OUTER HOUSE, COURT OF SESSION

[2018] CSOH 1

CA6/14

OPINION OF LADY WOLFFE

In the cause

SUSAN ALEXANDER, ROBERT FIFE, AUDREY HENDRY, ROBERT HENDERSON AND BRENDA SCOTT

Pursuers

against

MARSHALL ROSS & MUNRO, CHARLES J BOW AND PATRICIA E GRZYBEK

Defenders

Pursuers: Connal QC (sol adv); Pinsent Masons LLP
Defenders: J Brown; BLM

5 January 2018

Introduction

The Parties

[1] The pursuers in this action are the Trustees of the Scottish Solicitors Staff Pension Fund ("the Fund"). They call as defenders the firm of Marshall Ross & Munro ("the first defender") and the individual partners thereof, namely Charles Bow ("the second defender") and Patricia Grzybek ("the third defender"). The first defender was dissolved with effect from 31 March 2015, when the third defender retired from the firm. The second defender continued in practice as a sole practitioner. The second and third defenders are called as the former partners (and hence cautioners) of the first defender. Latterly, the

pursuers added an alternative case directed against the second defender in his personal capacity ("the pursuers' alternative case"). As will be seen, Mr Connal did not distinguish between the different forms of the rules applicable from time to time. Accordingly, where there is no differentiation as to the terms of the rules as they applied from time to time to the Fund, I shall simply refer to them generically as "the rules" and "the scheme".

The Nature of the Sum Claimed

[2] The sum claimed, amounting to just under £90,000, is said to represent that part of the deficit in the Fund ("the deficit") arising in respect of three individuals whom I shall refer to a Mr H, Ms W and Mrs M and collectively as "the Members". The Members were formerly employees of one or more of the former iterations of the first defender.

The Former Iterations of the First Defender

[3] The first defender is sued as the successor of a number of partnerships, commencing with the formation of the firm of W.M. Marshall Ross & Munro on 30 December 1949 ("MRM1"). (In using the terms "successor" or "predecessor" I make no assumption in respect of the continuity of the business or the transmission of liabilities from one iteration to any later entity of the same name.) The defenders lodged a document identifying what they say were some 16 iterations of the first defender's predecessors. These different iterations occurred from time to time over a period of 58 years and resulted from the retirement and assumption of new partners, dissolutions, new partnership agreements, a merger and one de-merger. In submissions, the defenders relied in particular on an acrimonious dispute in 1989, which did not entail the transfer or use of the whole assets of the then business (the partnership of MRM dissolved, with two partners forming their own

partnership and the remaining partners forming MRM12) and a demerger in 2006. The first defender is the 17th iteration ("MRM17"). It was formed in August 2006 and is now dissolved. In terms of that document, the second defender was a partner of iterations MRM7 (in 1979) to MRM16 (which was dissolved in August 2006). The third defender was a partner only of iterations MRM16 and MRM17. MRM17 was dissolved when the third defender retired from private practice. These matters are not all agreed, but it is helpful to understand the defenders' position, as the pursuers added averments to address some of these matters.

[4] The pursuers acknowledged that the first defenders never directly employed any of the Members in question. The last date on which any of the three Members was employed by one of the former iterations of the first defender was either in 1991 or, at the latest, in about February 1994, during the existence of MRM13. The other two Members retired, respectively, in 1986 and 1989.

Legal Issues

Outline of Basis of Liability the Pursuers Rely Upon against the First Defenders

[5] The pursuers do not seek to trace the evolution of these iterations. Nor do they seek to identify the character or quantum of any liability of any individual iteration at any point in time. The pursuers assert that the first defender "inherited" the liabilities of its predecessors. (The pursuers lodged a notice of basis of calculation of liability, No 21 of process, but this simply sets out in general terms how an apportionment of the Fund deficit is calculated, together with a breakdown of the split between Members. It does not identify any part of the deficit attributable to any Member's service with any prior iteration of the first defenders.) Rather, the pursuers rely on the proposition that liability has transmitted

from one iteration to another, on the broad basis that, as it appeared to the outside world that the business of the firm appeared to be carried on by its successor, liability transmitted. Accordingly, they do not seek to hold liable any prior iterations of the first defenders nor any partners of any prior iterations. Their case is periled on the effective transmission of the total liabilities as accrued from time to time by all prior iterations having been transmitted to MRM17.

[6] The only form of the rules referred to in the pleadings are those first promulgated in 1990 but thereafter amended and referred to in the Summons as "the Current Rules". These were not referred to at Debate.

