FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 39
CA6/14

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

SCOTTISH PENSION FUND TRUSTEES LTD

Pursuers and Reclaimers

against

(FIRST) MARSHALL ROSS & MUNRO, (SECOND) CHARLES J BOW and
(THIRD) PATRICIA E GRZYBEK

Defenders and Respondents

Pursuers and Reclaimers: Martin QC, FCM Thomson; Pinsent Masons LLP
Defenders and Respondents: JA Brown; BLM

8 June 2018

Introduction

[1] This is a reclaiming motion against an interlocutor of the commercial judge, dated 1 February 2018, dismissing the action following a debate on the relevancy of the pursuers' written pleadings. The issues for determination are ones of principle. The first is whether a contingent liability in the defenders to make contributions to remedy a deficit in a pension fund arose in respect of three employees; the last of whom retired in 1994. This turns upon the construction of the documents setting up and regulating the fund and the interaction of

the defenders, or predecessor firms, with the fund. The second is whether, if such a contingency did arise, it transmitted to successor partnerships under the name of Marshall Ross & Munro ("MRM"), which continued the business of the partnership which had undertaken the liability.

Background

[2] The Scottish Solicitors' Staff Pension Fund provides pensions on retirement for employees of solicitors and/or for the widows, children or dependents of such employees. It was set up by Declaration of Trust, with rules appended, dated 17, 19, 22 and 27 December 1947. The 1947 Rules were replaced, with effect from 6 April 1978, in terms of a Trust Deed dated 4 August and registered on 15 August 1980, which adopted new 1980 Rules. The Fund is currently governed by the terms of a Trust Deed dated 8 February 1990, which replaced the 1980 Rules, with effect from 6 April 1988, by rules and by-laws of the Fund referred to in clause 1A of the 1990 Trust Deed. The 1990 Trust Deed and Rules have been amended on a number of occasions, most recently in 2015.

[3] The Fund as originally established in 1947 was a defined contribution scheme. Fixed contributions were payable by the employee and employer. The benefits payable on retirement depended on the value of the portion of the Fund attributable to the particular employee/employer's contributions. The 1980 Rules changed the scheme to a final salary one. The amount payable upon retirement was thereafter to be calculated by reference to the employee's years of service and his/her final salary. By 2003, a funding deficit had arisen. The Fund was closed to new members and to future accruals of benefit to existing employees, with effect from 30 September 2003.

[4] The first defenders were a partnership of solicitors, trading under the name "Marshall Ross & Munro". They were engaged in the provision of legal services, primarily in conveyancing and private client work. They were dissolved with effect from 31 March 2015. The second and third defenders are the former partners of the first defenders. The first defenders were the successors of a number of partnerships, commencing with the formation of the original firm of Wm Marshall Ross & Munro, later Marshall, Ross and Munro, on 30 December 1949 (MRM 1). Since then various partners have either joined or left the firm. There have been 16 subsequent partnerships under the same name, ending with the first defenders (MRM 17), which was formed in August 2006 and was dissolved when the third defender retired in 2015.

[5] It is not disputed that, as a matter of law, whenever a partner joined or departed, the existing partnership was dissolved and a new one formed. However, the first defenders' website stated that they had been established for over 100 years. The second defender became an employee of the firm in 1977. He was assumed as a partner in 1979. He was a partner in each successive firm trading as MRM from that time. He continues in practice as a sole practitioner, but still under the name MRM. The third defender was assumed as a partner in 2001, along with JS, to form MRM 16 with the second defender. A demerger agreement was entered into in December 2005. This led to the departure of JS with the second and third defenders "continuing" the existing firm.

[6] The pursuers seek to recover deficit contributions in respect of three former employees of MRM, all of whom were members of the Fund. Between 1 April 1955 and 7 February 1994, MRM employed IW, RM and GH. GH was an active member who accrued benefits between 1 April 1955 and 1 October 1989. RM did so from 1 January 1989 to 7 February 1994 and IW from 1 March 1960 to 30 September 1986. The various partnerships

trading as MRM between 1955 and 1994 deducted contributions from these employees' salaries and paid them to the Fund, together with the corresponding employer contributions, in accordance with the trust deed and scheme rules. RM and IW are currently recipients of payments from the Fund. GH died on 5 May 2010, but a spouse's pension is being paid to his widow. The second defender was a partner of the successive partnerships of MRM during at least part of the periods of employment of all three employees.

[7] Following the identification of a deficit in 2003, the pursuers took steps to make good the deficit by requiring contributions from employers to be paid to the Fund, apportioned according to their liability to the Fund as calculated by the Fund's Actuary. Between 2003 and 2008 deficit reduction contributions were paid in full by the partnerships trading as MRM in respect of the liabilities attributable to the three members. The second and third defenders attended AGMs and EGMs of the Fund and voted at these meetings in their capacity of assenting employers. From September 2008, MRM fell into arrears in respect of the deficit reduction contributions. They continued to make partial payments to account to the Fund from September 2008 until December 2012.

Trust Deed and scheme rules

[8] Article IX of the 1947 Trust Deed provides that:

> "These presents or any part of them (including the Rules) may be amended at any time... provided that (1) no amendment to these presents except to the Rules ... may be made without the consent of a majority of the Managers; and (2) no amendment or addition to these presents or the Rules shall be competent which shall make the main purpose of the Fund other than the provision of annuities on retirement at a specified age of employees of Solicitors practising in Scotland (or for the widows, children or dependents of such employees after their death) ...".

The relevant provisions of the 1947 Rules are as follows:

> "*III Assenting Employers*

To enable the employees, or any of them, of an eligible employer to become or remain contributing members of the Fund, such employer must –

(i) have undertaken to the Managers to pay all contributions payable by him in respect of members of the Fund in his employment from time to time and generally to conform to these Rules and any by-laws made thereunder;

...

An eligible employer who has undertaken the foregoing obligations is hereinafter called an 'assenting employer'.

...

XVIII Termination of Employers' Obligations

Employers may terminate their obligations to the Fund at any time on six months previous notice. Such termination shall not prejudice the right of the Fund to recover any sums which have become due at or before the date on which it takes effect.

XIX Actuarial Investigation

As the purpose of the Fund is to ensure pensions on retiral of an amount ... the Managers shall cause an actuarial investigation to be made at such intervals as they think fit in order to ascertain if the purpose aimed at is being attained. Should the Actuary report that the Fund is failing to attain its purpose, the Managers shall submit the position to the members and their employers with a view to such remedial steps being taken as are deemed necessary..."

[9] Article IX of the 1980 Trust Deed, which confers the power of amendment, is in substantially the same terms as Article IX of the 1947 Deed. Clause IV of the 1980 Rules defines "assenting employer" in the same manner as Clause III of the 1947 Rules. Clause XVIII makes the same provision for the termination of Employers' Obligations as Clause XVIII of the 1947 Rules. The 1980 Rules then provide:

"*XXI Actuarial Investigations*

(1) The Manager (*sic*) shall appoint an Actuary to the Fund ... [T]he duties of such Actuary shall be to make a valuation of and report upon the position of the Fund as at the end of each successive period of not more than five years as may be determined by the Managers and at the request of the Managers to make such reports and give such certificates, advice and information relating to the operation of the Fund as may be requisite or expedient. If the valuation and report made by the Actuary shows that there is a deficiency in the amount required to pay the benefits set forth in these rules the Managers after consultation with the Actuary shall

> determine what action shall be taken either by increasing contributions or decreasing pensions or other benefits in order to restore the actuarial solvency of the Fund..."

