OUTER HOUSE, COURT OF SESSION

[2025] CSOH 58

CA82/24

OPINION OF LORD BRAID

In the cause

MULTIPLEX CONSTRUCTION EUROPE LIMITED

Pursuer

against

NIGHTINGALE ARCHITECTS LIMITED

Defender

Pursuer: MacColl KC, A Mckinlay; Brodies LLP
Defender: Thomson KC, McAndrew; Womble Bond Dickinson LLP

27 June 2025

Introduction

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

the Conditions of Contract) and is accordingly liable to indemnify MPX against "claims, proceedings, compensation and costs" payable arising out of such infringement; and (3) payment of damages of £23,380,407.80 in respect of the alleged atrium defects. It should be noted that whereas the principal action concerned only the cladding in the atrium, the declarators sought in this action relate to both that cladding and the external cladding. However, reflecting the position in the principal action, the preliminary proof before answer in this action was restricted to the sole question of whether or not MPX's claim against NA in respect of the atrium cladding has prescribed. Although the proof was restricted in that way, NA's preliminary plea as to the competency and relevancy of the first and second conclusions was also debated during the course of the hearing on submissions, and I return to that later.

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

Date of service

[3] Service of the original summons was effected on NA on 1 December 2021, and service of an amended summons on 24 May 2022. Parties proceeded on the basis that it was the latter which is relevant for present purposes (although ultimately, as will be seen,

it is immaterial which date is taken, since MPX's claim had prescribed even by the earlier date).

The breach of contract/fault case

[4] MPX avers, in Article 13, that NA was in breach of various obligations under the NA contract and at common law in specifying and/or approving for use and/or permitting the use of and/or failing to prevent the use of non-compliant cladding panels.

The indemnity case

[5] The indemnity, contained in Clause 80 of the Conditions of Contract, provides:

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

The issues

[6] The issues in this action, insofar as it relates to the breach of contract (and breach of duty) case, as in the principal action, are: when did prescription begin to run (in particular, was its commencement postponed by either section 11(2) or 11(3) of the 1973 Act); and, was the running of prescription suspended through the operation of section 6(4). In that latter regard, MPX relies on, among other things, (i) the collateral warranty granted by NA in favour of GGHB dated 18 June 2010 and 29 March 2011, (ii) the statement of design compliance signed by NA on 15 January 2015 and (iii) Emma White's email of 31 August 2018. As described in my opinion in CA80/2024, in the collateral warranty NA warranted and undertook to GGHB, among other things, that it had complied and would continue to comply with all the terms and obligations incumbent on it under its contract with MPX, and

would complete its services in accordance with that contract; and that it had not and would not specify for use in relation to the project any products or materials not in conformity with relevant British or European standards. The statement of design compliance certified that the prepared design fully complied with all requirements of the documents listed therein, including the building contract. The terms of Ms White's email are set out in my opinion in CA80/2024 but, in brief, she made certain statements in relation to Alucobond.

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

Decision

The breach of contract case

When did prescription begin to run?

[8] NA argues that on the hypothesis on which the action proceeds, NA's approval of the relevant products (thus authorising the work to proceed) led MPX to incur loss in the form of an inevitable liability to its employer, GGHB, under the building contract. That would involve an inevitable need for remedial work to remedy the breach of the statutory duty to build the hospital in accordance with the building warrant and to procure compliance with the mandatory standards of the Building (Scotland) Regulations. On that analysis, the earliest on which NA had allegedly approved a drawing regarding the specification of Alucobond was 13 September 2012. However, contrary to the position adopted in its pleadings, and its note of argument, MPX now accepts that there was a

concurrence of *injuria* and *damnum* by December 2012, when it first made payment for a non-conforming material and so, for present purposes, absent any argument available to MPX by virtue of section 11(2), 11(3) or 6(4) of the 1973 Act, I will proceed on the basis that the prescriptive clock began to tick no later than December 2012. (Although there was more than one product installed in the atrium, paid for on different dates, MPX do not contend for "salami slicing" of the claim, ie, that different prescriptive periods should apply to different products). It follows that unless MPX can invoke either section 11(2) or (3) to delay the commencement of prescription, or section 6(4) to suspend it, MPX's claim had prescribed by December 2017.

Does section 11(2) apply?