Basis of Liability against the Second Defender

[7] As noted above, the pursuers have an alternative case against the second defender, as follows:

> "*Esto* liability did not transfer from one iteration of MRM to the next, which is denied, the second defender employed and made contributions to the Fund in respect of each Member from his assumption as partner in 1979. He is an Assenting Employer in respect of each Member and is therefore liable to the Pursuers in respect of the sum sued for of each Member…"

The pursuers do not further particularise this averment. It was not suggested that the second Defenders personally employed any of the Members. On the information presented by the defenders, the second defender always practiced in partnership, apart from a brief period of practicing on his own account between March and May 2001 (ie about 7 years or so after the retirement of the last of the Members to be employed).

Defenders' Challenge

[8] The defenders challenged the relevancy of the pursuers' case on several grounds. In relation to issues of relevancy, Mr Brown made submissions in respect of the proper analysis of the original obligation, the issue of transmission of liability and the parameters of that doctrine, the presumption of regularity founded upon by the pursuers and prescription. In respect of the pursuers' alternative case, the defenders meet this with his third plea, namely, that all parties necessary for the effective determination of the cause have not been called.

Notes of Argument etc Setting out the Pursuers' Position

[9] It has been a less than straightforward task to ascertain the basis (or bases) of liability founded upon by the pursuers against the defenders.

[10] The pursuers' pleadings are lengthy. While there are limited admissions regarding the dissolution of several of the prior iterations of the first defenders, the pursuers' pleadings contain the averments that, notwithstanding dissolution, "the following iteration of MRM **inherited** the liabilities of its predecessor including contingent liabilities to make future contributions to the Fund which could crystalise [*sic*] if, for example, any deficit should arise….". (Emphasis added.)

[11] The contention that each successor firm "inherited" the liability of its predecessor was repeated in the Pursuers' Note of Proposals for Further Procedure (No 26 of process), under reference to the cases of "*Pattison & Sim"* (it is not clear whether this is the pursuers' case against a firm of that name in 2014 (see [2014] CSOH 119) or in 2016 (see [2016] CSOH 284) and *Heather Capital Ltd (in Liquidation)* v *Levy & MacRae* [2015] CSOH 115. Reference was made to a presumption that "liability to the Fund transferred between each iteration of MRM". I shall refer to this as the transmission presumption. (There was also reference to

consideration of the basis upon which an employer becomes an assenting employer, though this matter was not canvassed before me at Debate.)

[12] The pursuers also lodged a Note of Basis of Defenders' Liability (No 20 of process). This suggested (at para 5) that the "[t]ransmission of liability between partnerships is preserved where there is a continuation of 'substantially the same business[']. The purpose is the protection of creditors." The case of *Sim* v *Howat and McLaren* ([2011] CSOH 115) ("*Sim* v *Howat*") was cited as authority for this proposition.

[13] In the pursuers' Note of Argument (No 31 of process), it was accepted (at para 4) that the effect of changes from time to time in the prior iterations of MRM17 was not agreed but it was the pursuers' position "that such changes do not materially affect their entitlement to recover from MRM (as it was constituted from time to time) and it therefore remains liable to them for pension contributions." Reference was again made to *Sim* v *Howat* and to *Heather Capital*. It was also contended (at para 7) that transmission of liability was preserved where there was a continuation of "substantially the same business". It was suggested that the dissolution of one iteration did not affect the transmission of the contingent liability. In relation to prescription, which the defenders had raised, it was suggested (at para 8) that "[i]t is unnecessary as a matter of law for the Parties to set out the underlying juridical basis for the rule or [*sic*] prescription conveniently summarised in *Sim* v *Howat*." It was further contended that the rule was clear.

[14] Notwithstanding these presentations of the pursuers' case (in their pleadings, in their Note of Proposals for Further Procedure, in their Note of Argument and in their Note of Basis of Liability), the uncertainty as to the legal basis of the pursuers' case led Lord Doherty to ordain the pursuers to lodge a Supplementary Note of Argument identifying (i) the specific nature of the obligation which they seek to enforce against the defenders, to relate

this to the categories of obligations listed in Schedules 1 and 3 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"), and (ii) the date on which the obligation became enforceable.