[10] Article IX of the 1990 Deed, conferring the power of amendment, is in substantially the same terms as Articles IX of the 1947 and 1980 Deeds. Clause XIX of the 1990 Rules, concerning the termination of Employers' Obligations, is in substantially the same terms as Clause XVIII of the 1980 and 1947 Rules. Clause XXII, on the power of the trustees to make Actuarial Investigations, is in substantially the same terms as Clause XXI of the 1980 Rules, and Clause XIX of the 1947 Rules.

[11] The 1990 Rules were amended on a number of occasions. In exercise of their powers under Article IX of the 1947 Trust, the trustees amended the 1990 Rules to allow the Fund to operate as closed or paid-up from 27 May 2003. As amended, in 2003, the rules provided that:

> "*XX Winding up and operating the Fund as a closed fund as an alternative*
>
> ...
>
> (1) The Managers shall wind up the Fund or, as an alternative to winding up, shall operate the Fund as a closed or paid up arrangement … Where a resolution to operate the Fund as a closed or paid up arrangement is so approved, during the period in which the Fund is operating as a closed or paid up arrangement:
>
> > ...
> >
> > (b) whilst no contributions shall be payable to the Fund towards the provision of benefits for service after the date on which operating the Fund as a closed or paid up arrangement was approved, contributions may still be payable by employers towards the provision of benefits accrued prior to the date on which operating the Fund as a closed or paid up arrangement was approved. Such employer contributions shall be determined by the Managers on the advice of the Actuary."

Liability on a contingent basis, in respect of employer contributions subsequently required by the Fund as required to enable benefits to be paid, came into existence as at that date; at a time when MRM included the second and third defenders as partners.

The pursuers' averments

[12] The pursuers aver that the successive partnerships of MRM have traded continuously under the name of "Marshall Ross & Munro". There have been no significant outward changes in the business on its transfer from one partnership to the next. The first defenders' website states that *"Marshall Ross & Munro, Solicitors have been established for over 100 years. We have cared for generations of people ...".* The second defender's profile on MRM's website states that he joined *"the firm"* in 1977. The pursuers aver that "at all times, the name of the firm remained the same and consequently, creditors were entitled to assume that the entity with which they contracted, remained the same". They aver that:

> "each iteration (*sic*) of MRM which made contributions in respect of a Member and failed to withdraw from the Fund is an Assenting Employer in respect of that Member. Any subsequent iteration of MRM inherited the liabilities of the previous iteration (although they could also be an Assenting Employer in respect of a different member). An Assenting Employer which has failed to withdraw from the Fund remains bound by the Fund Rules (as may be amended from time to time). Moreover, any partnership which has inherited liability in respect of the Fund is bound by the Rules governing the Fund at that time (again, as may be amended from time to time thereafter).
>
> ...
>
> Each successor firm of MRM has inherited the actual and contingent liabilities of its predecessor, namely MRM, including the contingent liability to make future contributions to the Fund which could crystallise if, for example, any deficit should arise."

[13] The pursuers aver that MRM, as currently constituted, inherited the liabilities of MRM as it was constituted at 7 February 1994, being the date upon which RM ceased to accrue benefits under the scheme. At no point since that date have the defenders given notice to the pursuers that they wish to withdraw from the Fund as an assenting employer in terms of Rule XVIII of the 1980 Rules, or Rule XIX of the 1990 Rules. Accordingly, MRM remained an assenting employer of the Fund, notwithstanding the cessation of accrual of

benefits after 7 February 1994. "Subsequent iterations" of MRM from 7 February 1994 inherited the liabilities of the predecessor partnerships as they were constituted at that date. The defenders are, it is contended, liable to make deficit contributions under Clause XX (1) of the 1990 Rules as amended. The sum sued for represents the contributions which the pursuers claim are due from the defenders in order to meet the Fund deficit attributable to the benefits payable to the three former employees.

Commercial judge's reasoning

[14] In the course of a highly discursive Opinion, the commercial judge retraces much of the groundwork already covered in detail recently in *Sim* v *Howat* [2011] CSOH 115. She considered that the pursuers' case rested on three assumptions: first, that the totality of the sum claimed was capable of transmission; secondly, that there was an unbroken transmission of the accrued liability from each firm to its immediate successor; and, thirdly, that the totality of what had accumulated had transmitted to the first defenders. The starting point, according to the judge, was that a successor firm was not liable for the debts of its predecessor (*Thomson & Balfour* v *Boag & Son* 1936 SC 2, at 10; *Sim* v *Howat* (*supra*) at para [13]). Each partnership had a separate legal personality.

[15] A transmission "presumption" could apply if a trading entity transferred its whole business to a new entity, without any outward change in the form or the way in which the business was carried on, and without any contribution being made to the successor firm. The formulation of the presumption, as set out by the Scottish Law Commission (SLC Discussion Paper No.159/ Law Commission Consultation Paper No.111, joint project on the law of Partnership at paragraph 10.65) did not accurately represent the law. The principle, as stated in *McKeand* v *Laird's Trs* (1861) 23 D 846 at 857, had been narrowed in *Heddle's*

Executrix v *Marwick & Hourston's Tr* (1888) 15 R 698 (at 708). The basis for the presumption was an agreement by the successor partnership, either expressly or by implication, to assume liability for the debts owed by the first entity. Whether the successor had agreed to do so was a question of fact and circumstances.

[16] It was not sufficient that there had been uninterrupted business. The fact that the business had carried on was neutral. A transfer of the whole business, meaning its assets and liabilities, was required in order to bring the presumption into play. The continuous use of the name MRM, and the lack of any significant outward change to the business, were not sufficient. The onus was on the pursuers to aver a relevant case (*Heather Capital* v *Levy & McRae* [2015] CSOH 115; *Stephen's Tr* v *Macdougall & Co's Tr* (1889) 16 R 779). The pursuers had no averments of a tacit or express agreement by the first defenders to assume the liabilities of its predecessors. On that basis, their primary case was irrelevant.

[17] The payments made from 2003 onwards did not assist. There were no averments that the partnerships, which had succeeded that which had employed the members in February 1994, had made any payments. There were no averments of any payments by MRM 15 (which was formed in April 1995). The fact that no payments were made by MRM 15, was a fatal break in the chain. The fact that MRM 16 was not formed until several months after MRM 15 had been dissolved on 31 March 2001 was a further fatal break.

[18] Whether or not a contingent liability arose in a particular set of rules required to be assessed according to the terms of the rules, and, in particular, the power of amendment and its scope. The correct interpretation of the deeds and rules was that no contingent liability existed in respect of any deficit in the Fund prior to the amendment in 1997, either at the point at which each partnership joined the scheme or at the point of its presumed dissolution. The existence of a general power of amendment, which at the material time was

incapable of generating a deficit and from which assenting employers could readily withdraw, was not sufficient to impose a contingent liability for deficits arising years later under an amended scheme. At the point of dissolution, each successive partnership would only be liable for any arrears due in respect of payments for any members employed which were "due at or before the notice of termination" i.e. the point of withdrawal from the Fund.

[19] The partnerships which existed after 1994, when the last Member retired, were not assenting employers in respect of any of the Members. Any amendment made to the 1990 Rules came too late, as none of the firms after that point were assenting employers in relation to the members. There was no contingent liability to be transmitted, even if the transmission presumption had been relevantly pled. The first defenders could not be an assenting employer of the members at a time before they came into existence. Upon the dissolution of the last partnership to employ any of the members, there ceased to be an assenting employer.

[20] As the scheme was a contractual one, the quinquennial prescriptive period applied. Not having heard argument on the point, the commercial judge reserved her opinion on when time had started to run, for the purpose of prescription, on a contingent liability. The matter having been put in issue by the defenders, the pursuers' averments were wholly inadequate. The pursuers did not have any averments that the payments made from 2003 to 2008 constituted a relevant acknowledgement. The pursuers had failed to discharge the onus that the obligation had not prescribed.

