
**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2018] CSIH 70**
**XA18/18**

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the Remit from the Sheriff Appeal Court

in the appeal

DAVID KENNEDY

Pursuer and Appellant

against

THE ROYAL BANK OF SCOTLAND PLC

Defenders and Respondents

**Pursuer and Appellant: McIlvride QC; Harper Macleod LLP**
**Defenders and Respondents: DM Thomson QC, S Murdoch (sol adv); Burness Paul LLP**

15 November 2018

**Introduction**

[1] This appeal concerns the pursuer's term loan arrangements with the defenders. The pursuer avers a breach of contract; being the defenders' early termination, and demand for repayment, of three loans. The issue is whether any obligation to make reparation in respect of the alleged breach has prescribed under section 6 of the Prescription and Limitation (Scotland) Act 1973.

**Procedural history**

[2] The action was raised on 2 April 2015. On 21 April 2016, after a debate, the sheriff found that the pursuer had pled a specific and relevant case of breach of contract, but held, as a matter of relevancy, that any obligation to make reparation had prescribed. He sustained the defenders' plea-in-law to that effect but dismissed the action, rather than assoilzing the defenders. The Sheriff Appeal Court allowed the pursuer's appeal on prescription. They held that there was no "material" on which the sheriff had been entitled to reach the conclusion that the defenders' demand, for repayment of substantial sums of money within a short period of time, was bound, as at that moment, to cause the pursuer loss. A preliminary proof on prescription was allowed and the cause was remitted to the sheriff. The same sheriff, who had already dismissed the action, heard the proof. On 23 October 2017, he reached the same conclusion on prescription; this time holding that the defenders had been in breach of contract, but that they should be assoilzied on the basis of prescription.

[3] The pursuer appealed again. The appeal was appointed provisionally to the SAC's accelerated procedure. However, on 18 January 2018, on joint motion, it was remitted to this court in terms of section 112 of the Courts Reform (Scotland) Act 2014 "given the current flux in the law of prescription" and because the appeal raised "novel and more particularly, complex, issues". On 29 August 2018, the court allowed the defenders to lodge late grounds of cross appeal.

**Background**

[4] The pursuer runs a car sales business. He also owned nine "buy to let" residential properties, which were subject to standard securities in favour of the defenders. These

enterprises were supported by three term loans, including a revolving one. By letter dated 8 February 2010, the defenders purported to terminate the loans before the expiry of the terms, citing an irretrievable breakdown in the bank-customer relationship. They gave the pursuer two days in which to repay £532,077.88. If the loans were not repaid, the defenders stated that they would follow their specified debt recovery procedure. By letter of 12 February 2010, following representations by the pursuer's solicitor, the defenders extended the period for full repayment to 60 days from 12 February. The pursuer's evidence was that he had been the subject of a proceeds of crime investigation, having sold cars to persons believed to be involved in organised crime, but no proceedings had been taken against him. There was no evidence from the defenders about this.

[5] On 4 March 2010, the pursuer wrote to the defenders referring to the unfavourable environment in which to secure alternative finance and the costs associated with legal/valuation work, along with arrangement and security fees. In the absence of a satisfactory explanation for the breakdown in the banking relationship, the pursuer could not obtain alternative finance. Over the course of March and April, he contacted friends and associates, whom he thought might be interested in purchasing the properties at full value, so that he could satisfy the demand for repayment. His efforts were unsuccessful. In early March 2010, the pursuer's wife offered to obtain funding in her own name to purchase the properties. On 22 March, she had an offer in principle, of loan facilities at a level of 75% of the total value of the nine properties, from Birmingham Midshires. On or about 25 March, dispositions and standard securities were executed by the pursuer and his wife. The instructions to the solicitor, who acted for all parties, were that the conveyancing and security transactions were only to proceed if and when the funds from Birmingham Midshires became available.

[6] On 6 April, the solicitor received the last of the relevant certificates of title on behalf of Birmingham Midshires. On or after 7 April, Birmingham Midshires approved and advanced the funds, amounting to 75% of the value of the properties, to the pursuer's wife. She used these funds to buy the properties from the pursuer, who in turn used them to extinguish his liability to the defenders. The sum sued for is £159,078; being the difference between the market value of the nine properties and what the pursuer received for them.

**Sheriff's reasons**

[7] Although the Sheriff Appeal Court had allowed a preliminary proof only on prescription, the sheriff found in fact and law that the defenders had been in breach of contract in issuing the termination letter and demanding repayment. In respect of the date on which loss, injury or damage had occurred, the sheriff identified "four candidates: 12 February; 4 March; 25 March; and 6 April". No finding in fact was made as to when the relevant claim had been made for the purposes of section 6(1)(a), but, in his Note, the sheriff said that it was 2 April 2015. This is ascertainable from the sheriff court process. The sheriff's conclusion was that the pursuer's loss, injury or damage had occurred on 12 February 2010. Any obligation to make reparation had thus prescribed.

[8] The sheriff relied principally on *Dunlop* v *McGowans* 1980 SC (HL) 73. The obligation to make reparation for loss was "a single and indivisible obligation" (see also *Beard* v *Beveridge Herd & Sandilands* 1990 SLT 609 and *Jackson* v *Clydesdale Bank* 2003 SLT 273). The sheriff considered that section 11(1) prevented prescription running where a pursuer had suffered a wrong but no loss, but it did not enable the pursuer to select the date from which it would run by selecting a particular element of loss or damage. The concurrence of a wrong (*injuria*) and loss (*damnum*) was objective. The loss did not require to be actual. The

sheriff found that the "act", in terms of section 11(1), was the issue by the defenders of the termination letter. At that point, the pursuer would have had a cause of action in the form of a declarator and interdict against the defenders from taking debt recovery proceedings. In settling on 12 February, the sheriff found that the pursuer had no prospect of persuading the defenders to revoke the demand and had not succeeded in doing so. He had had three options. The first was to refinance with another lender. It was not possible to pinpoint a date when the prospect of refinancing ended. The second was to sell the nine residential properties at full value to relatives or associates. This was not feasible but, again, it was not possible to pinpoint a date upon which this prospect ended. By the end of March the only realistic option was the third; to sell the properties to his wife.