[15] In the Supplementary Note of Argument (No 32 of process), under the heading "the specific nature of the obligation, the following is stated:

> "The present note is prepared in obedience to the Interlocutor of 10th March 2017. However the Pursuers maintain their previously stated position that, as a matter of law, the underlying juridical basis of the obligation matters less than the existence of the obligation which is plain.
>
> In addition, the Court's approach to the present argument will, it is submitted, be informed by two highly relevant factors. Firstly, the Court should approach this matter using the practical and supportive approach to the long-term operation of pension schemes most recently endorsed in *Trustees of the Johnston Press Pension Plan and others -v- Sedgwick Noble Lowndes Limited and others* [2017] CSOH 21 ("*Johnston")*. Secondly, the doctrine or principle in question is undoubtedly one formulated in the interests of creditors not in the interests of members of partnerships. Its operation requires to be viewed in that light.
>
> When considering the nature of the obligation, in effect what is under review is the law's pragmatic response to the apparent challenge of competing factors - the legal rule that each change in the partnership dissolves a previous partnership and, on the other hand, the far from uncommon proposition that the business carries on notwithstanding such a change, regardless. The Pursuers are content for convenience to rely on the review of the principle by Lord Hodge in Sim v Howat, his Lordship having sat as a Law Commissioner during the prior examination of this issue (Sim v Howat para 16).
>
> It is clear that a variety of phraseology has been adopted in connection with what is sometimes described as the presumption. The joint Law Commissions talk of the new firm "agreeing" to assume the liabilities of the old firm. When then turning to consider the other case materials reviewed by his Lordship, the Court will bear in mind that the obligations to the Fund under discussion in Sim v Howat had already "transmitted" over a substantial period of time through other partnership changes. It is clear that what is under consideration is **something akin to an agreement**. So says binding authority. In Thomson v Balfour, the liabilities are "taken over". Likewise, in Miller v Thorburn. In Heddles Executrix "agreed to adopt old debts and be liable for them". In Howat v Sim, Lord Hodge explains that the case law is "not explicit as to legal mechanism".
>
> **It appears that the specific nature of the obligation is an agreement, inferred from the circumstances, to undertake responsibility for all the obligations, present or contingent, of the former firm.** In Howat, the partners did not necessarily know of

> the existence of the debt. That was not thought relevant (para 37). Lord Hodge there summarises the question as being whether the new partnership "assumed responsibility for the prior debts of the business, including contingent liabilities, not whether the partners were aware of the extent of the precise nature of those liabilities". Not of course being aware of some liabilities means that the new partners cannot be held to have overtly agreed with the creditor. In addition, in order to make functional sense of the principle, it must be in the form of an ongoing and continuing undertaking - hence available, for instance, when a contingent claim emerges, potentially many years later. That may, in and of itself, remove any issue of prescription." (Emphasis in bold added.)

[16] In the light of these statements, the pursuers appear to accept that the legal obligation is "something akin to an agreement", inferred from the circumstances, to assume all liabilities (including contingent ones) of the predecessor. The principle relied upon is said to be formulated in the interests of creditors.

[17] In relation to prescription, and which was the relevant schedule under the 1973 Act, the pursuers did not identify what their own position was. Matters were advanced simply on the basis of what the nature of the obligation (and hence relative schedule) might be:

> "It may be that the obligation in question is best understood as an obligation 'under' a contract of partnership in terms of Schedule 1 Para 2(d) (though see discussion to the contrary by Johnston). Otherwise, it would remain a contractual or promissory obligation the only place for which would be under Schedule 1(g)."

In respect of the date the obligation was said to become enforceable, the pursuers' Supplementary Note stated:

> "The obligation on the Defenders to make payment to the Fund became enforceable in respect of each Member on the date on which that individual commenced membership of the Fund by virtue of their employment by that particular iteration of the Defenders (1st April 1955 in respect of [Mr H], 1st March 1960 in respect of [Ms W] and 1st January 1989 in respect of [Mrs M]). **It was on these dates that the Defenders became Assenting Employers in respect of each member** (and remain so given their failure to withdraw from it) and contracted with them to meet the actual or contingent liabilities of the Fund. The contract that each iteration had with SSSPF came to an end when each of the above iterations were dissolved (*Pattison & Sim* [para 13]). Thereafter, the agreement to undertake the liability to the Scheme was given on each occasion of partnership change and the obligation thus passed to subsequent iterations on the date of creation of each." (Emphasis added.)

It is not explained how the defenders became "assenting employers" of the Members in, respectively, 1955, 1960 or 1989, given that the second and third defenders never, as individuals, employed any of the Members and that the first defenders did not exist until 2006. The passage highlighted has no basis in fact. It is fundamentally inconsistent with the pursuers' primary case, which is that a liability of former assenting employers transmitted *to* MRM17, not that the defenders were directly liable *qua* assenting employer of the Members. Nor is it explained how, if time began to run on those dates, prescription had not already operated to extinguish these claims.