Submissions

Pursuers

[21] The pursuers maintained that the commercial judge erred in dismissing the action.

She ought to have allowed a proof before answer. The pursuers' pleadings were sufficient to satisfy the standard in a commercial action (*Kaur* v *Singh* 1999 SC 180, at 183; *Marine and Offshore (Scotland)* v *Hill and MCA Inspection Services* 2018 SLT 239 at paras [16]-[19]). The pursuers had made sufficient averments to invoke the transmission presumption, including the continuous use of the firm name, the portrayal on the firm's website of its continuous existence "for over 100 years", and, in relation to changes in the composition of the firm in 1989, 2000 and 2006, continued trading from the same office, under the same name.

[22] A party required to aver sufficient facts to engage the presumption. The onus of rebutting the presumption was on the party who wished to contradict it (Walker & Walker, *Evidence* (4th ed), paras 3.3 to 3.4). At the stage of debate, the only issue was whether the pursuers had averred sufficient facts and circumstances to engage the presumption. It was necessary to distinguish, first, between the basic facts which the pursuers required to prove in order to engage the presumption and, secondly, the factors which could be pled by the other party in seeking to displace it. Whether consideration was paid, or a capital contribution made, were not factors which could render the pursuers' averments irrelevant.

[23] The basic facts required to engage the presumption were no more than that the assets of a going concern had been assumed by a new partnership and that the business was continued on the same footing as before. The question of capital contribution was a factor which the defenders could rely on to rebut the presumption (*Thomson & Balfour* v *Boag & Son* 1936 SC 2 at 10; *Miller* v *Macleod* 1973 SC 172 at 182 and 186; *Ocra (Isle of Man)* v *Anite Scotland* 2003 SLT 1232 at para [14]). It was not necessary for the pursuers to aver that the new partnership had expressly, or by implication, agreed to take over the liabilities, as that would rob the presumption of its utility (*Sim* v *Howat* (*supra*) at para [30]; *Ridgway etc* v *Brock* (1831) 10 S 105 at 107; *Heddle's Executrix* v *Marwick & Hourston's Tr* (*supra*) at 706-707).

[24] The agreement of a new partnership to take on liabilities could be established either by proof of the facts and circumstances or by the operation of the presumption. The pursuers had opted to rely on the latter (*Heddle's Executrix* v *Marwick & Hourston's Tr* (*supra*) at 706 - 707). The commercial judge erred in failing to give due weight to the wider relevance of the payments made by the first defenders from 2003 onwards. Payment of the debts of a former partnership suggested that the presumption had operated (*Heddle's Executrix* v *Marwick & Hourston's Tr* (*supra*) at 708; *Sim* v *Howat* (*supra*) at para 32). There was nothing in the documents, which had been lodged by the defenders, to rebut the presumption. In particular, notifications in the Journal of the Law Society of Scotland of a change in the composition of the partnership were not sufficient. There was nothing in the demerger agreement, between MRM 16 and the first defenders, which was inconsistent with the operation of the presumption.

[25] The commercial judge erred in finding that no contingent liability in respect of a deficit was capable of arising under the rules applicable to the Fund, either at the point that each partnership joined the Fund, or at the point of each partnership's presumed dissolution. The Fund Deeds had contained a power of amendment since 1947 (Article IX of the 1947, 1980, and 1990 Trust Deeds). Each successive partnership, including that in existence in 1994, was an assenting employer who was subject to those powers of amendment. They became contingently liable in respect of deficit reduction obligations which were subsequently introduced by amendment (*Liquidator of the Ben Line Steamers, Noter* 2011 SLT 535). By the time that payment had been demanded in 2003, the 1990 rules had been amended to provide that the Fund operated as a closed or paid up scheme. The trustees had power to demand further contributions in respect of any deficit.

[26] Any contingent liability owed by a predecessor partnership would transmit upon operation of the presumption. Any dissolution or a winding up of the earlier partnership could not have the effect of terminating the liability, as the presumption would thereby be robbed of its practical effect. There was no requirement that contingent obligations should be known at the time of transmission. Knowledge of the debt by the successor partnership was irrelevant (*Miller* v *Macleod* 1973 SC 172 at 181; *Sim* v *Howat* (*supra*) at para 34).

[27] The pursuers had more general powers to demand payment from assenting employers. Clause XXI of the 1980 Rules provided for an increase in contributions in order to restore the actuarial solvency of the Fund. The level of contribution was to be determined by the length and level of contributions. There were obvious parallels with *Liquidator of the Ben Line Steamers* ((*supra*) at paras [14]-[20]) in that the firm had been expressly subject to the liability that the scheme deed and rules might be amended to increase the amount payable by participating employers.

[28] The commercial judge erred in failing to acknowledge that deficit payments made by MRM between 2003 and 2012 interrupted any prescriptive period. The pursuers had submitted that the prescriptive period had commenced in 2003, when the contingent liability crystallised upon deficit contributions being demanded. The pursuers had averred that payments had been made within the five year prescriptive period. Given that the defenders had admitted that payments had been made within the last five years in response to the demands, there was no need for further specification.

Defenders

[29] The defenders contended that the commercial judge reached the correct conclusion for the reasons which she had given. The debate had proceeded on the basis that the judge

would be able to determine the issues, one way or another, without further procedure (ie a proof before answer). The effective dissolution of each partnership caused the termination of its legal personality and contractual capacity. The point of dissolution determined the contract between a firm and each of its employees. It also determined each firm's membership of the scheme. A dissolved partnership ceased to be a legal person and could not be an employer, far less an assenting employer, as defined in Clause III of the 1947 Rules. The position was the same as if there had been a series of individual solicitors, each of whom had died and been succeeded by another. The fact that assenting employers could terminate their obligations to the Fund on six months' notice was unsurprising. The pursuers were wrong to assume that, because an employer could terminate membership by giving notice, termination could not occur by any other means. Termination could occur on death or dissolution (*Hoey* v *MacEwan and Auld* (1867) 5 M 814; *Balmer* v *HM Advocate* 2008 SLT 799).

[30] There was nothing objectionable about the pursuers' assertion that each firm, at the point of dissolution, was under a contingent contractual obligation to the pursuers. In the context of pension schemes, it was easy to envisage schemes which would contain powers to require further contributions. The analysis in *Liquidator of the Ben Line Steamers (supra)* on the meaning of a contingent obligation was correct. The difficulty was identifying what the pursuers claimed the obligation to be. Assenting employers had an absolute right to terminate their obligations on giving six months' notice. The 1947 Rules made no provision for employers to make up any shortfall. Rule XIX provided for periodic actuarial assessment, and, in the event of a shortfall, for the matter to be considered by the Members and employers "with a view to such remedial steps being taken as are deemed necessary". No such steps were ever taken during the currency of the 1947 scheme.

[31] The only contingent obligation, which could impose a liability on the partnerships of MRM under the 1947 Rules, was the general power of amendment. The contingency required that: first, the power of amendment would be exercised to change the fundamental character of the scheme from one incapable of accumulating a deficit, to one capable of doing so; secondly, such a deficit might arise; thirdly, the rules might be further amended to provide a power to require payment of deficit contributions; and, fourthly, such a power might be exercised to require former assenting employers to make such payments. There were two further difficulties. First, the dissolved partnerships could not vote in respect of any motion to change the rules, as was required for the exercise of the amendment powers. Secondly, the 1947 scheme contained an unrestricted right to terminate obligations on the part of an employer. The contingent obligation was so open-ended that the only prudent course open to a partnership at the point of dissolution would be to ensure that the obligation was terminated.

