gordon's Trustees* (at paragraph 19).

[112] At least formally, the pursuer advances two arguments to challenge this conclusion. First, the pursuer formally repeated the arguments it made, unsuccessfully, at the first debate based on the construction of the repairing obligations of the lease. Second, the pursuer made averments, based on certain *obiter dicta* in *URS Corp Limited*, to the effect that, as the loss suffered was purely economic, the pursuer's cause of action only arose once the loss had been discovered or reasonably could have been discovered.

[113] Both of the pursuer's arguments in respect of section 11(1) fall to be rejected.

[114] In relation to the first, having considered the provisions of the lease, I rejected this argument in my decision on the first debate (see paragraphs 47 to 48 of the first debate decision). I see no reason to revisit this conclusion and, indeed, no such reason was advanced by the pursuer.

[115] In relation to the second, as counsel for the pursuer recognised, the views of Lords Hamblen and Burrows in *URS* do not represent the law of Scotland.

Section 11(3)

[116] The only question which arises in respect of section 11(3) is whether the pursuer has relevantly averred a basis for invoking this section in respect of its own claim in terms of the two collateral warranties.

[117] Whatever may have been the position at the first debate (see paragraph 65 of the first debate decision), counsel for the pursuer was clear that no such argument was now being

advanced in respect of the prescriptive period applicable to the landlord's claims arising in terms of the original building contract and appointment respectively (see [65]).

[118] Contrary to the submissions of the first defender (see [31]), I do not consider that the fact that I have rejected the pursuer's arguments in relation to the proper construction of the collateral warranties (see [101] to [108] above) removes the need to consider the relevancy of the pursuer's case in respect of section 11(3) in relation to its claim under the collateral warranties. It does not follow that simply because the pursuer now accepts that section 11(3) has no application to the running of the prescriptive period in respect of claims arising out of the original building contract and appointment, that the section also has no application to the pursuer's claims arising out of the collateral warranties.

[119] The position of the defenders and the third party was, in essence, that, in line with the approach of the Inner House in *Tilbury Douglas*, it was the lease and the repairing obligations that the latter imposed on the pursuer which constituted the loss, injury and damage caused by the defenders' alleged wrongful act. There was no requirement that the creditor knew or ought to have known that something had gone wrong or that he or she had suffered a detriment.

[120] The pursuer relied on the decision which I had reached on this question following the first debate (see paragraphs 51 to 54). Counsel for the pursuer argued that the Inner House's decision in *Tilbury Douglas*, which post-dated my decision on the first debate, was no more than an application of the same principles arising out of case law which had been considered at that debate.

[121] In light of my decision following the first debate on the relevancy of the pursuer's pleadings in respect of section 11(3), I need to consider whether there has been a material development which requires me to revisit the question. Notwithstanding the development

of the pleadings in respect of other issues, the pleadings for the pursuer in respect of the application of section 11(3) to claims under the collateral warranties have not changed.

However, contrary to the submissions of the pursuer, I do consider that, for two reasons, the decision of the Inner House in *Tilbury Douglas* represents a sufficiently significant development to require me to re-visit this issue.

[122] The first reason is the observation of Lord Malcolm, in the *Tilbury Douglas* case, when refusing to grant permission to appeal to the UK Supreme Court in respect of a ground of appeal focussing on section 11(3). His Lordship observed (at paragraph 12) that my decision following the first debate was “difficult to reconcile with” the line of authority which included *David T Morrison*, *Gordon’s Trustees* and *WPH Developments Limited*. In my view, in the somewhat unusual circumstances of the present case in which I am hearing a second debate (see [4] above), the doubt expressed by the Inner House as to the correctness of my first decision requires me to re-consider the question.

[123] The second reason is that, again contrary to the submissions of the pursuer, I consider that the decision in *Tilbury Douglas* does represent a development of the principles established by the UK Supreme Court in *David T Morrison* and *Gordon’s Trustees*.