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

[10] MPX avers in Article 16 of condescendence that NA's breaches of contract and common law duty insofar as they occurred before January 2015 were continuing breaches in terms of section 11(2) at least until the date of practical completion. It further contends that those averments should be taken *pro veritate* and that it is entitled to be given the opportunity to prove, at a future proof on the merits, that there were continuing breaches.

[11] On that latter point, I disagree. The purpose and scope of the preliminary proof is to determine whether the claim which MPX has made against NA has prescribed or not. To

decide that, it is necessary to determine when prescription began to run; and to determine that, the court must deal with the section 11(2) argument.

[12] As is submitted on behalf of NA, the key issue is whether the act or neglect is a continuing breach, or whether it is "simply the effects of a past act, neglect or default that are being felt" (Johnston, *Prescription & Limitation of Actions (2nd Edn)*, at paragraph 4.65). Here, the breach complained of is that NA approved the use of defective products in the atrium. Even if the contract was breached more than once in that regard (by approval of more than one drawing providing for the defective products), on any view the breach or breaches were completed by the time of the purchase and installation of the products. In general, in the absence of express instructions to do so, the design responsibilities of an architect do not include a continuing duty to review its design or supervise the works, unless something occurs to make it necessary or prudent for a reasonably competent architect to do so: *Jackson & Powell* (9th ed), paragraph 9-025; *New Islington and Hackney Housing Association Ltd* v *Pollard Thomas & Edwards Ltd* [2001] PNLR 20, Dyson J at para [14]. Although MPX relies on paragraph 3.27 of the NA Scope of Services, which required NA to undertake regular inspections of the works and provide reports as required by MPX, it does not aver that NA was required to undertake an inspection of the ACMs as they were being installed, far less aver that inspections undertaken after their installation should have identified their presence. Nor does MPX aver that there were any breaches by NA in the post-installation period, or circumstances that might have given rise to a duty on NA to revisit what had been installed.

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

Does section 11(3) apply?

[14] MPX submits that it is entitled to rely upon section 11(3) of the 1973 Act to postpone the start of the prescriptive period until it received Mr McCracken's initial advice on 21 January 2021; it was only then that it became aware of the relevant loss, namely the liability to GGHB. However, since MPX also now accepts that the relevant loss was incurred by around December 2012, when it incurred wasted costs to JDP and Clad UK in relation to cladding products which it is alleged did not meet the requirements of the building contract, and since MPX was aware that it had incurred those costs, there is no basis, standing the current state of the authorities (referred to in my opinion in CA80/2024), upon which it can rely on section 11(3) to delay the commencement of the running of prescription.

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

Does section 6(4) apply?

[16] Subject to what I say below about payment, MPX relies on four matters as having engaged section 6(4): that NA sought and obtained payment for its services; the collateral warranty provided in favour of GGHB; the statement of design compliance; and Emma White's email of 31 August 2018. In relation to the first of these, payment for services, MPX advanced that submission only in the event of the court rejecting its submission in the principal action that the provision of everyday services, and claiming payment therefor, could not provide a basis for engaging section 6(4). Since I have upheld that submission, the MPX submission need not be considered, but, for completeness, the

provision of services by NA (including their assigning a status to a drawing or drawings) and the claiming of payment for those services were, in the context of the contract between MPX and NA, routine occurrences which could not, viewed objectively, have induced error such as to engage section 6(4). In any event, the evidence was insufficient to establish that those services, or the claiming of payment, led to any error on the part of anyone within MPX which induced it to refrain from making a claim. The evidence from Mr Fernie and Mr Murray, relied upon by MPX, is merely to the general effect that MPX would have relied upon the expertise of the design teams, including NA, but that could be said of any contract with a professional person.

The collateral warranty

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

[18] As will be seen from my opinion in the related downstream action, *MPX* v *WSP* (CA83/24), [2025] CSOH [59], I consider that the collateral warranty granted by WSP did not engage section 6(4). That reasoning applies equally to this action, albeit NA did not argue (as WSP did) that the warranty could not induce error because of the fact that it pre-dated the construction works. Rather, it argues that since NA was contractually obliged

to deliver a collateral warranty in favour of GGHB, under penalty of sums being retained from amounts payable for the services, its compliance with that provision - thus avoiding moneys being retained - was the sort of every day activity referred to in *Tilbury Douglas Construction Ltd* v *Ove Arup and Partners Scotland Ltd* 2024 SLT 811 that is outwith the scope of section 6(4) (or which, in any event, would not induce the objectively reasonable person into error). That is simply a slightly different analysis which arrives at the same result as in the WSP action.