[32] The consequence of the dissolution of each partnership was that they had left the scheme. A partnership could not be an assenting employer if it ceased to have the contractual capacity to be an employer. The obligations of a now dissolved partnership may be contingent, but they had to be identifiable. Each firm required to be liable under the rules of the scheme as they existed at that time before any liability could transmit to a successor partnership.

[33] The commercial judge was correct to characterise the mechanism by which any liability transmitted to a successive firm as contractual, whether express or implied from actings. No case had actually been decided on the basis of the presumption. The scope of the common law principle of transmission was confined to the narrow reading in *Stephen's Tr* v *Macdougall & Co's Tr* (1889) 16 R 779. The rule only came into play in specified

circumstances, which were that the whole assets of the predecessor firm were made over to the successor firm. In each case, where the whole assets were not transferred, there was no transmission (*Nelmes & Co* v *Montgomery & Co* (1883) 10 R 974; *Stephen's Tr* v *Macdougall & Co's Tr* (*supra*); *Thomson & Balfour* v *Boag* (*supra*)). A proper winding up of the old firm would prevent a transmission of liability (*Stephen's Tr* (*supra*)). The principle was limited to cases in which the change in partnership came about by the assumption of a new partner, which prevented the mischief of the new firm getting the assets of the business gratuitously, taking them away from the creditors of the old firm, whilst the former partners of the old firm were left with the liabilities and not the assets. Where the dissolution of a firm came about by resignation or retirement, the creditor continued to have recourse to all the partners and all the assets.

[34] The transfer required to be gratuitous, or for nominal consideration (*Ridgway etc* v *Brock* (*supra*); *McKeand* v *Laird's Trs* (*supra*); *Miller* v *Thorburn* (1861) 23 D 359; *Heddle's Extx* v *Marwick & Hourston's Tr* (*supra*); *Stephen's Tr* v *Macdougall & Co's Tr* (*supra*); *Henderson* v *Stubbs* (1894) 22 R 51 at 55; *Ocra (Isle of Man)* v *Anite Scotland* (*supra*) at para [14]). It was necessary for the new firm to have consented to the assumption of the liability, which was to be inferred from circumstances. It was for the pursuers to aver facts and circumstances in respect of each alleged transmission (*Heather Capital* v *Levy & McRae* (*supra*)). The contingent obligations of a firm dissolved in 1962 required to be analysed to see whether transmission had occurred through a further 15 dissolutions. Some of the authorities cited were examples of novation (*McKeand* (*supra*) and *Heddle's Executrix* (*supra*)). Only in *Miller* v *Macleod* (*supra*) had a direct claim by a creditor against a successor partnership succeeded. The presumption could not be applied to a latent obligation which was unknown to the successor firm. Knowledge of the obligation was a prerequisite.

[35] There was no single unifying principle to be drawn from the cases. They were difficult to reconcile. There was no basis for the suggestion that the onus to aver the facts and circumstances to engage the transmission presumption was other than on the pursuers. The fact that there were minutes of dissolution in 1962 and 1970 demonstrated that the partnerships had not carried on seamlessly. The SLC discussion paper (para 10.65) was incomplete. It did not make clear that the whole of the assets required to be taken over and the transfer had to be substantially gratuitous.

[36] In relation to prescription, the onus was on the pursuers to aver that the cause of action had been preserved (Johnston: *Prescription and Limitation* (2nd ed) at paras 22.08 to 22.15). The pursuers had failed to plead a relevant acknowledgement. It was accepted that the pursuers could make relevant averments about acknowledgement and the defenders would then not insist on the prescription plea.

Decision

[37] There are two points of principle to be determined. The first is whether the pursuers have identified a contingent liability which is capable of transmitting from one partnership to its successor. On the hypothesis that the various constitutions of MRM are to be treated as if they formed one continuous entity, in so far as third party relations are concerned (the second point for determination), MRM incurred a liability, as assenting employers, to the Fund in respect of each of the three employers. They were at liberty to withdraw from the obligations to the Fund upon six months' notice. They did not do so. Had they done so prior to the 1980 changes, which altered the benefits entitlement from money purchase to a calculation based on final salary, their liability would have been restricted to contributions which had fallen due prior to the effective date of the notice. Even after 1980, the same state

of affairs existed, since the termination provisions (Clauses XVIII) remained the same. The new provisions (1980 Rule Clause XXI replacing 1947 Rules Clause XIX), relative to actuarial investigation, enabled the Fund Managers to increase contributions in order to restore actuarial solvency, but they did no more than that. In any event, as the defenders had ceased paying contributions in 1994, it is difficult to see how this provision could have applied to them. In short, it is doubtful whether the change allowed the Managers to request additional funds from employers who were no longer contributing.

[38] It is the 2003 change to Clause XX which is significant. This ended the payment of contributions generally on the closing of the Fund. It provided that "contributions may still be payable by employers towards the provision of benefits accrued", as determined by the Managers on the advice of the Actuary. On the same hypothesis that MRM were a single continuous entity throughout, they would be liable from that point in the contingent event (which occurred) that the Fund became unable to pay, to their three former employees, the accrued benefits. Provided (as was the case) that MRM had not terminated their obligations before this provision came into effect, they would be liable to contribute as and when required to do so by the Managers (*Liquidators of the Ben Line Steamers, Noter* 2011 SLT 535, Lord Drummond Young at para [24] explaining the nature of a contingent debt), even if they had no members then still contributing. The second point of principle is therefore the nature and scope of the transmission presumption, and in particular, what a pursuer requires to aver to engage it.

[39] The joint consultation paper, issued by the Scottish Law Commission and the Law Commission (of England and Wales), considered the law of partnership in both jurisdictions. The lead Scottish commissioner in connection with the preparation of the

paper was Patrick Hodge QC. The paper describes (at para 10.65) the transmission presumption in Scotland in the following terms:

> "From the case law, it seems that the courts in Scotland have focused on the circumstances surrounding the creation of the new partnership and the transfer of the assets of the former business to it, in deciding on the liability of the new partnership for the old firm's debts. Where the business taken over is substantially the same as the old firm, and where that business is continued without interruption, there appears to be a general presumption that the new partnership takes over the whole liabilities as well as the assets (*Miller* v *Thorburn* (1861) 23 D 359, 362). This presumption may be displaced (*Thomson & Balfour* v *Boag & Son* 1936 SC 2.) The principle behind this presumption is that creditors should not be prevented from recovering a debt because all the assets of the firm which was liable has been taken over by a new partnership which is substantially similar, in terms of business and constitution, to the old firm (*Thomson & Balfour* v *Boag & Son* (*supra*), Lord President (Normand) at 10). While judges speak of applying a presumption, the courts in reality are deciding whether the new firm has agreed to assume the liabilities of the old firm. Such an agreement may be inferred from circumstances of the particular case or from a course of dealing (Gloag, for example, treats the taking over of the assets of a business as a 'fact from which the court may draw the inference that the new firm has agreed to be liable to the creditors of the old'." Gloag, *Contract* (2nd ed, 1929) at 267).

[40] The paper continues by explaining (at para 10.66) that the only conclusion that can be drawn from the authorities is that the courts will look at the facts and circumstances surrounding each case to establish whether the partnership is continued on substantially the same basis as the old firm and, thus, whether the presumption of liability will apply. Where the partnership taking over the assets is "practically the same" as the predecessor and the business is continued without interruption, with the predecessor left without assets, the paper (at para 10.68) considered that "some continuity in liability" was clearly desirable to "protect the interests of creditors".