[124] In *Gordon’s Trustees*, Lord Hodge made clear that, based on the correct construction of section 11(3), the creditor requires, whether actually or constructively, to be aware only of the existence of the loss or damage as an objective fact. There is no requirement for the creditor to be aware of any detriment or that in any sense “something has gone awry” (see paragraphs 19, 20 and 21). The examples given by Lord Hodge are illustrative of the underlying principles. At paragraph 19, Lord Hodge refers to a person purchasing defective goods, incurring expenditure or failing to regain possession of his property when he or she

wishes to do so. Subsequently, at paragraph 21, his Lordship addresses the knowledge the creditor requires to have for the purposes of section 11(3):

“It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure.”

Notably, in these examples, the creditor to the obligation in question is the recipient of goods and or services being provided and his or her awareness is considered from that perspective.

[125] In *Tilbury Douglas*, the Inner House applied these principles in the case of a contractor, the pursuer, which had entered into a fixed-price contract for enabling works. At the same time, the pursuer had entered into a novation agreement in terms of which the defender was subcontracted to provide engineering services to the pursuer including certain design works. The pursuer claimed that the defender’s design was negligent which resulted in the need for an extensive re-design and also delayed the works. The Inner House concluded that, for the purposes of section 11(3), the prescriptive period commenced at the date on which the pursuer had entered into the fixed-price contract. This was because at that date, having entered into the fixed-price contract, the pursuer’s losses arising from the re-design and consequent delays were “locked in” (paragraph 49). This was so, notwithstanding the fact that, at that point, no re-design had actually been carried out and no delays had been suffered. Therefore, for the purposes of section 11(3), the prescriptive period began even though, at that time, there was no suggestion that the pursuer had either not obtained something which it had sought or had incurred any expenditure (*cf Gordon’s Trustees* at paragraph 21).

[126] On this basis, I consider that the decision in *Tilbury Douglas* does represent a development of the principles arising from *Gordon’s Trustees* because they were applied to a

situation in which the claim in question was being made by a provider of services rather than a recipient of them. In that situation, the Inner House concluded that the creditor had sufficient awareness of loss having been sustained solely because it was aware of the fact that the fixed-price contract had been concluded, in terms of which it would subsequently be obliged to incur expenditure in relation to the re-design and the consequent delays. From this perspective, at the point the fixed-price contract was concluded, the pursuer's loss can be seen to arise from the fact that it had agreed to too low a price for the enabling works it was to provide when the – as yet undiscovered – need for re-design and consequent delay would be considered.

[127] Accordingly, upon re-visiting the arguments in respect of the application of section 11(3) in the present case, in light of the approach of the Inner House in *Tilbury Douglas* and the authoritative statement of how the principles arising from *Gordon's Trustees* are to be applied, I conclude that the pursuer has not pled a relevant case. Applying the logic of *Tilbury Douglas*, at the point the pursuer entered into the lease on 8 December 2009, its losses in relation to repairing the cladding defects were “locked in” as a result of the repairing obligations which the pursuer had undertaken. This follows from the approach of the Inner House in *Tilbury Douglas*. The pursuer had sufficient awareness for the purposes of section 11(3) even though at that point no money had been expended in respect of those repairs which, of course, nobody knew would be needed.

Section 6(4)

[128] The logical starting point for consideration of the parties' arguments in respect of the relevancy of the pursuer's pleadings in relation to section 6(4) is the most recent analysis of that provision by the Inner House in *Legal & General Assurance*.

[129] In that case, the Inner House was considering the relevance of the respondents' averments which concerned a claim relating to alleged defects with soffit insulation. These averments sought to invoke section 6(4) on the basis that the respondents had been induced into error by representations made by, amongst others, the reclaimers in their collateral warranty, to the effect that they had complied with their obligations under the original appointment. The respondents averred that this error induced them to refrain from making a claim.