The Pursuers' Pleadings

[18] As this is a debate, the challenge is to the relevancy and specification of the pursuers' pleadings. Notwithstanding this, neither party referred to the pleadings. The defenders' attack was rather a comprehensive attack on the whole basis of the pursuers' case. Likewise, Mr Connal did not refer to his pleadings or seek to defend them *per se*. The arguments were presented as a matter of generality. Consistent with how matters were presented, I do not propose to undertake any detailed analysis of the pursuers' pleadings or, indeed, to set them out.

Summary of Propositions on which Pursuers' Case Based

[19] While Mr Connal did not seek to summarise the propositions underpinning the pursuers' case, Mr Brown did so, as follows:-

(1) that all the now dissolved firms which employed any of the employees in question were assenting employers within the meaning of the scheme rules from time to time;

(2) that the presently convened first defenders, being the last firm called Marshall Ross & Munro, are responsible for the accrued and contingent liabilities of all predecessor firms;

(3) that the liability of the present defenders on the foregoing basis is to be assessed as though the present defenders had themselves been assenting employers, and on the current version of the scheme rules; and

(4) whatever species of liability is asserted (which is unspecified), it has not been extinguished to any extent by prescription.

Mr Connal did not demur from this as an accurate or complete summary of the pursuers' case.

The Submissions on behalf of the Defenders

[20] Mr Brown's general submission was that the first of the propositions set out in the preceding paragraph was, at least, doubtful and that the other three were demonstrably unsound. The pursuers' action was therefore misconceived and irrelevant. He divided his submissions into five chapters, as follows:-

1. The competency of the pursuers' *esto* case against the second defender;
2. Analysis of the legal character of the original obligation;
3. The transmission of liability to a successor entity, and its limits;
4. The presumption of regularity; and
5. Prescription.

The Competency of the Pursuers' Esto Case against the Second Defender

[21] Mr Brown took no issue with the proposition that liability might transmit from a former partnership to a successor one. However, he noted that by subsequent adjustment the pursuers purported to introduce an additional case directed against the second defender only. The pursuers have not sought to convene him separately in any capacity other than as a partner of MRM17. But the pursuers asserted, both in averment and in notes of proposals submitted to the Court, that they were entitled to sue him for the alleged liabilities of previous long since dissolved firms of which he was a member. They appeared to base that on asserted joint and several liability on his part for what are said to be unspecified contingent liabilities of those predecessor partnerships, and on an alternative basis to their primary claim that any such liability transmitted to MRM17. They appear to assert that they are entitled to convene only the second defender and thereby to seek to constitute liability.

[22] The averments for pursuers' *esto* case directed solely against the second defender were as set out in paragraph [7], above.

[23] Mr Brown began by observing that the second defender was not the assenting employer and that the *esto* case contradicted the preceding averments in Article 3. The argument advanced in the pursuers' Note of Proposals for Further Procedure had been that the second defender was a member of each partnership and that the pursuers could sue each partner on a joint and several basis. It was there asserted (at paragraph 3 of No 26 of process) that:

> "The Pursuers are therefore entitled to sue as many or as few partners or former partners as they wish, bearing in mind their obligations to discharge their duties, including those relating to unnecessary expenditure. As such, it is not their intention to involve any further Defenders in this action".

Mr Brown argued that, contrary to that statement, it was not competent to sue just one partner of a dissolved or former partnership and require him to offload, as it were, any liability by calling other former partners as third parties.

[24] He developed this submission as follows. A partnership had its own separate legal personality. It was the primary obligant in respect of any obligation or contract it entered into. Any debt of the firm must be constituted against the partnership. The partners were, in effect, only cautioners in respect of any shortfall or default by the partnership. In the case of a dissolved partnership, it was not possible to reconstitute the partnership but the established rule was that all surviving partners within the jurisdiction required to be called. The proposition was well vouched by binding authority: see Bell's Principles at 356; Bennett Miller, *Partnership* (2nd Ed, 1994) at p156; *Snodgrass* v *Hair* (1846) 8 D 390 *per* the Lord Justice Clerk (Hope) at p396); *Muir* v *Collett* (1862) 24 D 1119 *per* the Lord Justice Clerk (Inglis) at p1122 and 1124; and, in particular, *McNaught* v *Milligan* (1885) 13 R 366

[25] In *McNaught* v *Milligan*, a decision of the First Division, the pursuer sought recovery of the amount of certain accounts which were said to have been incurred to the pursuer by three successive firms of writers in Glasgow. The defender had been one of the partners in each of those firms. He was called as the sole defender, to answer for all of the firms and the partners of which they had been composed. Of that, Lord President Inglis stated (at page 368 to 369): "It appears to me that according to all the authorities this action is incompetent as directed against one of the partners." He rejected the pursuer's suggestion in that case that another summons be added, and continued:

> "Whether the pursuer would require to call all the three firms which have been dissolved may depend upon circumstances, but whether he is bound to call the firms or not he must call all the partners, and there is nothing in the dismissal of the action which should prevent his doing so."