[41] The statement in the SLC's paper is accurate and, so far as the situation in this case is concerned, complete. In *Sim* v *Howat* [2011] CSOH 115, Lord Hodge was (at para [17]) being unduly modest in describing the limited utility of the statement. Whatever its basis, it is a

principle in its own right and adequately vouched by binding authority. That authority has already been described in some detail in *Sim* v *Howat* (*supra* at paras [18]-[25]) and repetition may seem unnecessary. However, at the risk of excessive recitation of *dicta*, it may suffice to make limited reference to some of the past expressions of the principle in order to set it, and its purpose, out in clear terms.

[42] In *Ridgway etc* v *Brock* (1831) 10 S 105, Lord Cringletie, whose note was approved by the Second Division, said (at 106-107):

> "… the Lord Ordinary cannot admit that partners of a company having contracted a debt, can withdraw their funds from payment of that debt by the mere act of entering into a new copartnery with a third person, and that too without notifying to the public their intended measure … Any person entering into such copartnery without such previous measures, appears … to consent that the funds of the new company must remain liable for payment of the debts of the company with whom he has associated himself."

This was so even if the creditors were said not to be able to go against the private estate of the incoming partner.

[43] In *Heddle's Executrix* v *Marwick & Hourston's Tr* (1888) 15 R 698, the business of a sole trader (James Marwick) had been taken over first by his widow and then by the widow in partnership (Marwick and Hourston). The business carried on as before, with the stock and assets of the old entities being handed over and traded by the new ones. Lord Traynor, in his note, interpreted (at 700) the earlier Victorian cases as follows:

> "In this state of the facts I do not think the law is doubtful. … the present case is not distinguishable in any essential particular from the cases of *Millar* [v *Thorburn* (1861)] 23 D 359 and *McKeand* [v *Laird* (1861)] 23 D 846. In the latter case it was laid down by the Lord Justice-Clerk (Inglis) 'that when parties take up a going business in that way, and take the stock, they must also take the liabilities,' and that in effect was the judgment pronounced".

The First Division agreed. Lord Adam, with whom (not surprisingly) the Lord President (Inglis) agreed, said (at 706 – 707):

> "I do not suppose that anyone will contend that when a new firm is constituted by a person becoming a partner in an existing business, whether carried on by an individual or a firm, the new firm becomes liable for the debt of the old business. Neither do I think that the mere fact of the new firm taking over the whole assets of the old business will *per se* render the new firm liable for the debts of the old business. … in all cases it is a question of circumstances, and that it must be established by presumption, or by proof of facts and circumstances, that the new firm agreed to adopt the old debts and to become liable for them".

[44] These cases are very clear in their statements of principle that, as a generality, a firm, which takes over another business and carries it on with no outward display of change apparent to a third party, will be liable for the old business's debts (see the reference to the "house" in Bell: *Commentaries* vii, ii, iv (p 636, 1990 reprint at ii, 526). Were it otherwise, creditors might find themselves in substantial difficulty when trying to ascertain and cite the true partnership, individual or company behind the name of the entity with which they had undoubtedly traded. On the other hand, if the creditor in fact knew of the identity of the original debtor and was aware of a change in the personality behind the business, different considerations would be likely to apply (*Stephen's Tr* v *Macdougall & Co's Tr* (1889) 16 R 779).

[45] In *Thomson & Balfour* v *Boag & Son* 1936 SC 2, it was determined that a successor partnership had not assumed the liabilities of a sole trader. The Lord President (Normand) (at 10) repeated what was regarded as uncontroversial:

> "It is a settled principle of law that, when the whole assets of a going concern are handed over to a new partnership and the business is continued on the same footing as before, the presumption is that the liabilities are taken over with the stock – *Millar* v *Thorburn*, *McKeand* v *Laird*; *Heddle's Executrix* v *Marwick & Hourston's Trustee*. The principle is that it would be inequitable to allow a trader to injure his trade creditors by assuming a partner and handing over his whole trading assets to the new partnership without liability to pay the trade debts".

[46] In *Miller* v *Macleod* 1973 SC 172, the court explained (LJC (Wheatley) at 182-183) the Victorian authorities once again. It was emphasised (*ibid*) that the facts of each case required to be examined to determine whether:

> "in the circumstances the pursuer has established by presumption or by proof of facts and circumstances that the new firm agreed to adopt the old debts and become liable for them".

In both *Thomson & Balfour* and *Miller,* views were expressed on whether, if a new partner had introduced a substantial amount of capital, the presumption would be displaced.

[47] The significance of capital contribution was explained in *Sim* v *Howat* (*supra*, at para [27] *et seq*). Where the business of a firm (A) transfers to what will be a new entity (B) upon the assumption of a new partner (C), although creditors of A (D) would be able to sue the former partners of the dissolved firm, they would not be able to go directly against B (and hence the transferred assets). No problem would, at least in theory, arise if B had paid A, since the price would be available were D to sue A. The problem arises where value is not given for the assets acquired. Lord Hodge's analysis in *Sim* v *Howat* was (at para [29]) that for D to be able to pursue B, there required to be facts and circumstances from which it could be inferred (or presumed) that B (and C) had accepted liability for A's debt to D "either expressly or tacitly" (para [29]) (a unilateral undertaking; para [33]).

[48] The continuation of substantially the same business is an essential prerequisite. However, Lord Hodge reasoned that giving value for the assets (but not necessarily a capital contribution) could displace the presumption. That may certainly be so in a competition between the partners of the old and new firms, but it is difficult to see why it should effect relations with a creditor who may have no knowledge of the new partner, the amount of any value given to the old firm, any capital contribution or its purpose. This reservation about the significance of such matters is not, however, significant in the assessment of the

relevancy of the pursuers' case. It is sufficient to proceed upon Lord Hodge's detailed and reasoned analysis whereby the court is looking at the facts and circumstances in order to see whether it can be inferred that the successor partnership and its new partners tacitly undertook to meet the transmitting partnership's debts to third parties. In so doing, given the mischief to be guarded against, the approach, at least in cases where the creditor is unaware of a change in the personality of the partnership debtor, must be an objective one and not governed by the actual agreement reached between A, B or C.

[49] The pursuers have averred sufficient from which the court can infer that, in relation to their dealings with third parties, including the pursuers, the various successor MRM firms undertook to pay the debts of their predecessors. According to the pursuers' averments, to the outside world (or at least that beyond the readership of the Law Society Journal), MRM were the same entity throughout. They traded from the same premises under the same name. They held themselves out to be the same business or firm. They paid some of the contributions called for after 2003. Of course, the different partnerships entered into different arrangements with themselves upon their various dissolutions. These will govern the liability of former or existing (as at the relevant date) partners to contribute to any sum found due by the first defenders to the pursuers (the issue in *Sim* v *Howat* (*supra*)). If the appropriate inference is drawn, however, these actual arrangements, which were unknown to the wider public, and, it is as yet assumed, to the pursuers, can have no bearing on the liability of the first defenders to the pursuers.

[50] Contrary to the commercial judge's opinion, it may be enough in a given case that there was an uninterrupted practise of a particular business. That is certainly a prerequisite but, in the absence of other factors, it may be sufficient to engage the principle. A person, artificial or otherwise, who continues to trade in the same business under the same name

may well be presumed to have undertaken former liabilities in the absence of an outward demonstration of a change of ownership behind the façade. The term "business practice" is easy to understand in such a mercantile context, as it is with that of a solicitor's office. Similarly, "uninterrupted" is not a difficult concept. In this case, it simply refers to the continued practise of the solicitor's business of MRM over time, ie without any significant gap in time. The factor referred to as "uninterrupted business practice" is not a neutral one. It suggests to third parties that, whatever manoeuvres may have occurred behind the scenes, the proprietors regard themselves as carrying on the same business from, as *Bell* (*supra*) put it, the same *house*.

