OUTER HOUSE, COURT OF SESSION

[2025] CSOH 57

CA81/24

OPINION OF LORD BRAID

In the cause

MULTIPLEX CONSTRUCTION EUROPE LIMITED

Pursuer

against

J&D PIERCE (CONTRACTS) LIMITED

Defender

Pursuer: MacColl KC, A Mckinlay; Brodies LLP
Defender: Brown; DAC Beachcroft Scotland LLP

27 June 2025

Introduction

[1] This is the "downstream" action against J&D Pierce (Contracts) Ltd (JDP) 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 applicable legal principles, 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 JDP is in breach of its subcontract with, and duty of care to, MPX and that it is liable in damages to MPX; (2) declarator that the use of non-compliant materials in the atrium is an event at the

risk of JDP and that JDP is accordingly liable to indemnify MPX against "claims, proceedings, compensation and costs" payable due to such event, pursuant to Clause 83 of the Conditions of Contract, and that JDP is liable to pay to MPX the amount necessary to indemnify it against such claims. As in the principal action and the other downstream actions, the preliminary proof before answer in this action was restricted to the sole question of whether or not MPX's claim against JDP has prescribed.

[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 JDP in respect of that cladding, JDP 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 JDP 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 summons was effected on JDP on 2 December 2021. As in the principal action, the prescriptive period is 5 years from the date when the obligation or obligations owed by JDP to MPX became enforceable, subject, in this case, to any arguments open to MPX that the commencement of prescription was delayed by section 11(2) or (3) of the 1973 Act, or that its running was suspended by the operation of section 6(4).

The breach of contract/fault case

[4] MPX avers, in Article 24, that JDP was in breach of various obligations under its sub-contract with MPX and its duties at common law (set forth at Articles 6 to 19), by virtue of having designed the use of and installed Etalbond LT and Alucobond for the pod cladding.

The indemnity case

[5] MPX avers, in Article 28 that JDP is obliged to indemnify pursuant to Clause 83 of the conditions of contract, which stated: "Each Party indemnifies the other against claims, proceedings, compensation and costs due to an event which is at his risk."

The issues

[6] The issues in this action, insofar as it relates to the breach of contract (and breach of duty) case are: when did prescription begin to run (in particular, was its commencement postponed by either section 11(2) or section 11(3) of the 1973 Act); and was it suspended through the operation of section 6(4). In that latter regard, MPX relies upon the seeking of payment by JDP for its design services, and upon JDP's letter of compliance dated 21 January 2015. Insofar as the indemnity claim is concerned, the issue is: when did prescription begin to run.

Decision

The breach of contract case

When did prescription begin to run?

[7] JDP argues that the point at which there was concurrence of *iniuria* and *damnum*, and therefore the date from which prescription began to run, was, at the latest, 13 May 2013, when MPX paid the first certificate. That was the date when loss became inevitable, because MPX had incurred abortive expenditure by paying for cladding which would inevitably have to be removed. There was therefore *damnum* at that date. JDP's counsel referred, by way of analogy, to (among other case): *WPH Developments Ltd* v *Young and Gault LLP* 2022 SC 28, where loss had been incurred when encroaching walls had been constructed; and *Tilbury Douglas Construction Ltd* v *Ove Arup and Partners Scotland Ltd* 2024 SLT 811, where an inevitably loss-making fixed price contract had been entered into in reliance on negligent design. As for *iniuria*, it had occurred when JDP breached its contractual obligation by designing and constructing pods which included non-compliant materials. That was no later than 25 March 2013, the date of the first payment certificate; or earlier, by the end of 2012, by which time JDP had specified the use of both Alucobond and Etalbond for use in the pods, of which MPX was aware. As regards section 11(2), MPX's argument that the breach had continued until practical completion was unsound. It was beyond dispute that JDP had completed its works before the end of 2013, and it was absurd to suggest that it was under any continuing obligation thereafter to deliver something different at practical completion. The present case was on all fours with Lord Doherty's analysis of the case against the fourth defender in *Huntavon Properties Ltd* v *Hunter Construction (Aberdeen) Ltd* 2017 WL 01552420 at para [110].

[8] As regards whether the commencement of prescription was delayed by section 11(3), MPX knew by 17 May 2013 which products had been used in the construction of the pods, and that it had paid for them. It was therefore aware of the objective facts which constituted its loss, which was sufficient to preclude the operation of section 11(3): see *WPH Developments* and *Tilbury Douglas*, which explained the import of *David T Morrison & Co Ltd* v *ICL Plastics Ltd* 2014 SC (UKSC) 222 and *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287.