[9] The pursuer and his wife had approached a mortgage broker in the middle of March. The date when the conveyancing and security transactions settled was not relevant. Rather, the critical date was 12 February; the date when the pursuer had a cause of action open to him because, as the sheriff put it, "More as a matter of fact than of law, loss of some magnitude was inevitable." Alternatively, it would have been 25 March, being the date at which there was no realistic prospect of refinancing or purchasing at full value.

**Submissions**

***Pursuer***

[10] The pursuer appealed on the basis that the sheriff erred in law in determining that the action had prescribed. The sheriff wrongly found that the concurrence of *injuria* and *damnum,* in terms of *Dunlop* v *McGowans* (*supra*), had occurred on 12 February 2010. The relevant date was 7 April 2010, when the transaction to sell the properties to the pursuer's wife at undervalue had settled. That was the date of the pursuer's actual loss. The sheriff

erred in his interpretation of section 11(1). He considered that, for an enforceable obligation to make reparation to arise, there did not have to be "actual loss". This was wrong. In *Dunlop*, the obligation arose when the pursuer would have achieved vacant possession, not when it became inevitable that the pursuer would not be able to do so. There was no legal concept of "practical inevitability of loss"; it was the point at which loss was actually sustained that was relevant. Loss was the "existence of physical damage or financial loss as an objective fact" (*Gordon's Trs* v *Campbell Riddell Breeze Paterson* 2017 SLT 1287 at para 19). The harsh outcome in *Beard* v *Beveridge Herd & Sandilands* (*supra*) was consistent with this, in that the pursuer's loss there was in acquiring a less valuable lease. *Jackson* v *Clydesdale Bank* (*supra*) was distinguishable as, in the pursuer's case, there had been no concluded missives. The dispositions had been executed on 25 March, but the pursuer's solicitor did not have authority to deliver them until 7 April, when the loss occurred.

[11] Each of the three strands of the sheriff's reasoning was wrong. The first relied on the finding that, by 25 March, the only realistic option open to the pursuer was to sell the properties to his wife. This was irrelevant. It was the actual sustaining of loss that triggered the prescriptive period, rather than a prediction or assessment of the probability of loss. The second relied on there being a cause of action open as at 12 February. This was wrong because such an action would have been different to the one which was said to have prescribed; ie an action for damages. The third was the sheriff's reliance on his assessment that "More as a matter of fact than law, loss of some magnitude was inevitable". The inevitability of the loss was irrelevant; what mattered was when it was actually sustained.

[12] The contractual relationship between the pursuer and his solicitor had not been explored at proof. It was unfairly prejudicial to the pursuer for an argument based on the solicitor's fees (see *infra*) to be advanced for the first time at the hearing. There was no

finding in fact that the pursuer had paid his solicitor's fees prior to 2 April 2010. Any pre-litigation expenses were not recoverable as damages (*Shanks* v *Gray* 1977 SLT (Notes) 26). Any liability to pay fees could not be a relevant "loss".

***Defenders***

[13] The defenders' principal submission was that, once the pursuer had decided to satisfy the demand for repayment, each of the three options identified by the sheriff as a means of doing so involved the pursuer incurring loss. First, refinancing would have resulted in the "significant costs associated with legal/valuation work, arrangement and security fees" referred to in the pursuer's letter of 4 March. Secondly, selling the nine properties to relatives or associates at full value would have meant that the pursuer would have lost the rentals from the residential lets. Thirdly, selling the properties to his wife involved a loss of 25% of the market value. The difficulty in quantifying the loss at 12 February 2010 was not fatal to the existence of an obligation to make reparation as at that date (*Dunlop* v *McGowans* 1980 SC (HL) 73 at 81).

[14] It was not merely that a loss was inevitable under each permutation. Loss had actually occurred before 2 April 2010. The pursuer had used solicitors to correspond with the defenders in February 2010; there was a presumption that these would be paid for by the pursuer (Walker and Walker: *Evidence* (3rd ed), para 3.11.1; Davidson: *Evidence*, para 4.56). In *Gordon's Trs* v *Campbell Riddell Breeze Paterson* (*supra*), loss had arisen when a liability for legal fees had been incurred. Here, the pursuer had incurred a liability to his solicitors in connection with their correspondence with the defenders in February 2010.

[15] *Jackson* v *Clydesdale Bank plc* (*supra* at 280) showed that, where loss had been incurred, but there was the potential for the intervention of a third party or even the wrongdoer to

avoid the loss, the prescriptive period would still begin when loss had first occurred. It did not matter, therefore, that, up to 7 April, the defenders could have revoked the demand for repayment. In terms of *Beard* v *Beveridge Herd & Sandilands* (*supra*), prescription ran from the date when a creditor in an obligation to make reparation did not get what he bargained for. In *Beard*, that was a lease with an operable rent review clause in the 21st year of the lease; here, it was banking facilities on the terms agreed.

[16] The defenders cross appealed on two grounds. First, the following additional findings in fact should have been made, *viz*: (i) that by 12 February 2010, when the defenders demanded repayment, the pursuer had suffered loss; (ii) that, in any event, by the end of March 2010 the pursuer had suffered loss by the demand for repayment because by then it was inevitable that he would have to sell the properties at an undervalue; and (iii) the £640,922 received by the pursuer on the sale of the properties to the pursuer's wife was 75% of their open market value. Secondly, the sheriff erred in finding a breach of contract, when the scope of the proof had been restricted to prescription. There had been no evidence or submissions entitling the sheriff to make such a finding. The pursuer conceded this ground of cross appeal.