[51] The statement, that creditors are entitled to assume that the entity with which they are contracting is the same, is not a mere assertion. It is a reasonable conclusion from the fact that the successor proprietors have elected to trade under the same name; no doubt in part to take advantage of the continuing goodwill of the former firm at least where, as here, one or more of the partners remain the same. Reference to the absence of contradictory factors is significant. It is neither circular nor does it reverse any onus of proof. When a business trades in the same way, involving at least in part the same personnel, under the same name, it will be easy to apply the presumption or to draw the inference where there are no contra indicators such as, in *Heddle's Executrix* v *Marwick & Hourston's Tr* (*supra*), a simple change of business name.

[52] The commercial judge was in error in saying that the pursuers have no averments from which a tacit undertaking (not necessarily "agreement" with another) to assume the predecessor's liabilities could be inferred. On the contrary, they have relevantly pled such a case. In that context, the pursuers cannot be expected to aver that the transfers were gratuitous or that no capital contributions were involved. These are matters peculiarly

within the knowledge of the defenders. If they were thought to be relevant, it would be for the defenders to make the averments. The real question, in light of the pursuers' limited motion to allow a proof before answer, is whether the defences merit such a proof. It would seem that, at the time of the debate, parties were anxious that the commercial judge should resolve the issue on the written pleadings and documents. This may have prompted the judge to make such a decision in the face of, if not conflicting factual averments, those with the capacity of putting a different complexion on the issue.

[54] The defenders aver that the pursuers are (but not "were") aware "(and as is ... readily ascertainable from material in the public domain)" that the formations of MRM 16 (the first defenders) and 17 involved "obvious and material outward change in the manner in which the business had been carried on". They say that there was no "firm" trading as MRM prior to May 2001. The second defender was then operating as a sole trader before entering into partnership with JS and the second defender and taking over another firm. The "trading style" indicated the occurrence of a merger, which was advertised. Approaching the matter objectively, the defenders aver that "no reasonable observer" could have thought that: the second defender was assuming the liabilities of JS, JS those of the second defender; or third defender those of the second defender or JS. MRM 16 was dissolved.

[55] These factors, or at least some of them, if proved, may displace any onus arising from the transmission presumption or prevent any inference. All of this merits inquiry. The case cannot, in absence of agreements as to the facts, be disposed of as a matter of relevancy. So much depends on the facts found and weight to be attached to them in the ultimate equation.

[56] The only remaining issue is prescription. All that the defenders aver is that the obligations of the "now dissolved firms" relative to any predecessor firm was undertaken at

the date of formation of each firm. These are said to have been extinguished by "the short positive *et separatim* long negative prescription" (*sic*, Answer 11). Their second plea-in-law is in similar terms. The pursuers aver that MRM paid deficit reduction contributions between 2003 and 2008. They continued to make partial payments from 2008 until December 2012. The action was raised in early 2016. The pursuers' averments are at least sufficient to merit inquiry. If the defenders have made part payment, that would amount to an acknowledgement of the subsistence of an obligation (Prescription and Limitation (Scotland) Act 1973, s 10) otherwise extinguished by the expiry of the quinquennial (s 6) prescriptive period. On the basis that the quinquennial provision applies to an obligation of the nature under consideration, there is no immediately obvious reason for the application of the vicennial period (s 8).

[57] Paragraphs 2 to 4 of the commercial judge's interlocutor of 1 February 2018 should accordingly be recalled and a proof before answer allowed.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 39
CA6/14

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF LORD DRUMMOND YOUNG

in the Reclaiming Motion by

SCOTTISH PENSION FUND TRUSTEES LTD

Pursuers and Reclaimers

against

(FIRST) MARSHALL ROSS & MUNRO, (SECOND) CHARLES J BOW and
(THIRD) PATRICIA E GRZYBEK

Defenders and Respondents

Pursuers and Reclaimers: Martin QC, CM Thomson; Pinsent Masons LLP
Defenders and Respondents: JA Brown; BLM

8 June 2018

[58] I agree with your Lordship in the chair that this reclaiming motion should be allowed, and that accordingly the commercial judge's interlocutor of 1 February 2018 should be recalled and a proof before answer allowed. I do so for the following reasons, which in general correspond to your Lordship's reasoning.

Existence of a contingent liability

[59] The first question of law that arises on the facts of the present case is whether the

commercial judge was in error in finding that no contingent liability had arisen under the rules of the Fund, which was capable of transmission to successor partnerships, even if such transmission were competently established. On this issue, I agree that a contingent liability existed in 2003 at the time when Clause XX of the 1980 Rules was amended to provide that contributions might still be payable by employers towards the provision of benefits. Any final salary pension scheme, as against a defined benefit scheme, must have a provision for the potential increase of employers' contributions in so far as that is required to enable an employee to receive a pension based on his final salary rather than based on the defined contributions that the employer has made to the Fund. The amounts that may be required will normally be determined by those in charge of the scheme on actuarial advice. That is precisely what the amended version of Clause XX did. In essence, it provided for an increase in liability on the part of employers which might be triggered by the Managers if they obtained actuarial advice to the effect that such an increase was required to fund the final salary pension benefits of a former employee of the employer in question. That must in my opinion amount to a contingent liability, in the ordinary sense of that expression.

The liability of a successor partnership for the debts of its predecessor

[60] The more significant question, however, is the manner in which a successor partnership may assume liability for the debts of a predecessor partnership. This is not a straightforward issue, and, if I may say so, although a significant number of decisions have recognized the so-called "presumption" that a successor partnership takes over the debts of a predecessor in certain circumstances, the only thorough analysis is that by Lord Hodge in the Outer House in *Sim* v *Howat and McLaren*, *supra*.

[61] A critical consideration of the existing law is found in the Joint Consultation Paper on Partnership Law published by the Scottish Law Commission and the Law Commission for England and Wales (Scot Law Com No 111, 2000), at paragraphs 10.62-10.69. The relevant case law is analyzed at paragraph 10.65 in a passage that has been cited by your Lordship (at paragraph [39] above). In summary, where a new partnership is created and takes over the assets of the former business, the business taken over is substantially the same as the old partnership, and where that business is continued without interruption, the general presumption is that the new partnership takes over the whole of the liabilities as well as the assets. In some circumstances the presumption may be displaced. The underlying rationale can be regarded as equitable in nature: where the new partnership takes over the assets of the old partnership, creditors should not be prejudiced, but should be able to enforce the obligations of the old firm against the new firm. The discussion continues (at paragraph 10.66) by stating that the case law is unclear as to whether the agreement or undertaking to take over the liabilities of the old firm need be only within the partnership or whether it must be between the new partnership and the creditor who seeks to enforce an obligation. No conclusion was drawn as to that issue.

[62] At the heart of this area of law is a fundamental tension between the existence in law of successive partnerships as partners are added to or leave an existing partnership and the perception by outsiders of the partnership's business as a continuing commercial enterprise. On every occasion when a partner is assumed into or leaves the partnership, the theory of the law is that the partnership is dissolved (subject to any contrary agreement among the partners) and a new partnership created. That partnership is a separate legal person. At the same time the old partnership, the debtor in the obligation, has ceased to exist, although the obligation is payable as part of the winding up process of that partnership. On the other

hand, those who deal with the partnership, who normally have no concern with the changes in its constitution, perceive a continuing business, carried on in the same way as previously. Thus the successive partnerships and the continuing business necessarily stand in a contradictory relationship.