[9] MPX originally argued in response that its loss was contingent upon a claim being made by GGHB. It no longer insists upon that argument (seemingly, in relation to any of the downstream parties, including JDP), although its position on record, in Article 29, remains that its loss takes the form of its liability to GGHB. It further argues that in the context of the claim against JDP, the costs incurred to it were not wasted expenditure, nor loss caused by JDP's breach of contract, rather they were the consideration for the service provided by JDP. In support of that analysis, it relies on the *obiter dicta* of Lord Doherty in *Midlothian Council* v *Raeburn Drilling and Geotechnical Ltd* 2019 SLT 1327 at para [25], approved by Lord Harrower in *Legal and General Assurance (Pensions Management) Ltd* v *Halliday Fraser Munro & Others* [2023] CSOH 81 at para [24]. Further, in reliance on section 11(2), MPX avers that JDP's breaches were continuing breaches until at least the date of practical completion in January 2015, and that the prescriptive period could not have started any earlier than then. Finally, in reliance on section 11(3) MPX argues that prescription did not begin to run until 2021 when, having reviewed its records, it first determined that non-compliant ACM PE products had been installed and that it could not, with reasonable diligence have been aware of any loss before then.

[10] In approaching the question of when prescription began to run, it seems to me that it is not helpful to begin by asking whether any payment made by the creditor was in the nature of consideration for services, particularly since each case must turn on its own facts. Rather, there are two distinct questions, as counsel for JDP recognised. First, applying section 11(1), on what date did the obligation in question become enforceable, in other words, when was there concurrence of *iniuria* and *damnum*? There is no dispute in the present case that *iniuria* first occurred in 2012 or 2013, the controversy being when *damnum* occurred. In this regard, a detailed and helpful discussion of what constitutes *damnum* is to be found in Lord Drummond Young's opinion in *Kennedy* v *Royal Bank of Scotland Plc* 2019 SC 168, at paras [36] to [42]. Having identified when there was such concurrence, it is then necessary to ask whether prescription commenced at a later date through the operation of section 11(2) or 11(3). The heavily qualified *obiter* observations about consideration made by Lord Doherty in *Midlothian Council* (where he notably declined to express any firm view) and Lord Harrower's remarks in *Legal & General* were expressly directed towards this subsection rather than to the anterior question of when *damnum* had occurred. However, in my view, rather than focussing on the nature of the payment, the question must always be, following what the Inner House said most recently in *Tilbury Douglas*, when was the creditor aware of the objective facts which constituted its loss?

[11] Applying that approach here, I accept the submissions for JDP that *damnum* occurred either on 17 May 2013 when MPX paid JDP for pods which contained non-compliant materials which were to be, and were, installed in the atrium with the inevitable consequence that that would place MPX in breach of its contract with GGHB; or alternatively, when the pods which were disconform to contract were first supplied (*cf Kennedy*, Lord Drummond Young at [38], where he gave as an example of the occurrence

of *damnum*, the supply of defective goods under a contract). The significant point is that the loss comprised not so much an abortive payment, as the supply and subsequent use of the defective pods themselves.

[12] Turning next to section 11(2), it 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. There is, as counsel for JDP submitted, and as I have discussed in my opinion in the principal action, a difference between a continuing breach, a continuing duty which has been breached, and a breach which has continuing effects. It is only the first which engages section 11(2): see *Johnston* v *Scottish Ministers* 2006 SCLR 5, para [17]; *John G Sibbald & Son Ltd* v *Douglas Johnston* [2014] CSOH 94, para [8]; *Warren James (Jewellers) Ltd* v *Overgate GP Ltd* [2010] CSOH 57, para [57]. In the present case, the breach relied upon is the design of pods which provided for the use of non-compliant materials, and the subsequent supply of pods containing those materials. The former breach was completed by the time the design had been completed, in about February 2013, and the latter by, at the latest, 22 November 2013 when JDP had completed its work and submitted its final application for payment. JDP does not aver any continuing duty to inspect the works for defects, after the pods had been installed, nor to revisit the design. No coherent basis has been advanced by MPX as to why section 11(2) should operate so as to delay the commencement of prescription until the date of practical completion, by which time JDP's involvement under the main contract had long since ceased. Finally, as in the other downstream actions, I reject MPX's contention that its averments about section 11(2) should be taken *pro veritate* at this stage, given that the purpose of the preliminary proof is to determine whether MPX's claim against JDP has prescribed or not.

[13] The question then becomes whether MPX can rely on section 11(3) to delay the commencement of prescription to a later date. The plain fact is that it was also aware of the facts which constituted its loss by 22 November 2013, since it was aware, both, of the cladding products incorporated into the pods, and that the pods had been delivered and incorporated into the atrium. It was also aware, of course, that it had paid for the pods but, as stated above, its loss comprised not abortive payments but the use of the pods in the atrium in breach of its contract with GGHB. Thus, it becomes irrelevant to ask whether the payment made was by way of consideration for services provided: that is nothing to the point in this case, since it is not the payment which constituted MPX's loss.