**Decision**

[17] In terms of section 6 of the Prescription and Limitation (Scotland) Act 1973:

> "(1) If … an obligation… has subsisted for a continuous period of five years –
>
> (a) without any relevant claim having been made…
>
> then as from the expiration of that period the obligation shall be extinguished: …"

Section 11 provides that:

> "(1) … any obligation (…arising… from… any breach of…a contract) … to make reparation for loss, injury or damage… shall be regarded for the purposes of

> section 6 … as having become enforceable on the date when the loss, injury or damage occurred."

In *Dunlop* v *McGowans* 1980 SC (HL) 73, Lord Keith of Kinkel, adopting the reasoning of the Second Division (1979 SC 22), explained (at 81) that:

> "An obligation to make reparation for … loss, injury and damage is a single and indivisible obligation and one action only may be prosecuted for enforcing it. The right to raise such an action accrues when *injuria* concurs with *damnum*. Some interval of time may elapse between the two, and …section 11(1) does no more than to recognise this possibility and make it clear that in such circumstances time is to run from the date when *damnum* results, not from the earlier date of *injuria.* The words 'loss, injury or damage' …indicate nothing more than the subject-matter of the single and indivisible obligation to make reparation".

The question of when *injuria* concurs with *damnum* in this, as in every, case is ultimately one of fact. It is, for the purposes of prescription, when did the pursuer first suffer loss as a result of the defenders' alleged breach of contract; in this case as a consequence of the premature termination of the pursuer's term loans?

[18] Notwithstanding the apparent clarity of Lord Keith's *dictum*, section 6 has continued to pose problems; usually concerned with cases in which the pursuer has not appreciated that a wrong has occurred until a date far removed from that when any loss was suffered. *Beard* v *Beveridge, Herd & Sandilands* 1990 SLT 609 is an example of this. The loss to the landlord had occurred at the point when their solicitors had failed to incorporate a functioning rent review clause into the lease; not when that review would have operated or when the landlords realised their solicitor's error. The absence of a review clause meant that the lease was a less valuable one than that which had incorporated the clause. Thus loss had been sustained upon execution of the lease (see Lord Cameron at 4).

[19] In *Gordon's Trs* v *Campbell Riddell Breeze Paterson* 2017 SLT 1287, Lord Hodge described (at para [19]) loss, injury or damage as "a reference to the existence of physical damage or financial loss as an objective fact". The relevant pursuer, if he or she had

incurred expenditure or failed to obtain possession of property, would find that the prescriptive period runs, at the latest, from the date of that expenditure or failure, notwithstanding that he or she had not realised that there was a claim in respect of the loss against another. That is not directly relevant to the present case, but it nevertheless assists in the analysis.

[20] The alleged breach by the defenders consisted of the termination of the pursuer's credit facilities, which would otherwise have remained extant until the expiry of the terms. The termination created loss at that point. The relevant date is when the initial intimation of the termination was given (8 February 2010), even if there was, on 12 February, a later extension of 60 days, since it was then that it was apparent that the facilities would be coming to an end, one way or another, prematurely. The *damnum* (loss) was immediate upon the occurrence of the *injuria* (wrongful act). The pursuer no longer had his credit facilities, or at least did not have ones of the length stipulated in the conditions of loan. The sheriff erred, but perhaps only in expression, when he said that, for prescription to start running, the loss does not have to be actual. It does, but it does not either require to have been suffered or to be precisely calculable at the relevant date and it may increase over time. It is again an error, but only in expression, to say that it is sufficient that loss is inevitable. It has to have happened in one form or another. However, where loss is inevitable, as a matter of law, in almost all cases, loss will have already occurred. It is, put simply, quantifiable future loss. This is illustrated by *Dunlop* v *McGowans*, where loss would have been calculable from the point at which the solicitors had failed to serve the notice to quit. It is clear also from *Beard* v *Beveridge, Herd & Sandilands*.

[21] No matter what the liquidity of the pursuer might have been, the termination of his credit facilities amounted to a loss of a quantifiable benefit which enabled the pursuer to

conduct his businesses; notably his "buy to let" flats, which, financed by the secured loans, would return a profit on rents received. This termination resulted in future loss in the sense that the "inevitable" need to re-finance the business was capable of quantification, albeit in an uncertain manner, as at the date of termination. That quantification would have necessitated an estimate of the costs of any predicted method of refinancing, taking into account, for example, the three options which were thought to be open to the pursuer. However difficult the exercise of quantification may have been at the point of termination, it is of a similar type of exercise to that often embarked upon by the courts in relation to the prediction of future events in damages claims. As at the date of termination, the pursuer's loss was at least quantifiable by reference to a reasonable estimate of the legal, valuation, arrangement and security fees, to which an extra amount might be added to cover the likelihood of a less favourable credit facility.

[22] The defenders sought to introduce an argument that, in any event, the pursuer had incurred legal fees as at February 2010; evidenced by the sending of the letter of 10 February 2010. This is a legal argument which is based on a finding in fact made by the sheriff. As such, given that the pursuer had sufficient time to deal with the point, the court will address it. It is important to distinguish between legal expenses which legitimately form part of a damages claim, such as the Land Court expenses in *Gordon's Trs* v *Campbell Riddell Breeze Paterson* (*supra*), and those which are directly related to the claim in an action which is subsequently raised. The former would amount to loss. In this case these would include the costs of refinancing, including legal expenses in relation to the preparation of any conveyancing or security documents. The latter would fall to be assessed within the litigation expenses regime (RCS 42.16; Table of Fees, Chapter III, Part V, para 2) and would not be recoverable as damages. They would not constitute loss, injury or damages for the

purposes of prescription. In view of the fact that it is established that loss had occurred at the time of the termination, the cost of the instruction of solicitors as an element of loss does not require separate consideration.