[130] The critical part of the court's reasoning is to be found between paragraphs 87 and 89. The court distils a series of propositions from previous case law.

- First, in order to rely on section 6(4) it is necessary for the creditor to show that the reason the creditor did not make a claim was that he or she was misled by the debtor's fraud or because of an error induced by the debtor (*BP Exploration* at paragraph 33; *Tilbury Douglas* at paragraph 59).
- Second, the debtor must lead the creditor to believe something different from the truth (*BP Exploration* at paragraph 65; *Tilbury Douglas* at paragraph 59).
- Third, 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 (*Caledonian Railway Co* at 776 and 777)

[131] Applying the law to the case before it, the Inner House concluded that the respondents' averments did not involve inducement of an error of the nature required to invoke section 6(4). The respondents' pled case was that they had been induced to refrain from making a claim for breach of the reclaimers' collateral warranty solely as a result of an

error apparently induced by the conduct of the reclaimers in granting that same collateral warranty. In these circumstances, the Inner House found that the respondents' case was circular and illogical. In essence, using the language of section 6(4)(a)(ii), the reason why the respondents' pleadings were irrelevant was that they failed to disclose the inducement of an error which induced the respondents to refrain from making a claim.

[132] Later in the opinion, the Inner House made some additional *obiter* remarks concerning other averments made by the respondents seeking to rely on section 6(4) in respect of some different defects. These averments were to the effect that the respondents had been induced to refrain from making a claim based on the reclaimers' conduct in performing their obligations under their appointment including duties of monitoring, inspection and certification; seeking payment under their appointment; and, entering into a collateral warranty. Ultimately, the court was not required to reach a conclusion on the relevancy of these averments but observed:

"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." (paragraph 93)

[133] I consider that, for present purposes, this passage discloses two points of significance. First, the principal reason that the Inner House was minded to conclude that this part of the respondents' averments was irrelevant was that which it had given in respect of the averments relating to the soffit insulation claim: namely, that they failed to disclose the inducement of an error which induced the respondents to refrain from making a claim.

Indeed, it is striking that in the passage of the respondents' averments which is quoted in the opinion (at paragraph 90), the word "error" does not appear.

[134] Second, the Inner House makes reference to and endorses the observations of Lord Malcolm in paragraph 61 of *Tilbury Douglas*. Given that paragraph's apparent centrality to the arguments advanced by the defenders and the third party before me, it is necessary to consider that paragraph and its context in a little detail.

[135] As a starting point, it is notable that, when considering permission to appeal, the court regarded the passage as being one of secondary importance (see paragraph 5 of the statement of reasons). The passage is also *obiter*. The principal reason that the Inner House held that the Lord Ordinary had erred in his decision in respect of section 6(4) was that there was no factual evidence to support the conclusion that the creditor, Tilbury Douglas, was in error and so was induced to refrain from making a claim (see paragraphs 53 and 54).

[136] Most importantly, I consider that Lord Malcolm's observations in paragraph 61 as to the conduct by the debtor, the engineer Arup, relied upon by the Lord Ordinary have to be seen in this context. As I understand the reference to "everyday" conduct, His Lordship is doing no more than querying whether generic conduct – the provision of services and accepting payment in terms of a contract – which was apparently unrelated to any relevant error on the part of the creditor fell within the scope of section 6(4). This reading is consistent with the fact that in the following paragraph, Lord Malcolm returns to considering the lack of evidence of any relevant error on the part of Tilbury Douglas arising from the assurances made by Arup as to its design.