[14] I therefore find that prescription commenced by 22 November 2013 and so, absent any section 6(4) argument open to MPX, its claim against JDP for breach of contract/duty would have prescribed by 22 November 2018.

Does section 6(4) apply?

[15] In this action, MPX relies on only two matters which are said to have brought section 6(4) into play: that JDP sought and obtained payment for its services; and the letter of compliance of 21 January 2015. 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 JDP and the claiming of payment for those services were, in the context of the sub-contract between MPX and JDP, 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. As regards the statement of compliance, MPX submits that the letter provided a sense of comfort that JDP had performed its obligations and had it not provided the letter that would have prompted further investigation. JDP retorts that the letter did no more than comfort an existing belief, but that belief was not induced by JDP; and that the provision of the certificate was in any event a routine matter in the context of the subcontract.

[16] I prefer JDP's submission. The provision of the letter of compliance was, as in the case of the statements of design compliance provided by the architects and fire consultants, essentially a routine, box-ticking exercise. None of the witnesses spoke to having been induced into a state of error by it. MPX may well have taken comfort from the letter although perhaps such comfort is more illusory than real, since whenever performance is tendered and payment sought there is arguably an implied representation that the contract has been complied with; but that falls far short of being induced into error by the letter itself. Indeed, that formulation of the significance of the letter - that it provided comfort - is more redolent of reassurance that what was already believed to be the case was true, rather than that the letter was something which induced error. Finally, the provision of the letter was a routine, everyday matter. It is nothing to the point that had it not been provided, questions would have been asked.

[17] For completeness, JDP, in its submissions, also addressed the issue of the duration of any error which might have been induced, should it be the case that the 2015 letter had, after all, induced error in the mind of MPX. Such error could only have suspended the running of prescription from 21 January 2015, by which time, on my analysis, prescription had been running for 1 year and 2 months, although on JDP's submissions, for at least 20 months.

Counsel for JDP submitted that the latest date on which MPX could be said to be labouring under any error induced by JDP was 2 August 2018, the date of Kenny Hamill's email to Mr Burnett stating that it did not look as though the panels achieved the surface spread of flame classification as set out in the fire strategy (although no witness in fact spoke to any subsisting erroneous state of mind post-Grenfell Tower in 2017).

[18] MPX's position is that it did not know, and could not have known, of the true position until 2021. However, while that may be the date by which it had the facts necessary to establish a *prima facie* case, 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* v *VFS Financial Services Ltd* [2022] SC 133, paras [52] and [53]. I accept JDP's submission that the latest date by which MPX held that information was 2 August 2018, the date of the Hamill email. Since the prescriptive period would then have had a further 3 years and 10 months to run, and the present action was served 3 years and 4 months later, on 2 December 2021, it follows that - on the hypothesis on which we are proceeding, that error was induced by the letter of 21 January 2015 - the action would have been raised within the prescriptive period, and that with some 6 months to spare; unless, that is, MPX ought, with reasonable diligence, to have discovered the error more than 6 months before 2 August 2018. I therefore now turn to the issue of reasonable diligence.

Reasonable diligence

[19] The question to be considered is, again on the assumption that JDP 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? JDP does not argue that MPX

should have discovered the error at the point of practical completion. Rather, it argues that with reasonable diligence and applying the standard of what the prudent person carrying on business of the type operated by MPX would do (*Glasgow City Council*, Lord President (Carloway) at [57]), that MPX should have discovered the error by the late summer of 2017. Essentially, its argument is that MPX in fact knew in 2012/2013 (through Mr Murray) what materials had been installed by JDP; that it ought, in any event, to have been able to identify what cladding had been used, and where, by within a few days of the Grenfell fire, so that it ought to have been able to identify the materials, and obtain the relative data sheets, by June 2017; that it ought not to have excluded the atrium from the 2017 review; and that expert advice should have been sought in 2017, not 2021.

[20] MPX argues that if it failed to use reasonable diligence in not considering the atrium in the immediate aftermath of the Grenfell tragedy then so did GGHB, but in the context of whether they, in a question with JDP, themselves used reasonable diligence, that is neither here nor there. Beyond that, it submits that Mr Shaw conducted the 2018 review with reasonable diligence, reached a reasonable conclusion that the materials were compliant, and that the error could not have been discovered sooner than 2021 when it received Mr McCracken's report.