[23] The appeal should be refused and the court should adhere to the sheriff's interlocutor of 23 October 2017, except that: (1) two findings-in-fact require to be added, *viz*. [37] The first relevant claim made by the pursuer was on 2 April 2015; and [38] the pursuer suffered loss when the defenders' terminated the pursuer's loan facilities on 8 February 2010; and (2) the first finding-in-fact and law should be deleted.

**Postscript**

[24] There is one procedural matter which requires to be addressed. The sheriff had originally dismissed the action by sustaining the plea of prescription, albeit that he dismissed the action rather than granting decree of absolvitor. The appeal was allowed and the matter remitted to the sheriff for a preliminary proof on prescription. In circumstances where a court of first instance has already made a decision on an issue, which essentially goes to the merits of the case, such as prescription, it is inappropriate for that case to be remitted to the same sheriff for determination of the same issue, albeit after proof. Although the court is confident that the sheriff determined the matter in an entirely objective way, the real possibility of at least sub-conscious bias (see *Scottish Ministers* v *Stirton* 2014 SC 218, LJC (Carloway) delivering the Opinion of the Court, at para [88]) is something which the mercurial fair minded and informed observer would undoubtedly have had at the forefront of his mind, given that the sheriff had already adjudicated on the same matter as he required to re-determine after proof. As a matter of fairness, the proof should have been allocated to a different sheriff.


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Lord President
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OPINION OF LORD BRODIE

in the Remit from the Sheriff Appeal Court

in the appeal

DAVID KENNEDY

Pursuer and Appellant

against

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Defenders and Respondents

**Pursuer and Appellant: McIlvride QC; Harper Macleod LLP**
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15 November 2018

[25] I am grateful for having had the very considerable advantage of sight of Your Lordships' respective opinions in draft. I respectfully agree with Your Lordships that in the present case *damnum* concurred with *iniuria* (as these expressions were used by Lord Keith in *Dunlop* v *McGowans*) immediately on the withdrawal by the respondents of the appellant's credit facilities. Accordingly, any obligation on the part of the respondents to make reparation to the appellant by reason of their breach of contract was extinguished by

virtue of the short negative prescription provided by section 6(1) of the 1973 Act prior to the raising of this action on 2 April 2015. I therefore agree that the appeal must be refused.


**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2018] CSIH 70**
**XA18/18**

Lord President
Lord Brodie
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OPINION OF LORD DRUMMOND YOUNG

in the Remit from the Sheriff Appeal Court

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DAVID KENNEDY

Pursuer and Appellant

against

THE ROYAL BANK OF SCOTLAND PLC

Defenders and Respondents

**Pursuer and Appellant: McIlvride QC; Harper Macleod LLP**
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15 November 2018

[26] I agree with your Lordship in the chair that this appeal should be refused, for essentially similar reasons. I further agree with the amendments to the sheriff's findings-in-fact and the deletion of his first finding-in-fact and law, as proposed at paragraph [23] of your Lordship's opinion.

**The Prescription and Limitation (Scotland) Act 1973**

[27] The issue between the parties turns on the application of sections 6 and 11 of the Prescription and Limitation (Scotland) Act 1971. Section 6(1) provides as follows:

> "If … an obligation to which this section applies has subsisted for a continuous period of five years –
>
> (a) without any relevant claim having been made in relation to the obligation, and
>
> (b) without the subsistence of the obligation having been relevantly acknowledged,
>
> then as from the expiration of that period the obligation shall be extinguished".

Section 11(1) provides that:

> "[A]ny 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 incurred".

Section 11 has the effect that, for the five-year prescriptive period to begin to run in relation to an obligation to make reparation, it is essential that there should be a concurrence of *injuria* and *damnum*: *Dunlop* v *McGowans*, *supra*. In that case Lord Keith, in the House of Lords, states (at page 81):

> "An obligation to make reparation for such loss, injury and damage is a single and indivisible obligation, and one action only may be prosecuted for enforcing it. The right to raise such an action accrues when *injuria* concurs with *damnum*. Some interval of time may elapse between the two, and it appears to me that section 11(1) does no more than to recognize this possibility and make it clear that in such circumstances time is to run from the date when *damnum* results, not from the earlier date of *injuria*".

Comparable statements of the law are found in the Second Division, in the opinion of the Lord Justice Clerk at pages 33-34 and Lord Kissen at pages 36-37.

[28] The essential principle that emerges from *Dunlop* v *McGowans* is that, before the short negative prescription can begin to run, there must be both a legal wrong and loss

caused by that wrong. That involves three elements: *injuria*, *damnum*, and a causal link between the two. The critical issue in the present case is the meaning of the concept of *damnum*, or loss, in relation to the claim advanced by the pursuer against the defenders. In considering what loss may have occurred, however, it is also both important and useful to consider the nature of the legal wrong and the causal link between that wrong and the loss that is said to have occurred.

**The pursuer's claim**

[29] The pursuer seeks reparation for an alleged breach of contract by the defenders. It is averred that the relevant breach of contract resulted from a letter sent by the defenders to the pursuer on 8 February 2010 terminating his banking facilities. Those facilities were contained in three agreements. Two of these were term loan agreements, under which the sums borrowed were repayable by specified monthly instalments over set periods, neither of which had expired prior to 8 February 2010. Both of those loans were secured over residential properties belonging to the pursuer. The third was an agreement to provide what was described as a revolving loan. This was to be used by the pursuer to purchase two further residential properties. Initially it was repayable by 30 November 2008, but by a supplemental agreement this date was extended to 31 January 2010. In its letter of 8 February 2010 the defenders demanded repayment of all sums due by the pursuer by 11 February 2010; the total sum then due by the pursuer to the defenders was £532,077.88. Solicitors acting for the pursuer wrote to the defenders setting out his reaction and requesting an extension of the time for repayment. By letter dated 12 February 2010 the defenders granted an extension of 60 days for repayment. The breach of contract alleged by the pursuer is thus the termination of his banking facilities in breach of the terms of the loan

agreements. It is that breach of contract that is said to constitute *injuria* for the purposes of the short negative prescription.