[137] On this basis, contrary to the submissions on the part of the first defender, I do not understand paragraph 61 of *Tilbury Douglas* to be suggesting that the type of conduct which may be relevant for the purposes of section 6(4) is restricted beyond that it requires to have

induced an error on the part of the creditor which, in turn, induced the creditor to refrain from making a claim. I do not consider this a surprising conclusion. There is no support in the language of the provision for any such restriction. Furthermore, to read paragraph 61 as the first defender contended for, would involve regarding it as impliedly disapproving the earlier analysis of the Inner House in *Heather Capital* in relation to conduct (at paragraph 63). (For completeness, I note that the Inner House, in a decision issued after the debate in the present case, has expressly approved *Heather Capital* – see *Greater Glasgow Health Board v Multiplex Construction Europe* 2026 SLT 433 at paragraph 76.)

[138] Having considered the decision in *Legal & General Assurance* in detail, including its references to *Tilbury Douglas*, I respectfully find it difficult to improve on the summary given by Lord Sandison in *Batchelor*:

“Leaving aside for later discussion the import of the ‘reasonable diligence’ proviso, it ought to be borne in mind that, for the purposes of debate, section 6(4)(a)(ii) simply requires the creditor to aver that he was induced to refrain from making a relevant claim as a result of error induced by words or conduct of the debtor, together with such specification of the basis upon which he advances that contention as gives the debtor fair notice of that basis. There is no warrant in the provision for limiting the sort of conduct which may qualify as inducing an error, although it appears that there may be highly exceptional circumstances where it can be determined that the conduct alleged was incapable as a matter of fact (not as a matter of law, because no limit on the types of qualifying conduct is truly provided by law) of causing a relevant error.” (at paragraph 164).

[139] I also respectfully agree with Lord Sandison’s observation in *Batchelor* that there is no requirement that the conduct on the part of the debtor be such as to induce a relevant error on the part of a reasonable person (at paragraph 164). (Again, I note that this point was subsequently confirmed in *Multiplex* (IH) at paragraph 97.)

[140] Based on my conclusions as to what is to be taken from the decisions in *Legal & General Assurance* and *Tilbury Douglas*, much of the argument I heard from both sides simply falls away. In particular, I do not consider that the arguments raised by both the pursuer

and third party as to the status of *Tilbury Douglas* as a precedent arise. Furthermore, for similar reasons, as I do not regard either case as seeking to alter the pre-existing understanding of the correct construction of section 6(4), I also do not consider it necessary to address the pursuer's broader arguments as to the pre-history and development of the section.

[141] It remains to consider the relevance of the pursuer's averments seeking to rely on section 6(4) as against the first and second defenders in respect of both its claims and the claims of the landlord.

[142] As summarised by Lord Malcolm in *Tilbury Douglas*, in order to rely on section 6(4), a creditor requires to prove and therefore, for present purposes, plead three things: first, that there was a period when the creditor laboured under an error which meant that he or she did not make a claim; second, when that period began and ended; and, third, that the error was caused by the words or conduct of the debtor.

[143] I have set out the pursuer's averments in full above (at [16] and [17]).

[144] Dealing with the averments which relate to the conduct of the first defender, I am satisfied that the pursuer has pled a relevant case which, if proved, would entitle it to rely on section 6(4).

[145] In relation to the first criterion identified in *Tilbury Douglas*, the pursuer has clearly averred the error under which both it and the landlord were labouring: specifically, that no cladding defects existed in the hotel. The pursuer also avers that, as a result of that error, both it and the landlord refrained from making a claim against the first defender.

[146] In respect of the second criterion, the pursuer avers the period during which both it and the landlord were in error – December 2009 to 16 December 2020 and February 2009 to 18 September 2017 respectively.

[147] Finally, the pursuer avers a whole course of conduct by the first defender which, so the pursuer contends, either induced the error or at least materially contributed to the concealment of the defects from both it and the landlord. Critically, in my view, this course of conduct includes the physical concealment of the defects by covering them with other materials as the works progressed. From this starting point, the pursuer then makes averments relating to the first defender's contractual duties to identify and report defects; the first defender's claim for payments; and the grant of the collateral warranty. At its most basic, the pursuer's position is that, as a result of the first defender's conduct, neither it nor the landlord were physically able to see the defects which were incorporated into the building as it was constructed. I consider that the concealment of the defects and, therefore, the existence of any claim which either the pursuer or the landlord had arising therefrom, is indistinguishable from the concealment referred to by Lord Hope in *BP Exploration Co* (at paragraph 31).