[19] In any event, the evidence in the present case did no more than establish that had the warranty not been provided, that may have prompted further inquiries, but that is nothing to the point. Further, no evidence was led which established that the warranty had in fact induced an error either in MPX's corporate mind or on the part of any person acting as its agent as to the conformity of the cladding in the atrium. As counsel for NA pointed out, it was signed on behalf of MPX by Timothy Bicknell, who was not a witness; and Mr Ballingall, the managing director of MPX at the material time, did not speak to it.

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

Statement of design compliance

[21] MPX submits that while it was not aware of any issues as regards the cladding prior to receipt of the statement of design compliance, the statement provided a sense of comfort that NA had designed in accordance with its obligations and that if it had failed to provide a certificate, that would have prompted further investigation. The fact that NA was contractually obliged to provide it did not prevent it from having induced error. In context, the certificate was plainly referring to NA's full scope of design services. The provision of

such a certificate was not within the scope of "everyday" conduct addressed in *Tilbury Douglas.*

[22] NA submits that viewed objectively, the design compliance letter by NA would not have induced a reasonable person into error, as was clear from the purpose for which the letter was requested and the scope of what was actually certified. The evidence showed that the provision of such statements was no more than a box-ticking exercise to enable the certification of practical completion. As Mr Marke said in evidence the statements were useful to have sight of but MPX would expect its professional consultants to advise it of any non-compliance as soon as they became aware of it (which forms an interesting contrast with MPX's position in the action by GGHB, that it was under no obligation to inform GGHB of any breach by it). As for what was certified, "prepared design" was not defined but in context, should be construed as a reference to NA's outline specifications, and could not have been understood as certifying that the design produced by other specialists was compliant with the contract, the more so where design compliance letters were also obtained from WSP and JDP.

[23] I prefer NA's submissions. The provision of the design compliance letter was essentially a box-ticking exercise. None of the witnesses spoke to having been induced into error by the NA letter as to the composition of the atrium cladding materials. Mr Fernie, for example, said that he understood the statements of design compliance as the consultants confirming their designs were in compliance with the contractual requirements, but that falls far short of his being induced into error, at the time, as a result of the statement. Similarly, Mr Wales said that MPX "took comfort" from the statements, which showed that the consultants and subcontractors had taken due diligence in carrying out their works, but such generic comfort is insufficient to establish corporate error on the part of MPX in

relation to the atrium cladding. This evidence illustrates the "scattergun" approach MPX took towards the statements. In other words, MPX took comfort from the statements as a whole, rather than place reliance on any particular statement. The evidence merely underlines that no real thought was given by anyone as to which particular consultant (if any of them) had the contractual responsibility to approve the materials, which undermines the argument that either the NA (or for that matter the WSP) statement induced an error in the mind of MPX which induced it to refrain from making a claim.

[24] Additionally, the statement of compliance was something which NA had to provide in order to receive payment. As such, it was, in the context of this contract, both an everyday occurrence and a mere statement of confidence in NA's design. As with the collateral warranty, it is nothing to the point that had it not been provided, questions would have been asked. It was plain from the evidence that the provision of the statement of compliance was essentially no more than a tick-box exercise.

[25] Accordingly, the provision of the statement of compliance did not engage section 6(4).

Emma White's email of 31 August 2018

[26] The most significant feature about Emma White's email of 31 August 2018 is that it was sent after the prescriptive period had already expired, and so it is fundamentally irrelevant (and if I am wrong in holding that neither the warranty nor the statement of design compliance had induced error in MPX, then it matters not whether a further error was induced by the email). However, in deference to the arguments made about the email, I will briefly consider this issue. The terms of the email are set out in my opinion in the principal action, but bear repetition:

> "We can confirm that the final IBI design package for the Adult and Children's atria included the specification of Alucobond cladding. This was proposed to the following areas;
>
> • Adult Atrium - Cores, FM Link Bridge Pods, first floor Café/Restaurant Pod, first floor Sanctuary and main entrance feature column encasements
> • Children's Atrium - Cores and various coloured feature boxes, walls and window reveals.
>
> At the time of the design, and in compliance with the Fire Strategy, CFD model and Scottish Building Regulations requirements this product was classified as Class 0 in relation to surface spread of flame; this was evidenced by the attached BBA certificate which is included for your information."