Lords Shand, Mure and Adams all gave short concurring opinions. Lord Mure said (at p 369):

> "In the case of *Muir* v. *Collett* it was distinctly laid down, that where one of the partners of a dissolved firm is sued for a company debt the pursuer is bound to call all the others if he knows who those partners are. "

Mr Brown emphasised that the pursuer's failure in that case was described in terms of competency. Nor was this merely an historical curiosity, as was clear from the decision in *Mair* v *Wood* 1948 SC 83. The rule stated in *McNaught*, of the need to call all partners of a dissolved firm, was an example of a wider rule. In any case involving joint and several liability, it was necessary to call all of the co-obligants. It was a substantive rule.

Mr Brown also referred to the other authorities in his Note of Argument which also vouched this proposition. It is not necessary to set out those passages. The present case was, Mr Brown argued, indistinguishable from *McNaught* and it was binding. The pursuers do not meet this argument. The pursuers' reply that this is "procedural only" was both superficial and wrong. The pursuers' case, insofar as directed against the second defender should be dismissed.

[26] That sufficed to enable the court to dispose of the pursuers' alternative case, by dismissal of the action *quoad* the second defender. What remained was the pursuers' case directed against the last firm (MRM17), which existed only from 2006 to 2015, and its two partners. MRM17 had existed when the action was raised. It was now dissolved. It remained debatable whether one must convene the executors of the deceased partners.

[27] Mr Brown made a subsidiary point, which he said was illustrative of the wider difficulty with the pursuers' formulation of their case. Notwithstanding that none of the entities ever employed all three Members (and some employed two, one or none of them), the pursuers treated the 17 different iterations without distinction as though they were a

single entity with unbroken employment of all of the employees. On the pursuers' approach, the seventeen component parts of the jigsaw could "by some unspecified legal magic" be reassembled so as to transmit the whole of the liability to the last successor partnership and, further, that this was all achieved under the Current Rules. That was wholly unsound, but even if that were not so, the pursuers' alternative case against the second defender was necessarily irrelevant.

[28] The proposition underlying the pursuers' alternative case was that if there is no transmission of liability the second defender was liable by his membership of those firms of which he was a member, and which employed the pensioners. Those firms were MRM7 to MRM12 inclusive. It must follow that on the pursuers' alternative case there was no liability on the second defender in respect of employment by MRM1 to MRM6 inclusive, since although those firms employed certain of the pensioners the second defender was not a member of any of them, but the pursuers make no attempt to track the consequences through. Self-evidently the pursuers' alternative case must be for a lesser sum calculated on a different basis from the primary case, but that was nowhere identified. That alone rendered the pursuers' alternative case irrelevant.

The Origin and Character of the obligation

[29] As between the original firm, MRM1, and the trustees of the Fund, it has been assumed that all was quite regular at the outset. The obligations *inter se* MRM1 and the Fund would be contractual, and governed by the Fund rules in force at that time, namely the 1947 Rules. The next step to consider was the consequences of the dissolution of that partnership.

The Consequences of Dissolution of the Previous Firms

[30] Mr Brown noted that the pursuers appeared to accept that the change of membership in a firm led to its dissolution and the formation of a new firm, a rule that was overwhelmingly vouched by authority: for example, *Sim* v *Howat and McLaren* [2011] CSOH 115 *per* Lord Hodge at para 13; *Inland Revenue* v *Graham's Trustee* 1971 SC (HL) 1 *per* Lord Reid at p19-22. But the pursuers appeared to assume that after dissolution these dissolved firms could continue to accrue liabilities which did not exist at the point of dissolution, in particular by virtue of amendment to the scheme rules occurring decades later. This was, Mr Brown submitted, plainly unsound. Dissolution brings to an end the separate legal personality of each firm: see *Inland Revenue* v *Graham's Trustees*; *Balmer* v *HMA* 2008 SLT 799 *per* Lord Eassie at para 83 (and the authorities there cited and extensively discussed). It was clear that dissolution operated to determine contracts, in exactly the same way that the death of an individual determines contracts to which that individual was a party. Thus, Mr Brown argued, dissolution of a partnership operated to terminate a non-assignable lease (*Graham's Trustees*) as well as contracts of employment (*Hoey* v *MacEwan and Auld* (1867) 5 M 814).