[63] This tension is mirrored in the two sets of contracts that on one hand regulate the partnership internally and on the other hand govern the partnership's relations with external parties. The internal relationship of the partners will obviously be governed by the partnership contract, possibly with subsidiary agreements among the partners. The external dealings of the partnership are likely to be governed by a wide range of contracts, and may well in addition involve delictual and restitutionary obligations. In some cases the third party transacting with the partnership will be interested in the details of changes in the partnership. For example, the partnership's bankers will require new mandates specifying the persons who are entitled to operate the partnership accounts. Employees, because of their direct involvement in the business of the partnership, are also likely to know of changes as they take place. Landlords of property rented by a partnership usually avoid the difficulty of changes in the partnership by granting the lease in favour of trustees for the partnership. Clients of a firm of solicitors may well be concerned about the individual partner or partners who deal with their business, but their concern about changes in the remainder of the partnership is likely to be limited. Beyond these and analogous categories, third parties who transact with the partnership generally deal with the partnership as a trading or professional entity. They will not normally be concerned with the details of changes in the partnership itself; they do business with a commercial entity, and at a practical level they regard that entity as continuing despite any changes in the underlying partnership.

[64] The presumption that, where essentially the same business is passed by one partnership to another, the new partnership takes over liabilities as well as assets is designed to deal with these sources of tension. It is, on a strict analysis, a presumption that where there is a continuity of business and a transfer of assets the obligations of the old partnership are novated in such a way that they become obligations of the new partnership; novation is the standard way in which the debtor's part of an obligation may be transferred by one person to another. Normally novation requires the consent of the creditor, for obvious reasons. In the case of successive partnerships, it is perhaps rare for such consent to be given expressly, but in the great majority of cases consent can be readily implied, by accepting payment from the new entity, or by raising proceedings against the new entity for payment of a debt or fulfilment of an obligation. Moreover, it is manifestly in the interests of creditors that their debts or other obligations should be transferred to the new partnership, as that partnership has taken over the assets of the old partnership. The reasons for agreeing to novation go further than the mere transfer of assets, however. As a commercial matter a creditor normally expects its debts to be paid out of the earnings of its debtor, and if the debtor's business passes to a new legal entity it is the earnings of that entity that will provide the resources to pay the debt. Thus considerations of liquidity, as well as those of solvency, support the basic principle that debt should be transferred in such a case.

[65] In the Law Commissions' Joint Consultation Paper it was indicated that the case law was not clear as to whether any agreement to take over liabilities of the old firm should be a matter for the partnership alone or whether the creditor should be involved. The criterion that is identified is whether the partnership is continued on substantially the same basis as the old firm. It is in precisely that situation that the sources of tension discussed above apply. For the reasons discussed in the last paragraph, I am of opinion that this issue will

rarely arise in practice. The primary agreement must be among the partners, but the consent of creditors will be required, as with any novation. Nevertheless, the effect of the presumption is that the partners agree that the new firm should take over the obligations and liabilities of the old firm, and the consent of the creditors of the old firm will be inferred whenever they seek to enforce the old firm's obligations or liabilities against the new firm.

[66] The conditions for the operation of the presumption are in my opinion accurately summarized in the Law Commissions' Joint Consultation Paper. The critical conditions are found at paragraph 10.68:

> "Where the partnership taking over the assets is practically the same as the partnership from which they are taken over, where the business is continued without interruption, and where the result is that the first partnership, if it exists at all, is left without assets, some continuity in liability for obligations is clearly desirable to protect the interests of creditors of the original partnership".

Thus three conditions are set out. First, the new partnership must be "practically the same" as the old partnership. What this means in my opinion is that the business entity should remain essentially the same, despite changes in the individual members of the partnership. Secondly, the business of the partnership must be continued without interruption. This is the most important of the three requirements; it is continuity of business that provides a practical reason for the presumption, in two respects. In the first place, where the business is continued without interruption, the general expectation of third parties who have dealt with the partnership is that they will continue to be able to enforce the obligations incurred in the course of the partnership's business. In the second place, a debt of the old partnership will normally be paid out of the future earnings of the business, which in this case is the business of the successor partnership. Thirdly, the original partnership, if it continues to exist, should be left without assets. I do not think that this requirement should be interpreted strictly. A significant diminution in assets would clearly suffice. Moreover, in a

case where the business has been continued notwithstanding its transfer from one partnership to another, the assets will almost invariably have been transferred, for the simple reason that they are required by the new partnership to carry on the continuing business. Thus in a case where the business has been transferred without interruption it will nearly always be reasonable to infer that the assets have been transferred from one firm to the other, with the result that the old firm is deprived of assets. It is the transfer of assets that provides the second major justification for the presumption: the presumption is necessary to ensure proper protection for the creditors of the old partnership.

[67] The Law Commissions expressed the view at paragraph 10.68 of their Joint Consultation Paper that, in cases where the foregoing three conditions were satisfied, it was unnecessary to make special provision in legislation. This conclusion was largely based, however, on the supposition that proposals for continuing personality made elsewhere in the Consultation Paper would be implemented. That has not in fact happened. The Joint Law Commissions followed their Consultation Paper with a Report (Report on Partnership Law, Scot Law Com No 192), but this was not implemented in any way. Consequently it can be said that a potential problem remains in the existing state of Scots law in this area. In the absence of legislation, the presumption that a successor partnership takes over the debts of its predecessor appears the only satisfactory way of dealing with the underlying problem. For the reasons discussed above I consider that this is an important aspect of partnership law. I am accordingly of opinion that the presumption that a successor partnership takes over the debts of its predecessor should be applied consistently in all cases where the three conditions set out in paragraph 10.68 of the Joint Law Commissions' Consultation Paper are met, including the very common cases where the inference of a transfer of assets is made from the fact of continuation of the business without interruption. Consistent application of

the presumption is important to ensure proper protection for those who deal with partnerships, who expect to have their debts paid out of the earnings of the partnership's continuing business and, as a last resort, expect that the partnership's assets will be available to satisfy their debts.

[68] Two further reasons can be said to support the application of the presumption. The first is an essentially equitable consideration. If a new partnership takes over the assets of an old partnership, it is only fair that the old partnership's liabilities should pass with those assets. That, moreover, probably accords with the general expectations of those who deal with businesses conducted by partnerships, and a similar expectation would arise on any transfer of a business from one entity to another. The second consideration is that it is possible in Scots law to contract a unilateral obligation. When a new partnership takes over the business and assets of an old partnership, the practical effect of the presumption is that the new partnership undertakes to meet the debts and other obligations of the old partnership. Conceptually, that is entirely intelligible in Scots law, although it might present difficulties under the English law of contract. This is the important point made by Lord Hodge in *Sim* v *Howat and McLaren*, *supra*, at paragraph [33], where he analyses the legal mechanism whereby the new partnership assumes responsibility for the old partnership's debts. While rights can be transferred without the consent of the creditor in certain cases, novation, the transfer of obligations, can only occur with the creditor's consent. The result is therefore that the old partnership remains liable as well as the new partnership, on the basis that it cannot rid itself of its debts. I agree with that view, although it seems to me that in practice the creditor of the old partnership will at least impliedly consent to the transfer of the obligation to the new partnership, if only for the reason that it is the new partnership

that receives the assets of the old partnership and it is the new partnership whose business will generate the funds from which the obligations of the old partnership will be met.

[69] The Commissions observe (paragraph 10.65) what when judges speak of applying a "presumption" they are in reality deciding whether the new firm has agreed to assume the liabilities of the old firm. That is clearly correct. Nevertheless, in my opinion the principle involved is properly described as a presumption. When the necessary conditions are fulfilled, it is presumed that the partners of the new firm have agreed to assume the liabilities and obligations of the old firm, but that obligation can be expressly excluded by those partners. In that event, however, a further important consideration applies. The assets of the old firm are taken over by the new firm, and the old firm will usually cease to trade. In that event its affairs should be wound up; that is essential if the interests of its creditors are to be properly protected. If, therefore, the partners of the successor firm decide to exclude the presumption, it is in my opinion essential that they should intimate their decision to those who have continuing dealings with the old firm, so that those persons can take appropriate steps to enforce or secure their existing rights.