[21] I prefer JDP's submissions. With reasonable diligence, MPX ought to have recognised that the atrium was treated in the fire strategy as an external space and ought to have undertaken the steps desiderated by JDP. Had it done so, it could have discovered any error induced by JDP by (at the very latest) the end of 2017. Since that is more than 6 months before the date of its actual knowledge (as I have found), the consequence is that even if an error was induced by JDP's letter of compliance, the prescriptive period had expired by the time that the summons in this action was served on JDP. Putting that another

way, the period from 22 November 2013 until 21 January 2015, when prescription initially ran, was 14 months. The period from 1 January 2018 until the action was served on 2 December 2021 was 3 years and 11 months. The aggregate of those periods is more than 5 years. I would point out, also, that those dates give MPX the benefit of the doubt in two respects, namely, (i) 22 November is the last possible date on which the breach could be said to have been completed and (ii) the end of 2017 allows a generous period for expert advice to have been taken. Thus, on any view, even if the GGHB claim against MPX had not prescribed, I would have found that MPX's claim against JDP had nonetheless prescribed.

[22] For all of these reasons, JDP is entitled to decree of absolvitor insofar as the action pertains to the breach of contract/duty claim.

The indemnity case

[23] I begin by observing that the indemnity in this case is in different terms from that before the court in the downstream actions against WSP and Nightingale, in that either party may benefit from the indemnity; and the indemnity is triggered by an event which is at the other party's risk. This indemnity is, therefore, more obviously engaged than those in the downstream actions. However, that is not material for present purposes: what is material is that both this indemnity, and those in the downstream actions, are against "claims, proceedings, compensation and costs" payable by a triggering event. It is therefore desirable that the same approach to construction of that phrase be taken in all three downstream actions, so that there is a common approach to the commencement of prescription.

[24] It is not disputed that, on the authority of *Highland and Islands Airports Ltd* v *Shetland Islands Council* 2015 SC 588, an action containing only declaratory conclusions interrupts the

running of prescription, and that consequently the second conclusion in the present action is competently brought, even though MPX is unable to quantify its loss. JDP argues that it was clear to MPX from the time that it knew of the breach of contract that it could sue JDP and that if the argument that time did not begin until a much later date were correct, it must follow that the action was premature; but the argument was erroneous. Any uncertainty over the extent to which GGHB would insist on MPX doing remedial works, or paying damages, went to the quantification of loss rather than to its existence. If it was not premature to raise protective proceedings for declarator to prevent the loss of a right to indemnity, even though no claim against which indemnity would be sought had yet been made, then the right to indemnity must be enforceable, as from the date that there was concurrence of *iniuria* and *damnum*. If as a matter of construction, asked counsel for JDP rhetorically, the indemnity did not bite until an actual claim had been constituted, then why did the clause not just say that?

[25] The principal difficulty with that approach is that, as appeared to be agreed by all parties, including JDP, the question of when an indemnity obligation became enforceable is to be determined by construction of the indemnity itself: *Scott Lithgow Ltd* v *The Secretary of State for Defence* 1989 SC (HL) 9. That requires to be the starting point (and indeed, the finishing point) rather than asking whether the creditor was aware of the potential for a claim, or whether a declaratory action raised is, or is not, premature.

[26] As I say in my opinion in the downstream action against WSP, there is a discussion of the conflicting case law and the difference between a liability indemnity and a so-called general indemnity in *The Mayor and Commonalty and Citizens of the City of London* v *Reeve and Company Limited & Ors* [2000] EWHC Technology 138 (25 February, 2000). In that case His Honour Judge Hicks QC had regard to the width of the words used in the clause under

consideration, in coming to the view that the clause provided a general indemnity. So, too, here, it seems to me that the reference to "proceedings", "costs" and "compensation" payable is suggestive of the indemnity becoming enforceable only at the point when liability has been established, rather than at an earlier date. It is significant that the clause refers to "proceedings" rather than to "liabilities", which is, at the very least, a pointer that the indemnity does not bite before proceedings are raised which is sufficient for MDX for present purposes. Further, it would be odd if the parties' intention had been that one of them had to pursue a claim under the indemnity clause for costs incurred in defending an action before an action had even been raised, or before the extent of it was known. The answer to the rhetorical question posed by counsel for JDP is that the clause, properly construed, does say just that. Accordingly, I do not consider that a claim under the indemnity has prescribed.

[27] As for whether the second conclusion is premature, even if it was, on the foregoing analysis, premature when the action was raised (before the principal action was served on MPX by GGHB), that particular objection flew off when the principal action was subsequently raised; in any event, a party cannot be criticised for acting out of an abundance of caution, and the action cannot be (and is not) criticised as raising a purely hypothetical issue.

[28] For these reasons, I find that MPX's claim under the indemnity has not prescribed.

Disposal

[29] I will repel the pursuer's sixth plea-in-law, and sustain the defender's third plea. I will therefore assoilzie JDP from the first conclusion of the summons. I note that the defender, whether intentionally or not, has no plea-in-law regarding the indemnity, but in

view of the decision I have reached in relation to the indemnity, that is of no consequence. *Quoad ultra*, I will put the case out by order to discuss how the action is to proceed in relation to the indemnity.