[31] *Hoey* was clear and binding authority, commented on with approval by the High Court in *Balmer* v *HMA*, that the dissolution of a partnership determined the contract of employment between the partnership and an employed clerk, in exactly the same way that the death of an individual would determine the employment of anyone employed by that individual. It was accordingly clear that, in the present case, each dissolution determined the contract of employment between the firm and each of its employees. No doubt the court would readily infer that a new contract of employment was tacitly agreed between the employee and each successor firm, but the point was that each successor firm was a separate

legal person. It was therefore a nonsense to suggest, as the pursuers appeared to, that each dissolved firm remained an assenting employer, capable of being bound, post-dissolution (and in some cases decades afterwards) by subsequent scheme amendments. Rather, Mr Brown submitted, it was clear that dissolution determined each firm's membership of the scheme.

[32] Furthermore, a dissolved partnership had no legal personality. It was incapable of juristic acts. Dissolution of the partnership as a juristic person was (like the death of a natural person) a permanent state. A partnership could not be revived. Accordingly, it could not be an employer, far less an assenting employer. It could not contract. The position was exactly the same as if there had been 17 successive individual solicitors, each of whom had died and been succeeded by another. Mr Brown submitted that it would be absurd to suggest that an individual solicitor who became an assenting employer in 1955, and who died in 1962, was to be taken to have bound his estate in respect of changes to the scheme rules occurring 50 years later. It was equally absurd to make that suggestion in the case of a partnership. There is no legal distinction between an individual and a partnership which would compel such a conclusion, and no reason of policy or principle. Such a conclusion would be against the weight of authority.

[33] That being so, he said, the proper analysis was that, even if it were to be assumed that each partnership was an assenting employer, each partnership ceased to be an assenting employer at the point of dissolution, and none was bound by any change in the scheme rules which post-dated its dissolution. None of the prior iterations consented to be bound by the scheme after its dissolution. While a contingent liability could transmit, and could be enforceable against the assets of a dissolved firm, the obligation giving rise to the contingency had to be constituted pre-dissolution.

[34] It followed that it is necessary to analyse the position at the point of each dissolution and to identify what obligations (if any) were incumbent on each firm. In order to do so, he considered the scheme Rules in detail and which of the 16 prior iterations of the first defenders were subject to them.

(1) *The 1947 Scheme Rules ("the 1947 Rules"):* The original 1947 scheme provided that membership was open to those employees of assenting employers fulfilling the criteria set out in Rule II of the 1947 Rules (No 6/1 of process; p10). In order to qualify as an "assenting employer" the 1947 Rules required the employer to have given specific undertakings to the Fund, to have offered all eligible employees membership of the Fund, and to have made membership of the Fund a condition of service of all new employees (Rule III; No 6/1 of process; p11-12). Further, the 1947 Rules expressly recognised that an employee might transfer from the employment of an assenting employer to the employment of an employer who is not an assenting employer: Rules V(c) and XI; No 6/1 of process; p14 and 21). The 1947 Rules permitted employers to terminate their obligations to the Fund on six months' notice, without prejudice to the right of the Fund to recover any sums which accrued prior to such notice being given: rule XVIII (No 6/1 of process; p25). Mr Brown submitted that the scope of what was contemplated as recoverable were known arrears; it did not envisage a latent or contingent liability. At that time, there was simply no reason to believe that there would be a deficit. Finally, the 1947 Rules made no specific provision for employers to be required to make up any shortfall in the Fund. The only applicable provision was rule XIX (No 6/1 of process; p25-26) which provided for periodic actuarial assessment and in the event of a shortfall for the

matter to be placed before the members and employers "with a view to such remedial steps being taken as are deemed necessary". Mr Brown noted that there was no suggestion that any such steps were ever taken during the currency of the scheme for so long as the 1947 Rules were applicable. Given the general structure of the 1947 Rules which appeared to contemplate separate accounts being kept for each individual member and the benefits payable being only such as the accumulated sums at credit of the account could purchase (see rule VIII; 6/1 of process, p18-19), it was not surprising that the draftsman did not turn his mind to the question of shortfall, since a shortfall would be unlikely to arise with such a scheme. There was no contingent liability under the 1947 Rules.

(2) *The Partnerships governed by the 1947 Rules*: To the extent that any of them was an assenting employer, each of MRM1 through to MRM6 (for part of its existence) was subject to the original 1947 Rules. There is no averment of what liability (if any) any such partnership had under those rules at the point of dissolution. If there was no liability, whether actual or contingent, there was nothing to transmit. Given the terms of the 1947 Rules it was, Mr Brown observed, in any event difficult to see what contingent liability could have accrued. It was for the pursuers to aver intelligibly the origin of the obligation for which they contended. They had not done so.