[148] Taken together, I consider that the pursuer's case can be clearly distinguished from a situation in which the averments under consideration amount to no more than a contention that: "a defender has merely made an assertion to the effect that he has performed his obligations or has not been negligent." (*Tilbury Douglas* (Permission Hearing) statement of reasons at paragraph 5). For the same reason, the present case falls to be distinguished from the situations with which the Inner House was dealing in *Legal & General Assurance*. First, unlike the position relating to the soffit insulation claim where the respondents' reliance on section 6(4) was based solely on the grant of a collateral warranty (paragraphs 83 to 89), in this case the grant of the warranty forms only one part of a course of conduct which is founded on the first defender's physical concealment of the defects. Second, in this case, it is the pursuer's averments of the physical concealment of the defects which are related directly

to the pursuer's averred error that distinguishes it from cases involving the generic everyday conduct referred to in *Legal & General Assurance* at paragraph 93.

[149] The pursuer's averments which relate to the conduct of the second defender follow the same pattern as those which deal with the first defender. The averred error and the periods during which the error endured for the pursuer and the landlord (together with in this instance, the first defender) are the same. Similarly, the pursuer avers a course of conduct by the second defender which induced the error or, at least, materially contributed to the concealment of the defects. The averred course of conduct on the part of the second defender contains the same elements as are averred in respect of the first defender – the contractual duties of the second defender to identify and report defects in the works; the applications for payments made by the second defender; and the grant of the collateral warranty by the second defender.

[150] However, in my view, the critical averments in respect of the second defender are as follows:

“The second defender omitted to advise, inform, or otherwise draw the Landlord and/or the first defender's attention to the Cladding Defects. Further, in the course of verifying the Works, the second defender permitted the first defender to proceed with elements of the Works that physically concealed the Cladding Defects.”

These averments were the subject of criticism on the part of the second defender on the grounds that they did not give fair notice of the pursuer's case (see [53] and [54] above).

[151] Accordingly, it is convenient to deal with the particular criticisms of the second defender at this point. The second defender complains that the pursuer has not properly set out what it was that the second defender ought to have done in the course of verifying the works and, therefore, on what basis it could be said the second defender had “permitted”

the first defender to proceed with elements of the works that physically concealed the defects.

[152] In short, I consider that the second defender's criticisms are without merit. Frankly, I struggle to understand the point that the second defender seeks to make. The pursuer has set out, in some detail, the contractual obligations incumbent on the second defender to visit the works and, as they progressed, to verify that the works were being executed in accordance with the designs, specifications and otherwise in accordance with good practice. The pursuer also makes averments as to the second defender's obligations to report to the landlord and the first defender. Notably, during the course of argument before me, no criticism was made of these averments. Against the background of the averments in respect of these duties, the pursuer then makes the averments which are criticised by the second defender. In my view, the rather obvious answer to the second defender's criticism is that, on the pursuer's averments, the second defender ought to have identified the existence of the defects and drawn this to the attention of the landlord and the first defender. Instead, on the pursuer's case, the second defender allowed the works to proceed with the result that the defects were physically concealed.

[153] I consider further that, when read as a whole, the pursuer has also pled a relevant case which, if proved, would entitle it to rely upon section 6(4). I reach this conclusion for similar reasons as to those which I have set out above in relation to the averments which relate to the first defender. On the pursuer's averments, the second defender's lack of action resulted in the physical concealment of the defects which, in turn, led to the pursuer being in error as to their existence. The fact that, in the case of the second defender, the pursuer relies on a lack of action as opposed to some positive step does not matter (see *Heather Capital* at paragraph 63). As I have set out above (at [148]) in relation to averments which

concern the first defender, it is the pursuer's averments of the involvement of the second defender in the physical concealment of the defects which are related directly to the pursuer's averred error that distinguishes the pursuer's case from the situation considered in *Legal & General Assurance*.