That email was sent by Ms White in response to an email from Fergus Shaw to her, attaching a chain involving emails from WSP and expressing the view that there was a strong suggestion that the products did not comply with the fire design.

[27] I accept the submissions made by NA about the email. In brief: insofar as it referenced Alucobond, the email was factually accurate, and so could not have induced MPX to believe something other than the truth; and Ms White's silence about the products Signi and Etalbond could not reasonably have induced Mr Shaw to believe that those products were compliant in the broader context of the review being undertaken in which WSP's input as fire engineers was sought, and, Ms White's earlier comments on 11 April 2018 about Signi.

[28] A final reason for attaching no significance to the email is that, as will be seen, even if MPX had been induced into error by NA, it ought, with reasonable diligence, to have discovered that error before the email was sent. Accordingly, a fresh error cannot have been induced subsequently (adopting MPX's argument in the principal action, which I have upheld, as to why silence on the part of MPX in 2018 could not have induced error in the mind of GGHB).

Conclusion on section 6(4)

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

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

Reasonable diligence

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

[32] NA argues that with reasonable diligence, MPX ought to have discovered any error either during the design review process itself, or by the stage 3 completion date (ie January 2015), in either event, long before the Grenfell tragedy and the review triggered by it. On the first of these, there was no evidence that MPX had ever sought, or received,

a categorical assurance from WSP that the ACM PE panels specified for the atrium were consistent with the fire engineered solution within the fire strategy, which was a startling omission and not one that would have been made by a contractor in MPX's position exercising ordinary prudence during the construction phase of a nationally significant building. In relation to the manual, Mr Shaw had accepted that it contained errors and that it was misleading in terms of product. Whilst MPX was heavily critical of GGHB's failure to conduct a proper review at the point of handover, the same criticism could be directed at MPX in the present context. There were two red flags which ought to have prompted investigations by MPX at the time it reviewed the manual, namely, (i) an absence of detail about the installed products and (ii) an indication that a PE product had been installed which may not have been compliant with the fire strategy. Alternatively, it avers that MPX had available to it all the necessary information to be aware of the need to undertake investigations and thereby to establish the matters about which it now makes complaint, by no later than the middle or later part of 2017 at the latest.

[33] MPX did not specifically address these arguments, focussing instead on what it should (or should not) have discovered as part of the 2017 and 2018 reviews. It argues that it did not know and could not have known of the true position until 2021, when it received Mr McCracken's advice.

[34] Whether or not NA's argument about the design process is correct - and there was no evidence as to what ordinary prudence by a contractor would have entailed - I do accept the argument, for the reasons advanced by NA, that MPX ought, with reasonable diligence, to have discovered any error into which it had been induced by January 2015 at the latest. Since that was more than 5 years before the summons was served, the claim on this analysis, on any view of what the induced error was, and when it occurred, would still have

prescribed. Even if that is wrong, I accept NA's alternative position, that MPX ought to have discovered its error either on 1 August 2017 or certainly by no later than 23 March 2018, for the reasons given in my opinion in the downstream action against WSP (CA83/24).

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

[36] Whether any of the foregoing would have been sufficient to prevent the claim from prescribing would turn on when any error was found to have been induced, and what date is taken for discovery of the error. If error was induced by the provision of the collateral warranty, prescription would not begin to run until either January 2015, 1 August 2017 or 23 March 2018 at the latest. On the first date, the claim would still have prescribed by the time the action was served; on the latter two, it would have remained extant. If on the other hand the error was induced by the statement of design compliance, provided in January 2015, by that time prescription had already been running for 2 years and 1 month, with the consequence that MPX had 2 years and 11 months within which to serve a court action, that is, by July 2020 at the earliest or February 2021 at the latest. On that hypothesis, too, it matters not which date is taken as the recommencement of prescription, since in all cases, the claim had already prescribed when the action was eventually served in May 2022.

The indemnity claim

[37] Leaving aside for the moment the question of whether the indemnity is engaged at all (NA argues that, properly construed, it is not), NA submits that the indemnity is an

indemnity against liability and that since any claim by GGHB has prescribed, it must follow that any secondary liability in the nature of indemnity must also have been extinguished by prescription or otherwise simply not enforceable.