(3) *The 1980 Rules*: The 1980 Rules took effect from 1978. Although more detailed than their predecessors, they made no alteration so far as contingent liability is concerned. Rule XVIII (No 6/2 of process, p41) was to the same effect as its predecessor. Rule XXI (No 6/2 of process, p44), although materially differently

worded to the predecessor rule XIX had the same fundamental structure: there were to be periodic actuarial valuations and if remedial action was identified as necessary by the actuary, the form of any such action was then to be determined. Again, Mr Brown noted that there was no averment that anything of that nature was done under the 1980 Rules either. There was no contingent liability under the 1980 Rules.

(4) *Partnerships covered by the 1980 Rules*: The 1980 rules subsisted until replaced by the 1990 Rules, which took effect retrospectively from 1st April 1988. To the extent that any of them was an assenting employer, each of MRM6 (in part) through to MRM10 (in part) was governed by the 1980 Rules. As with the 1947 Rules there was no averment that any of those partnerships accrued any contingent liability under the 1980 Rules.

(5) *The 1990 Rules*: So far as liability to make up any shortfall is concerned the 1990 Rules as originally enacted ("the 1990 Rules") were not materially different from the 1980 Rules. To the extent that any of them was an assenting employer, each of MRM 10 (in part), MRM11 and MRM12 was subject to the 1990 Rules. MRM10 was the last partnership to employ Ms W. MRM12 was the last partnership to employ Mr H. If the record card produced by the pursuers in respect of Ms W (No 6/19 of process) is to be taken as accurate, MRM12 was also the last partnership to employ her in any pensionable capacity. If the pursuers' unvouched averment was to be taken as accurate she might also have been employed by MRM13 and MRM14, each of which was also (if an assenting employer) subject to the 1990 Rules. MRM14 was dissolved on 31st March 1995. On any view, he argued, all employment terminated and all employing

partnerships were dissolved before subsequent amendment of the 1990 Rules beginning in 1997 ("the amended 1990 Rules"). As before, he noted that there was no averment of any actual or contingent liability on any of these dissolved partnerships.

[35] In relation to the character of any obligation arising under the 1947 Rules, Mr Brown's submission was that, on the application of first principles, this was contractual. Mr Brown referred to the decision of Lord Glennie in *Trustees of the Scottish Solicitors' Staff Pension Fund* v *Crichton* 2009 SLT 1175. In that case the present pursuers endeavoured to hold the auditor of court, Mr Crichton, liable *qua* office-holder, for arrears said to have accrued during the tenure in office of previous auditors. Lord Glennie rejected the pursuers' case on the bases that the office of auditor had no separate legal personality and the auditor could not be an assenting employer. By a parity of reasoning with the first ground of that decision, Mr Brown urged the same result here: *a fortiori* a dissolved partnership had no legal personality. That lack of personality was (as in *Crichton*) fatal to the pursuers' case.

[36] Mr Brown also referred to *MNOPF Trustees Ltd* v *FT Everard & Sons Ltd & Ors* [2005] Pension Law Reports 225 and noted the analysis (at para 37) that the character of the obligation under the scheme in that case was contractual. The terms of the scheme under consideration in that case were very different: there were different and wider powers of amendment and the employers were bound into the scheme for its duration. He also invited me to note the principles of interpretation applicable to such schemes, as articulated by Arden LJ in *British Airways Pension Trustees Ltd* v *British Airways* [2002] EWCA Civ 672, which were quoted at paragraph 40 of *MNOPF*. Applying those propositions, the words of the 1947 Rules could not bear the interpretation implicit in the pursuers' approach. That approach was, seemingly, that a partnership could be revived 40 years later and subject to a

claim. However, as *Crichton* made clear, the lack of legal personality upon dissolution was fatal to the pursuers' case.

Relevancy of Averments that Dissolved Partnerships were Assenting Employers

[37] Mr Brown then turned to address the relevancy of the averments that the dissolved partnerships were assenting employers. Mr Brown referred to the definition of "assenting employer", noted above. He began by noting that there was no averment that any of the partnerships in question gave the undertakings required. He also noted that the defenders averred, without contradiction, that scheme membership was not made a condition of employment, and therefore that if the undertakings had been given, the undertaking to make scheme membership a condition of employment was not in fact honoured. It was obvious, he suggested, that in the context of reputable solicitors for whom giving a formal undertaking would be a matter of considerable significance, that may be an indication that no such undertaking was given.

[38] The proposition for the pursuers appeared to be that, because it was admitted that these employees were employed by each successive firm, then each such firm must have been an assenting employer, notwithstanding the absence of evidence as to the giving of undertakings. The pursuers' entire case appeared to be predicated on the bare assertion that because there were no records either way, no notice of termination had been given. But, said Mr Brown, there were no records of any kind. There were no records of joining the Fund.