[30] Nevertheless, the prescriptive period does not begin to run until *damnum*, or loss, has also occurred. The pursuer avers that in consequence of the withdrawal of his banking facilities he required to obtain sufficient liquid funds to repay the sums that were then due by him to the defenders under the three banking agreements. In order to raise those funds within the timescale specified by the defenders, he required to sell nine residential properties that he owned to his wife at less than their market value. The pursuer transferred title to the properties on 7 April 2010 for an aggregate sum of £640,922. He avers that the market value of the properties at that time was in excess of £800,000, and he accordingly claims that he suffered a loss of £159,078, which represents the difference between a market value of £800,000 and the sum that he actually received.

[31] In those circumstances the pursuer alleges that he did not suffer any loss for the purposes of sections 6 and 11 of the 1973 Act until he had completed the sale to his wife of the various residential properties. That occurred when the dispositions of the properties were delivered to his wife, on 7 April 2010, and it is that date that the pursuer claims to be the *terminus a quo* for the purposes of prescription. It is a matter of agreement that the present action was raised on 2 April 2015 (although this is not the subject of any express finding in fact by the sheriff, and there are no findings in fact made by the Sheriff Appeal Court). The critical issue is accordingly the date when the pursuer suffered loss as a result of the defenders' breach of contract. If the pursuer is correct in his claim that he suffered no loss until the transfer of the properties on 7 April 2010 the prescriptive period had not expired when the action was raised; if, on the other hand, the pursuer sustained *damnum*

prior to 7 April 2010, the prescriptive period will have expired before proceedings were initiated.

**Breach of contract**

[32] Thus the pursuer's claim against the defenders is based on an alleged breach of contract by the latter, in the form of a refusal to grant banking facilities in accordance with three loan contracts, at least two of which envisage that they would continue in existence for a considerable future period. Three features of this claim are in my opinion of importance in determining when he suffered *damnum*, or loss, for the purposes of the short negative prescription. First, the alleged breach of contract takes the form of non-performance – a refusal to perform – rather than misperformance – for example negligent performance of a contract to provide services, or the supply of defective goods. Secondly, the denial of continued banking facilities is alleged to have caused the pursuer financial loss, through his need to obtain alternative sources of finance. Thirdly, quite apart from the losses caused by the need to find alternative sources of funding, the denial of banking facilities in breach of contract of itself causes *damnum* to the bank's customer. The customer is deprived of what will usually be an important source of liquid funds. Liquidity is essential if a business is to be carried on properly, and the loss of liquidity by itself in my opinion amounts to *damnum* for the purposes of the short negative prescription.

[33] I would like to say slightly more about each of these three features. The fact that the breach of contract is non-performance rather than misperformance is important in two respects. First, at least if the breach of contract takes the form of a refusal to perform the fundamental contractual obligations of the party in breach, the existence of the breach of contract will be apparent at once. Furthermore, the consequences of that breach will also

normally be apparent immediately, at least in outline. This means that there is an immediate possibility of taking action to counter the breach or to address its consequences. In the case of a banking contract, it is possible that proceedings for interdict could be raised, or if an action is raised by the bank for repayment of sums due the customer could defend the action, possibly with a counterclaim, and in that way assert his or her rights under the contract. In cases of misperformance, by contrast, the existence of the breach and the likelihood of its consequences may not be apparent immediately. For example, if a solicitor provides negligent advice, or negligently fails to carry out his client's instructions (as occurred in *Dunlop* v *McGowans*), the existence of *injuria*, in the form of the breach of contract, and the damage consequent on such a breach may not become apparent until a later date. That may bring subsections (2) and (3) of section 11 into operation, in cases where there is a continuing act, neglect or default or the creditor is unable with reasonable diligence to be aware that loss, injury or damage caused by a relevant legal wrong has occurred. With a refusal to perform, however, these considerations are less likely to be relevant; the refusal is immediately apparent.

[34] The denial of further banking facilities in breach of contract may cause various types of financial loss. This obviously assumes a breach of contract. An overdraft facility will frequently be repayable on demand, and in such a case a call for repayment within a very short period will not amount to a breach of contract. Indeed what has happened in the present case is that the defenders appear to have treated term loans, with considerable periods to run, as if they were overdraft facilities repayable on demand. Unless there is a specific justification for doing so, that amounts to a breach of contract. If a banking facility is brought to an end in breach of contract, however, the most obvious and immediate consequence is that the customer is no longer able to borrow funds from the bank in order to

fund his or her business activities. The resulting illiquidity is commercially important. The availability of liquid funds is essential if a business is to be carried on, in order that its debts may be paid as they fall due. While some businesses may be financed by a credit surplus, such as a bank or other account that is kept in credit, many – perhaps most – businesses rely to some extent at least on borrowed funds to maintain cash flow and pay debts timeously. As a matter of commercial common sense, if the business's major source of liquid funds is denied, an alternative must be found more or less immediately.

[35] That inevitably has serious consequences for the conduct of the business. Liquid funds can be raised in various ways, sometimes by obtaining an alternative source of borrowing, for example a loan from another bank, and sometimes by selling assets to obtain such funds. It is the latter course of action that the pursuer was forced to adopt in the present case. Nevertheless, the fundamental point is that the primary *damnum* is the threat of illiquidity that results inevitably from the denial of loan facilities. That threat occurs immediately following the breach of contract. It is immaterial in my opinion that the loss caused by non-performance of the contract cannot be immediately quantified. That is a common feature of many different types of loss, and it would run counter to the obvious purposes of prescription if loss had to be capable of quantification before it counted as *damnum*.