[38] MPX submits in reply that NA's obligations to indemnify MPX did not arise until, at the earliest, MPX was subject to claims or proceedings from which it might require an indemnity; alternatively, that they will only be triggered if and when MPX is found liable to pay compensation or costs to GGHB; and that, either way, NA's obligations to indemnify MPX have not prescribed.

[39] Insofar as this matter is concerned, I refer to what I say in my opinion in the downstream action against WSP at para [38]. For the reasons therein stated, I do not consider that a claim under the indemnity has prescribed. That leaves unresolved questions as to the scope of the indemnity and whether it covers irrecoverable costs incurred by MPX in its defence of the principal action. Those questions fall outwith the scope of the preliminary proof on prescription.

Relevancy and competency of the conclusion for declarator

Introduction

[40] This issue is important for NA in that whereas its success in the arguments addressed thus far entitles it to absolvitor in relation to the atrium cladding claim insofar as founded upon breach of contract, success on its relevancy and competency argument would result in dismissal of the entire action insofar as it relates to the first and second conclusions. It invites the court to uphold its second plea in law (relevancy) relative to the first conclusion; and its first plea in law (competency), failing which its relevancy plea, to the second conclusion.

The conclusions

[41] The respective conclusions are in the following terms:

> "1. For declarator that the defender is in breach of its contract with the pursuer entered into on or about 18 June 2010 for the provision by the defender of professional services relative to the design and construction of the New South Glasgow Hospital *et separatim* is in breach of its duty of care in relation to the provision of those services; and that it is accordingly liable to the pursuer in damages *et separatim* in reparation for the loss and damage suffered by the pursuer as a result of those breaches or either of them.
>
> 2. For declarator that the defender has infringed the rights of Others (as that term is defined in the Conditions of Contract applicable to the contract entered into by the defender with the pursuer on or about 18 June 2010 for the provision by the defender of professional services relative to the design and construction of the New South Glasgow Hospital) and is accordingly liable to indemnify the pursuer against claims, proceedings, compensation and costs payable arising out of such infringement, pursuant to clause 80.1 of the said Conditions of Contract; and that the defender is liable to pay to the pursuer the amount or amounts necessary to indemnify the pursuer against such claims, proceedings, compensation and costs, pursuant to clause 80.1 of the said Conditions of Contract."

Submissions

[42] In support of his argument, senior counsel for NA founded upon certain legal principles underpinning a decree of declarator, the first being that it must not innovate upon the pursuer's rights but merely declare authoritatively an existing status or right which has previously been doubted or denied: Walker, *The Law of Civil Remedies in Scotland*, page 105. Second, decree of declarator will not be granted if sought in terms which are too vague, wide, general or otherwise unspecific: Walker, pages 111-112. Third, a declarator that deals with a hypothetical issue, or one which is not in dispute between the parties, is incompetent: Walker, page 112; *Keatings* v *Advocate General for Scotland* 2021 SC 329, paras [52] and [53]; *Stair Memorial Encyclopaedia*, Remedies, chapter 3, paragraph 5.

[43] Applying those principles to the first conclusion, senior counsel submitted that although it was competent to seek a bare declarator in circumstances where a loss has been incurred but where damages cannot properly be quantified (*Highland and Islands Airports Ltd* v *Shetland Islands Council* 2015 SC 588), the declarator sought was too vague in respect that (i) it did not specify the nature of the breach in question and (ii) it did not take account of important limitations on NA's liability (as contained in Clauses 82.1 and 82.2 of the Conditions of Contract). As such it would innovate upon the parties' contract. The action was therefore irrelevant insofar as based upon that conclusion.

[44] Turning to the second conclusion, counsel submitted that it, too, was irrelevant on the grounds of vagueness, but, more fundamentally, was incompetent on the ground that it raised hypothetical issues and was premature. The conclusion was premised on Clause 80.1 (set out at para [5] above) in terms of which NA indemnified MPX against claims arising out of an infringement by NA of the rights of "Others", but MPX's position was merely that it "may" come under such a liability, not that it has already done so. That much was apparent from Article 18 of condescendence in which MPX averred that it had incurred costs and may require to defend claims or proceedings and may require to pay compensation, which, at the time of raising the action, the pursuer was unable to quantify. The second conclusion sought an order that was plainly abstract or hypothetical or related to a future or contingent state of affairs which might arise in the future (when a claim is made) but which has not yet arisen; and there was no specification within the conclusion itself of the claims by "Others" in respect of which indemnification is sought (the conclusion was not, for example, expressly restricted to the GGHB proceedings with court reference A151/22).