Conclusions in respect of the challenges to the pursuer's case

[154] For the reasons which I have set out above, I conclude that:

- The pursuer's averments in Article 14 to the effect that neither of the defenders' collateral warranties provide for any period of contractual limitation equivalent to conventional short negative prescription are irrelevant and ought not to be remitted to probation (see [14]).
- The pursuer's averments in Article 14 that entering the lease did not constitute loss, injury and damage for the purposes of section 11(1) of the 1973 Act are irrelevant and ought not to be remitted to probation (see [14]).
- The pursuer's averments in Article 14 seeking to rely on section 11(3) are irrelevant and ought not to be remitted to probation (see [15]).
- The pursuer has averred a relevant case seeking to rely on section 6(4) which will require the hearing of evidence to determine.

Challenges to the second defender's case

[155] The relevant parties were agreed that, for the purposes of section 11(1), the prescriptive period in respect of any claim that the second defender had against the third party had commenced by the date of practical completion of the works at the latest. By that

point, the third party's product, Kooltherm K15 insulation, had been incorporated into the works.

[156] It follows that, in order for the second defender's case against the third party to be admitted to probation, the second defender requires relevantly to plead reliance on either or both of section 11(2) or section 6(4).

Section 11(2)

[157] In short, the issue between the parties is whether the third party's alleged misrepresentation is a "continuing act, neglect or default" for the purposes of section 11(2).

[158] The starting point for consideration of the third party's arguments under this heading has to be the wording of the subsection. That wording makes clear that the subsection is concerned with situations in which one has a continuing act, neglect or default which has caused loss, injury or damage. In that situation, read short, the date of the loss (which gives rise to the date of enforceability for the purposes of section 11(1)) is deemed to be the date when the continuing act, neglect or default ceases. Importantly, the language of the subsection is concerned with an act, neglect or default that is continuing. There is no requirement for the resulting loss, injury or damage to be so.

[159] The next step is to identify the act, neglect or default in question from which it is claimed the obligation to make reparation arises (see *Warren James (Jewellers) Limited* at paragraph 5; *John G Sibbald & Son Limited* at paragraph 8). In the present case, the second defender's case is squarely based on an alleged misrepresentation by the third party relating to the properties of the Kooltherm K15 insulation (see Answer 13.3). The second defender's primary position is that that misrepresentation was fraudulent or, alternatively, negligent.

[160] The third party argued that the alleged misrepresentation was not a continuing act. The principal basis for this contention was that the wording “act, neglect or default” in section 11(2) ought to be construed as meaning “cause of action”. Construed in this way, the Dean of Faculty argued that once the third party’s alleged misrepresentation had been acted upon by the second defender, the second defender had a completed cause of action. In support of his argument, he cited the analysis of the UK Supreme Court in *Cramaso LLP*.

[161] I consider that the third party’s argument is misconceived in that it conflates an act, neglect or default resulting in the creation of a completed cause of action with the cessation of the act, neglect or default for the purposes of section 11(2).

[162] The fact that a misrepresentation is actionable does not mean that it is not, for the purposes of section 11(2), “continuing”. Once a misrepresentation has been acted upon, the representee may suffer losses which give rise to an obligation on the maker of the statement to make reparation. Once losses have been incurred, the representee would be able to bring an action seeking to enforce that obligation. However, that actionability does not have the result that the misrepresentation is no longer “continuing” in the sense that it ceases to have any causative potency. Put another way, the fact that a misrepresentation has resulted in a representee incurring losses does not mean, in and of itself, that the misrepresentation can no longer be relied upon by the representee.