**The meaning of "*damnum*"**

***Case law since Dunlop v McGowans***

[36] The meaning of the expression "*damnum*" as used for the purposes of the short negative prescription is not elaborated in *Dunlop* v *McGowans*, beyond identifying it with the words "loss, injury and damage" found in section 11(1) of the 1973 Act. Subsequent cases

have touched on this question, but none of them has provided a definition or explanation that is of great assistance in the present case. For example, in *Beard* v *Beveridge, Herd & Sandilands, WS*, 1990 SLT 609; it was held that where a solicitor negligently drafted a lease with inadequate rent review provisions the loss occurred at the time when the lease was executed, because it was defective from that time onwards. That suggests a strongly objective interpretation of the concept of loss, which is entirely consistent with the most recent case on this subject, *Gordon's Trs* v *Campbell Riddell Breeze Paterson LLP*, [2017] UKSC 75. *Jackson* v *Clydesdale Bank PLC*, 2003 SLT 273, involved a claim brought by the liquidator of a company against its bank and receivers appointed by the bank, in which it was alleged that an inadequate price had been obtained when the company's assets were sold to a subsidiary. It was held that *damnum* occurred at the point when the sale occurred, notwithstanding that the receivers had power to cause the subsidiary to withdraw from the agreement. Lord Eassie held (paragraphs [23] and [25]) that the conclusion of a contract directly disadvantageous to a party produced immediate loss. Once again that indicates an objective view of loss. Moreover, it supports the view that a refusal by one party to perform its obligations under a contract is directly disadvantageous to the other party. That in my opinion is an indication that in a case such as the present loss to the pursuer occurred as soon as the defenders refused to extend banking facilities. The *injuria* alleged in *Beard* and *Jackson* consisted of a breach of contract, but in each case it involved the negligent misperformance of the contract, not a refusal to perform. As I have already indicated, a refusal to perform brings both *injuria* and *damnum* to a head, in a clearly defined form.

[37] We were referred to other cases involving, primarily, the question of whether a breach of contract or other act, neglect or default involved a continuing breach of duty. In *Johnston* v *Scottish Ministers*, 2006 SCLR 5, [2005] CSOH 68, the question was whether an

order regulating fishing in Scottish waters allegedly made in breach of European law was a completed or continuing act following its promulgation. *Warren James (Jewellers) Ltd* v *Overgate GP Limited*, [2010] CSOH 57, involved an alleged breach of a term in a lease of a unit in a shopping centre through the grant of a lease of another unit to a competitor of the first tenant; this was held not to be a continuing breach following the grant of the lease to the competitor. *John G Sibbald & Son Ltd* v *Johnston*, [2014] CSOH 94, involved the question of whether a breach of specification in a contract to design a bridge amounted to a continuing loss for the purposes of section 11; it was held that the relevant act or default occurred in the course of designing the bridge, and did not continue subsequently. All of these cases contain full discussions of the relevant aspects of sections 5 and 11 of the 1973 Act but none of them is directly analogous to the circumstances of the present case.

[38] Section 11(1) of the 1973 Act was further considered in *Gordon's Trs* v *Campbell Riddell Breeze Paterson LLP*, [2017] UKSC 75, a case that involved a lease of a grazing field that was thought suitable for development. Originally the field was let to a farming partnership under a series of seasonal grazing lets, but it was alleged that owing to the negligence of the pursuers' solicitors the farming partnership had obtained an agricultural tenancy, which made termination of the lease impossible, at least in the short term. The pursuers, who were the owners of the field, sued their solicitors for professional negligence, but were met with a plea of prescription on the ground that the pursuers had not raised the action within five years of the date when they suffered loss. That date, the solicitors submitted, was when they served a defective notice to quit, or alternatively when the tenant failed to remove from the fields following the service of that notice. The pursuers, by contrast, contended that they had not suffered loss until the Scottish Land Court issued a decision holding that the notice that had been served was ineffective. The pursuers' argument was rejected at first instance

and in the Inner House and UK Supreme Court. The critical question was whether for the purposes of section 11(3) the creditor "must be able to recognize that he has suffered some form of detriment before the prescriptive period begins": paragraph [18]. Lord Hodge considered that the answer should involve interpreting the words "loss, injury or damage" in the context of section 11 as a whole: paragraph [19]. In section 11(1) that expression "is a reference to the existence of physical damage or financial loss as an objective fact". Thus physical damage in an explosion or as a result of subsidence was enough to start the prescriptive period running, unless the exceptions in subsections (2) or (3) applied. Under subsection (1) considered by itself, however, no question arose as to the creditor's knowledge of that objective fact. Thus if defective goods are supplied in breach of contract, the prescriptive period begins, under section 11(1), when the goods are acquired; and when as a result of a breach of contract a party incurs expenditure or fails to regain possession of land, the period begins when the expenditure is incurred or the party fails to obtain vacant possession. Section 11(3) provides that the prescriptive period should not run for as long as the creditor was not aware and could not with reasonable diligence have been aware that loss, injury or damage caused by an act, neglect or default had occurred. In this respect, however, Lord Hodge held (para [21]):

> "The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure".

[39] For present purposes, two points are important. First, it is the objective existence of the loss that matters, not the creditor's knowledge of that loss. Secondly, so far as the creditor's knowledge is concerned, all that is required is an awareness that he or she has not obtained something that ought to have been acquired. That appears to point very directly to

refusal to perform a contract. In such a case the innocent party must, as I have indicated, be instantly aware that he or she will not obtain performance of the contract; in other words, the innocent party will lose the benefit of an existing right. That is self-evidently an awareness of the loss of property, in the form of a contractual right to performance. Furthermore, it is clearly implicit in the discussion in *Gordon's Trs* that it is immaterial that the amount of the loss should be instantly verifiable; it is enough that there is some kind of loss.