[45] Senior counsel for MPX submitted that no issue of competency arose, referring to *The Mayor and Commonalty and Citizens of the City of London* v *Reeve and Company Limited &*

Ors [2000] EWHC Technology 138 (25 February, 2000), para [29], which in turn referred to *County and District Properties Ltd* v *C Jenner & Son* [1976] 2 Lloyd's Rep 728, where Swannick J, at 738), said that it was "perfectly competent for a [party] to bring [Part 20] proceedings in order to enforce a cause of action which will arise only in the event of judgment being given against him."; and he pointed out that in the context of contribution claims, it was well established that such a claim could be advanced notwithstanding that decree was a necessary prerequisite and that decree had not yet passed. The rationale for allowing such claims to be advanced was to avoid a multiplicity of proceedings. Sufficient was averred to provide notice of the order being sought. The court should be chary of adopting an approach which invited parties to include conclusions that were far longer than necessary, in order to provide notice of the order sought.

Decision

[46] Insofar as the competency of the second conclusion, I do not agree that it is premature or hypothetical. There is on any view a dispute between the parties as to whether the indemnity is engaged, in circumstances where both parties were aware of MPX's possible liability to GGHB. Whereas on the one hand, the court should not devote its resources to answering questions which are purely hypothetical, on the other hand, a multiplicity of proceedings is equally to be discouraged, and a practical approach is called for. As senior counsel for MPX submitted, it is commonplace to allow contribution claims to be advanced before liability has been established; and there is no difference in substance between a contribution claim, and a claim under an indemnity in respect of a liability which has not yet been established against the party bringing the claim; certainly, no reason why the court should allow the one to be advanced while holding that the other may not. In

either case, the claim is advanced on the premise that the person advancing it "may" come under a liability, triggering a liability by the other party. Given the uncertainty which can arise over when a claim under an indemnity prescribes, a person in the position of MPX here would be in an impossible situation, if, on the one hand, its claim might prescribe (if the indemnity were ultimately found to be a "liability" indemnity); but on the other hand, was told by the court that an action to enforce the indemnity was premature because the indemnity was a "general" one under which no liability had yet arisen. Finally, in *Esso Petroleum Co Ltd* v *Hall Russell & Co Ltd* 1988 SLT 874, the House of Lords held as competent a conclusion which sought declarator (at 880, G to H):

> "that in the event of any body or person recovering from the pursuers by or in consequence of any process in any court of law the costs of repairing and reinstating [a jetty] at Sullom Voe harbour in the Shetlands incurred in consequence of damage inflicted on said jetty when the pursuers' tanker Esso Bernicia came in contact therewith on or about 30 December 1978 then the pursuers will in that event be entitled to be paid *et separatim* reimbursed by the defenders and the first, second, third and fourth named third parties jointly and severally or severally to the extent of the whole amount of any such repair and reinstatement costs recovered from them as a result of any such court proceedings together with any expenses paid or incurred by the pursuers in consequence of any such proceedings or such other sum or sums as to the court may seem proper".

That is no more hypothetical or abstract than the declarator sought in the present action.

[47] As for the relevance of the conclusions, it is true that they are couched in wide terms which the court is unlikely ultimately to grant. However, that is not a reason for dismissing the action at this stage. The relevance of an action is judged by the averments in the articles of condescendence, rather than by what is in the conclusion. Any order ultimately granted by the court would be tailored to match the facts which MPX had managed to establish in evidence, which in turn, would be framed by reference to what MPX had offered to prove in its pleadings: *Esso Petroleum*, Lord Jauncey of Tullichettle at 886 J. To expect MPX to frame its conclusions more precisely would indeed be, as counsel for MPX submitted, to

invite conclusions which were far longer than necessary, and totally unwieldy. Insofar as any limitations on NA's liability are concerned, that is a point to be taken in its defences, and may provide a further reason why the court would not grant decree in the terms sought, but it is not a reason to dismiss either conclusion as incompetent or irrelevant.

[48] For these reasons, I have reached the view that the first and second conclusions are both relevant and competent.

Disposal

[49] NA is entitled to have its fourth plea in law sustained *quoad* its breach of contract claim and *quoad* the atrium only. Its first plea-in-law will fall to be repelled. However, I will put the case out by order to discuss the precise terms of the order to be made in light of this opinion.