[163] The position can be tested in this way. In the present case, the second defender avers that, acting in reliance on the misrepresentation by the third party, it specified the incorporation of the third party’s product in the works to construct the hotel which is the subject of the present litigation. As a result, on the second defender’s case, the third party’s act – the misrepresentation – has caused the second defender loss and given rise to an obligation on the party of the third party to make reparation. If, hypothetically, immediately

after specifying the third party's product in the hotel works, the second defender had gone on to specify it in another project again in reliance on the alleged misrepresentation, there would seem no reason in either law or logic to suggest that the mere fact that the second defender had suffered loss as a result of its first reliance on the third party's act would in some way prevent subsequent reliance by the second defender.

[164] In relation to the third party's reliance on the passages cited from *Cramaso LLP*, I do not consider that they assist its argument because the court was not considering the nature of misrepresentation through the prism of section 11(2). I respectfully agree with the analysis of Lord Sandison in *Mackie* of what can be taken from *Cramaso LLP* for the purposes of applying section 11(2) to cases based upon misrepresentation (see paragraphs 141 to 143).

[165] I also reject the third party's argument that, in some way, once a misrepresentation had been acted upon by the representee, the representee, as a result of that fact alone, could no longer reasonably rely on the misrepresentation. I entirely accept that there may be cases in which, as a matter of fact, a representation is so closely connected to a particular transaction that following its conclusion, further reliance is unreasonable. However, as both the second defender's averments in this case and those considered by Lord Sandison in *Mackie* demonstrate, I consider that the circumstances of each representation require to be considered in their own context.

[166] In light of the above, it follows that I consider that the second defender has pled a relevant case entitling it to rely upon section 11(2) in respect of its claim against the third party.

Section 6(4)

[167] The relevancy of the second defender's case in respect of section 6(4) requires to be tested in light of the amendment made midway through the debate (see above at [19]).

Clearly, it was extremely unsatisfactory that the position of the second defender should only be clarified at that very late stage. This was candidly acknowledged by senior counsel for the second defender at the time.

[168] In any event, be that as it may, I am not persuaded by either of the third party's arguments that, on the basis of the second defender's averments, it would be bound to fail after proof.

[169] The third party's first argument is based on the contention that, having received the Wintech report in 2017, the second defender had actual knowledge of the true position regarding the compliance of the third party's K15 product with the relevant British Standard. In the alternative, the third party contends that, based on receipt of the Wintech Report, the second defender could, with reasonable diligence, have discovered this.

[170] The short answer to the third party's first argument is that I do not consider that the terms of the Wintech Report are sufficiently clear or emphatic to enable me to conclude, solely on that basis, that the second defender could not succeed in proving that it had no actual knowledge of the true extent to which the K15 product did, or perhaps more pertinently, did not, comply with the relevant British Standard. As was noted by senior counsel for the second defender, the report goes no further than recommending that clarification is sought from a fire consultant on the issue of the product's suitability.

[171] As to the third party's argument based on reasonable diligence, I respectfully agree with Lord Glennie in *Heather Capital* that that assessment is essentially a value judgment which, other than in the most obvious cases, ought to be made after hearing evidence (at

paragraph 100). I do not consider that the second defender's case in the present action is so obvious. In this regard, I note, for example, the second defender's averments concerning the report from the fire consultants, Atelier Ten, which was obtained following receipt of the Wintech report and which concluded that the K15 product was compliant.

[172] In all the circumstances, I am satisfied that the second defender has pled a relevant case entitling it to rely on section 6(4) in respect of its claim against the third party.

Disposal

[173] For the foregoing reasons, I will refuse the motions of the first and second defenders and the third party seeking absolvitor or, alternatively, dismissal.

[174] With the exception of the averments of the pursuer I have identified above which I have excluded from probation (see [154]), I will allow the parties a proof before answer.

[175] I will also appoint the parties to be heard by order so that a diet can be fixed and so that I can be addressed on any necessary procedural steps to be taken in advance of that diet.