***The fundamental meaning of "damnum"***

[40] In Trayner's Latin Maxims and Phrases, "*damnum*" is defined as "harm, injury, loss". This corresponds to the definition found in Lewis and Short's Dictionary, where the word is defined as "hurt, harm, damage, injury, loss". The reference here to "injury" is clearly not the same as the word "i*njuria*", at least so far as that word is used in Scots law; Trayner defines the latter expression as (*inter alia*) "any wrongful act". The distinction between *damnum* and i*njuria* is apparent from other terms that he defines, including *damnum absque injuria* (damage inflicted without legal wrong) and *damnum injuria datum* (damage or injury culpably inflicted). Lewis and Short give, as is usual, a substantial number of instances of the use of "*damnum*", several of which are taken from the Digest. By way of example, paragraphs 29 and 30 of Book 9 of the Digest (Ulpian, *Edict*, book 18, and Paulus, *Edict*, book 22 respectively) may be cited; these form part of the general commentary on the *lex Aquilia*, the statute dating from Republican times that was the foundation of the law governing liability for damage to property. Ulpian refers to damage caused by collisions between ships and smaller vessels, where liability under the *lex Aquilia* existed if the collision were caused by the fault of the sailors, and the liability of municipal authorities under the *lex* for

damage caused by the unlawful seizure of cattle. These examples involve physical damage to property, rather than pure economic loss. Today, however, it is pure economic loss (as against economic loss resulting from personal injuries or physical damage) that perhaps causes the greatest difficulty in determining whether or not present loss has occurred. Paulus gives an example of economic loss in book 22 of the *Edict*; this involves the death of a slave given as a pledge. After considering the economic interests of both parties, the owner and the creditor who holds security, the writer concludes that the creditor should have a right of action under the *lex Aquilia* up to the amount of the debt, which will benefit the debtor in so far as his debt is paid. Beyond that amount, however, the loss and right of action are those of the debtor. This represents, if I may say so, a clear recognition of the importance of the commercial reality of a transaction, albeit in a context that has happily passed well into history.

[41] Trayner also defines the expression "*damnum infectum*"; this means damage not yet occasioned but apprehended. The example given, so far as property is concerned, is damage threatened to buildings from mining operations below them. The remedy for threatened loss is said to be interdict. Lewis and Short also define "*damnum infectum*", as an injury not done but threatened. Reference is made to Book 39 of the Digest, which deals specifically with *damnum infectum* (generally under reference to Ulpian, *Edict*, books 1 and 53, and Paulus, *Edict*, books 47 and 48). Actual *damnum* was required before an action could be initiated under the *lex Aquilia*, but if loss were anticipated, obviously on objectively reasonable grounds, the available remedies were *cautio* and *missio in possessionem*. Both of these remedies involved security for the possibility that actual loss might result, personal security in the first case and real (in the sense that possession could be taken) in the second.

[42] For present purposes, the significance of the discussion of *damnum infectum* in both Scots law and Roman law is twofold. First, apprehended damage is different from actual damage and is not sufficient by itself to justify a claim for compensation. Secondly, and importantly for present purposes, apprehended damage nevertheless gives a right to legal remedies, interdict in Scots law and forms of security in Roman law. This demonstrates clearly that in both cases the right to bring legal proceedings was not dependent on the existence of actual quantifiable damage, but could be initiated if it were shown objectively that there was a sufficiently material threat to the property or rights of a creditor. This proposition is of importance in a case where a bank purports to repudiate a banking contract with a customer, in breach of that contract. In such a case the customer can take action at once, for example by raising proceedings for declarator and interdict to prevent effective steps by the bank to withdraw credit facilities. If the bank attempts to obtain repayment of sums outstanding, the customer is entitled to put the contract forward as a defence. In short, once the contract has been repudiated, there is sufficient "loss injury and damage", to use the expression found in section 11(1), for the customer to vindicate his or her rights against the bank. That in my opinion supports the proposition that, once there is a refusal by a bank to perform its obligations under a banking contract with a customer, "*damnum*" has occurred, and the short negative prescription begins to run.

**"*Damnum*" on the facts of the present case**

[43] The pursuer's argument is, in short, that loss, injury and damage, or "*damnum*", did not occur for the purposes of sections 6 and 11 of the Prescription and Limitation (Scotland) Act 1973 until 7 April 2010, when he transferred the various properties owned by him to his wife in exchange for a sum that is said to be substantially below the then market value of the

properties. For the reasons discussed previously, I am of opinion that this contention is incorrect. My primary reason for so holding is the effect that a bank's refusal to perform its obligations under a loan agreement is likely to have on its customer, at least if the customer is engaged in business activities. The customer is likely to face significant liquidity problems, which by themselves amount to *damnum* for the purposes of the short negative prescription. How those problems are resolved, and the precise losses that the customer suffers, will work themselves out at a future date. Nevertheless, at the date of the bank's refusal to perform, the customer faces the loss of basic contractual rights, which in my opinion amounts to a loss for the purposes of sections 6(1) and 11 of the 1973 Act.