[70] I do not think it necessary to discuss the case law on the presumption in detail; your Lordship in the chair has done so, as has Lord Hodge in *Sim* v *Howat and McLaren*, [2011] CSOH 115, at paragraphs [15] *et seq*. On the whole the cases can be said to support the operation of the presumption in the circumstances described in paragraph [65] above. The underlying reason for the presumption, that funds must be made available to pay the debts of the predecessor partnership, is clearly stated by Lord Cringletie in *Ridgway* v *Brock*, *supra*, in the passage quoted at paragraph [42] above. Likewise the statements of law found in cases such as *Heddle's Executrix* v *Marwick & Hourston's Trustee*, *supra*, and *Stephen's Trustee* v *Macdougall & Co's Trustee*, *supra*, are quite clear in their support for the presumption and its

practical importance. The same is true of the opinions in *Thomson & Balfour* v *Boag & Son*, *supra*, where the Lord President (at 1936 SC 10) regarded as settled law that, when the whole assets of a going concern are made over to a new partnership and the business is continued on the same footing as before, the presumption is that the liabilities are taken over with the stock. The equitable basis for the presumption is also stated in that opinion: it would be inequitable to allow a trader to injure his trade creditors by assuming a partner and handing over his whole trading assets to the new partnership without liability to pay the existing trade debts.

[71] The actual decisions in the decided cases turn to some extent on their individual facts, which is perhaps inevitable, but the general application of the presumption is recognized. In some cases exceptions to the presumption have been stated. Thus in both *Heddle's Executrix* and *Thomson & Balfour* v *Boag & Son*, it is suggested that the general presumption should not operate in a case where a partner comes into a business paying in a large sum of capital and the other partners merely provide their existing shares as their capital. In such a case, it is said, special circumstances might be required to impose liability on the new partner for transactions entered into before he became a partner. It is further suggested that, if the new partnership were entered into on the basis that there should be no liability for the prior debts of the old partnership, the presumption would be displaced. I am bound to say that I have considerable doubt as to the correctness of those statements, at least at a general level. The purpose of the presumption is to give effect to the expectations of third parties who have transacted with the old partnership whose assets have been transferred to the new partnership without the winding up of its affairs. It is not clear why third parties' rights should be affected by the details of the transaction among the members of the new partnership which, so far as they are concerned, is *res inter alios acta*.

Furthermore, the policy considerations behind the presumption where its requirements exist, including the transfer of the business and its assets, are strong. For that reason I consider that any exceptions to the presumption should be restrictively applied. For present purposes, however, it is not necessary to express a definite view on this matter. The exception does not apply to the present case. If necessary, I am of opinion that the earlier cases where the exception appears to have been applied can probably be treated as decisions on their own particular facts.

[72] Where the presumption operates, the obligations of the partners of the old and new partnerships *inter se* are not affected. In a sense the practical effect of the presumption is that the financial and accounting adjustments that are necessary following on the transfer of a business to a new partnership which carries on the same business require to be carried out by the partners themselves rather than by those who have dealt with the old partnership and who seek to recover debts due by that partnership or to enforce its obligations. At a practical level, it is the partners of the two entities who are best placed to carry out those financial adjustments, as they have ready access to detailed information about what has happened. If the onus of making adjustments for the transfer of the business to the new partnership were to fall on the creditors of the old partnership, by contrast, those creditors might have difficulty in discovering details of the relationship of the new partnership to the old. While the relevant documentation can obviously be recovered, there could be considerable practical difficulties where, for example, a person claimed to have suffered loss as a result of the negligence of the old partnership and the claim required to be formulated urgently because the end of a period of prescription or limitation was approaching. At a practical level, it is eminently sensible that a creditor of the old partnership should be able to

sue the new partnership that has taken over its business and assets, and to leave it to the members of the two partnerships to work out their own liability *inter se*.

Application of the presumption to the present case

[73] In the present case the contention for the pursuers is that the obligations of each of the series of partnerships that carried on business as solicitors under the name Marshall Ross & Munro transmitted to successor partnerships, and ultimately to the present defenders, by virtue of the transmission presumption. On the basis of the pursuers' pleadings, it cannot in my opinion be said as a matter of relevancy that the presumption has no application. If adequate evidence is led in support of the pleadings, the three requirements identified in the Consultation Paper of the Joint Law Commissions, described above at paragraph [66], may be satisfied on each successive change in the partnership carrying on the business. The pursuer submits that in each case the business, that of a firm of solicitors, was carried on without interruption. It did not appear to be disputed that essentially the same clients would move their business from each firm to its successor. Likewise, it could be said on the pursuers' averments that in each case the partnership taking over the assets was the same "business entity" as its predecessor. At least one of the partners appears to have remained the same, and there does not appear to be any suggestion that clients would not have regarded the partnership as a continuing business entity. As far as the assets of the partnership are concerned, I have suggested that the transfer of assets will normally be inferred if the business is carried on by the new partnership without interruption, and such an inference might be possible in the present case if evidence is available to make out the pursuers' averments. Moreover, as the pleadings stand at present

there is no suggestion by the defenders that the assets of the successive firms trading under the name Marshall Ross & Munro were not transferred to each firm by its predecessor.

[74] The pursuers' claim relates to contingent liabilities of successive partnerships to a pension fund. That in my opinion cannot make any difference to the result. In this connection I would make two general observations about the position of pension funds. In the first place, it is of the nature of pension schemes that they exist for a long time. They provide benefits for an employee on retirement, and thus they may exist for the whole of an employee's working life. During that time circumstances may change, in many respects. Changes in investment returns or the financial world at a general level are an obvious example. The tax regime may change; that has happened in the relatively recent past, with important consequences for pension funds. The increase in life expectancy inevitably places greater demands on pension schemes. Finally, as in the present case, funds have converted from defined benefit schemes to final salary schemes, which provide an employee with better provision for retirement. All of these may require greater contributions into a pension fund, and those contributions may relate to conditions that have taken place when the relevant employer was a predecessor partnership. For these reasons the presumption for the transmission of obligations may be a matter of some importance.

[75] In the second place, the rights and obligations that arise in respect of a pension fund are never binary. With a fund such as the present, three groups of persons are involved. The first consists of the fund trustees, who are the present pursuers. The second consists of employers, such as the defenders, and the third consists of the employees for whose benefit the fund exists. It should be noted, however, that the fund can also be said to benefit the employers, in that it provides an important part of the remuneration that they require to pay to their employees. For present purposes, the important point is that any changes to the

fund may affect all or any of those parties. If, for example, an employer escapes liability in respect of its employees, those employees are disadvantaged, and the trustees themselves may, according to circumstances, find that they lack the funds to meet their obligations to a particular employee-member of the fund.

[76] I am accordingly of opinion, in accordance with your Lordships, that on the pursuers' averments the transmission presumption may apply in the present case. Consequently the action must proceed to proof before answer to enable a proper investigation of the facts in order to determine whether the presumption does indeed operate and, if so, what its precise effect is in respect of the defenders' liabilities to the pursuers.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 39
CA6/14

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF LORD MALCOLM

in the Reclaiming Motion by

SCOTTISH PENSION FUND TRUSTEES LTD

Pursuers and Reclaimers

against

(FIRST) MARSHALL ROSS & MUNRO, (SECOND) CHARLES J BOW and (THIRD) PATRICIA E GRZYBEK

Defenders and Respondents

Pursuers and Reclaimers: Martin QC, CM Thomson; Pinsent Masons LLP
Defenders and Respondents: JA Brown; BLM

8 June 2018

[77] I am in complete agreement with the opinion of your Lordship in the chair. I have nothing to add.