[44] As I have already mentioned, the nature of a particular loan agreement may have a bearing on whether there is a breach of contract. An overdraft repayable on demand is quite different conceptually from a term loan. In the present case three loan agreements were involved. They are the subject of minimal findings in fact by the sheriff, but copies of the loan agreements are available and I have relied on these to discover the contractual position between the parties. Two of the loans were term loans. One of them, constituted by an agreement dated 9 September 2003, was for a loan repayable by 96 instalments, the last of which was payable eight years plus one month from the date on which the loan was drawn (which would have occurred in about October 2011). The second was constituted by an agreement dated 28 June 2006, and was repayable by 240 monthly instalments, the last of which was payable during the second half of 2026. The third loan was described as a revolving loan, and was governed by an agreement dated 3 October 2008. This loan was to be drawn down in tranches to fund the acquisition of property, and was stated to be repayable by 30 November 2008; that date is so close to the date of the agreement that it seems likely that the intention was to convert the loan into something akin to an overdraft

arrangement. It was in any event extended, following substantial repayment, to 31 January 2010 by a supplemental agreement dated 30 December 2009. That appears to indicate that by the time of the defenders' alleged breach of contract the loan was repayable, and would therefore have been in the same position as a loan repayable on demand. The sheriff does not go into this issue, however, and it is not necessary to say more about it for present purposes.

[45] The defenders wrote to the pursuer on 8 February 2010 to state that they were terminating his banking arrangements on the ground that the relationship between bank and customer had broken down irretrievably. Repayment of outstanding sums was requested by 11 February 2010. Thus the pursuer was given two days to repay the whole of his banking facilities. If repayment of the pursuer's whole overdrawn balance, of approximately £632,000, was not made within that period, the letter stated that the bank would follow its normal debt recovery procedures. The pursuer took legal advice, and on 10 February 2010 his solicitor wrote to the defenders to state that he did not accept that the relationship between bank and customer had broken down irretrievably and to request that the defenders should extend the threat to close the accounts by one month, until 11 March 2010, in order to enable consideration of all the agreements between the parties and so that the pursuer might take appropriate action on the basis of legal advice. The letter further referred to the pursuer's car sales business, and continued:

> "If the banking facility is withdrawn as stated by you on 11 February 2010 [the pursuer] tells us that the business will collapse. He tells us the business cannot operate without the facility provided by you in respect of [the first of the term loan agreements]".

That statement is hardly surprising. It amounts to a clear assertion of the liquidity problems that a business will almost inevitably face if its banking arrangements are withdrawn, at least if the business is dependent on the provision of finance from the bank.

[46] The defenders replied to the pursuer's solicitor's letter of 10 February on 12 February. Their letter indicated that they had reviewed the situation in the light of what the solicitor had said and were prepared to allow the pursuer's accounts to continue operating for 60 days. That would have the effect of extending the period for repayment to 13 April. Nevertheless, that would not in my opinion have any effect on the existence of *damnum* as from the date of the defenders' original letter of 8 February. The fundamental problem for the pursuer was the harm resulting from the defenders' intimation of their intention not to perform their obligations under the banking contracts. That harm continued to exist notwithstanding the extension of time; the pursuer still faced a major and immediate threat to his liquidity, and he required to take steps to address that threat. It is apparent from the findings in fact that the pursuer did take various steps to address the problem caused by the withdrawal of his banking facilities. In early March he wrote to the chief executive of the defenders and contacted the defenders' division that specialised in customers experiencing business difficulty; those approaches were not successful. During February and March the pursuer contacted a number of other banks, but these declined to offer him banking facilities. In March and early April he contacted relatives and associates who he thought might be interested in purchasing properties from him for value, but he was unable to obtain any offer of assistance.

[47] Finally, in the course of March, the pursuer and his wife took steps to investigate whether his wife could obtain funding, which would be used to purchase the properties owned by the pursuer and thus provide him with the ability to pay off his loans from the

defenders. That is the way in which the pursuer ultimately obtained the funds required to repay his loans. That appears to have occurred shortly after 7 April 2010, when the sale of the properties by the pursuer to his wife was completed. Nevertheless, all of the steps taken by the pursuer following the receipt of the defenders' letter of 8 February 2010 were intended to address the fundamental *damnum* that he had suffered in consequence of that letter: the impending withdrawal of his banking facilities, allegedly in breach of the defenders' contractual obligations. That loss flowed, according to the pursuer, from a refusal by the defenders to perform their contractual obligations owed to him. That refusal was itself a loss, and would inevitably lead to a range of further losses through the loss of liquidity and the threatened damage to the pursuer's business. Even if the latter are considered *damnum infectum* rather than present loss, for the reasons that I have previously discussed that is sufficient to give the pursuer a right of action against the defenders for breach of contract.

**Conclusion**

[48] For the foregoing reasons I am of opinion that the claim averred by the pursuer on record has prescribed in terms of sections 6 and 11 of the Prescription and Limitation (Scotland) Act 1973. I should, however, mention two further arguments advanced by the defenders. The first was that, following receipt of the defenders' letter of 8 February 2010, the pursuer took legal advice. The cost of doing so, it was said, amounted to "loss, injury or damage", or *damnum*, for the purposes of the short negative prescription. In my opinion this argument is incorrect. Legal expenses against the other party to a claim for breach of contract are treated as a distinct head of recovery, under the general control of the court, rather than as a head of loss. Consequently the incurring of legal expenses in presenting a

claim for breach of contract cannot be treated as a head of loss flowing from such a breach. It should rather be treated as a distinct head of expenditure that is incurred in order to assert a party's legal rights. The second argument that calls for comment was to the effect that, when a property is sold in order to pay a debt, a loss results from that fact alone. In my opinion that is not correct. The overall financial position of the debtor, on a balance sheet basis, is not affected by the sale and repayment. Before the sale the debtor owns a property on the credit side but owes a debt to the bank on the debit side. Following the sale the property and the debt, if they are equal amount, both disappear from the balance sheet. Thus it cannot be said that the sale of a property to repay a debt of itself causes loss. The primary loss in the present case rather arose from the defenders' alleged refusal to perform their contractual obligations and the consequential liquidity problems that that posed for the pursuer.

[49] I accordingly agree with your Lordship in the chair that this appeal should be refused.