[39] He turned to consider the pursuers' reliance on the presumption of regularity embodied in the Latin maxim *omnia praesumuntur rite et solemniter acta esse* ("the presumption of regularity"). Two points fell to be made about that. The first was that

where, as in the present case, there was clear evidence that matters were not regularly conducted (at least so far as the undertakings are concerned) the presumption might be displaced. The second point was that the presumption cut both ways. A large number of partnerships were dissolved and wound up decades ago. In some cases, that was done by formal minutes of dissolution by which final accounts were approved and mutual discharges granted. Those were to be presumed to have been regular and complete. If it were to be presumed that each successor partnership gave the undertakings and notice necessary to become an assenting employer, then, he argued, it must equally be presumed that at the same time notice was given of the dissolution of the immediate predecessor, and that everything was brought to an orderly and regular conclusion. It was therefore not obvious on what basis the pursuers were now to be entitled to assert that each dissolved partnership remained an assenting employer, as it were, from beyond the grave. Even if the defenders were wrong as to the effect of dissolution being to terminate the scheme membership of each dissolved partnership, the presumption of regularity must surely, he said, carry the proposition that when each new partnership gave its (presumed) undertakings to assume the status of assenting employer, it at the same time gave the requisite notice on behalf of its predecessor to withdraw from the scheme.

[40] More fundamentally, he noted that there was no averment whatsoever of any obligation said to be prestable against any of the dissolved partnerships in question. If there was no obligation prestable against any such partnership, there was no liability which could transmit to any successor. In truth, he said, the case for the pursuers depended entirely upon the extravagant proposition that the present defender (MRM17), which never employed any of the Members, which had never been an assenting employer, and which has never been a member of the scheme, was to be treated as though it had employed them all,

and had done so throughout the period in question, and that it is still an assenting employer subject to the current rules of the scheme. The case was fundamentally irrelevant on that ground alone and should be dismissed.

[41] He suggested that the relevancy of the pursuers' case could be tested by the following example. He started by assuming that immediately after termination of the employment of the last pensioner, the last employing partnership was dissolved by the death in a common calamity of all of its members. That would be before any amendment to the scheme rules permitting the trustees to seek contributions such as those now sought. It would be at a point in time where there was no shortfall in the scheme. In that scenario, he asked, could the trustees be heard, 20 years later, to assert that the estates of the deceased members of that partnership were liable for a shortfall which had only arisen after dissolution and death, and for which liability was only imposed by rules adopted after dissolution and death? That was, he suggested, so obviously absurd as to require no further elucidation. The present case rested on exactly the same foundation.

The Transmission of Liability to a Successor Entity, and its Limits

[42] Mr Brown next turned to the issue of the transmission of liability. This issue only arose if, contrary to the arguments he had advanced already, any liability had existed against one or more of the iterations of the first defenders. If, contrary to the foregoing, any liability ever existed as against any partnership, there were in any event no relevant averments of transmission. The only partnership convened was MRM17. If that partnership was said by the pursuers to have undertaken responsibility for latent liabilities of any previous dissolved partnership or partnerships in respect of those employees it was for the pursuers to set this out intelligibly. That, he said, required coherent averment of how each

such liability arose, which former partnership originally undertook it, and the manner in which it is said to have passed to the present defenders, including transmission through intermediate firms. In the case of liability originally accrued by MRM1 that requires the transmission to be tracked through every intervening firm.

[43] It was clear that the onus of averment was upon the pursuers: *Heather Capital Limited (in liquidation)* v *Levy & McRae and others* [2015] CSOH 115 *per* Lord Woolman at paragraphs 17 to 20; *Sim* v *Howat & McLaren, per* Lord Hodge at paragraph 31; *Thomson & Balfour* v *Boag* 1936 SC 2 *per* Lord Fleming at p16; *Miller* v *Macleod* 1973 SC 172 *per* the Lord Justice Clerk (Wheatley) at p183. The presumption did not arise automatically. It was for the pursuers to plead themselves within it. They had not done so.

[44] Mr Brown referred to the cases on transmission of liability contained in the joint bundle, including *Ridgway* v *Brock* (1831) 10 S 105, *McKeand* v *Reid's Trustees* (1861) 23 D 846; *Miller* v *Thorburn* (1861) 23D 359; *Nelmes & Co* v *Montgomery* (1883) 10 R 934; *Heddle's Executrix* v *Marwick & Hourston's Trustee* (1888) 15R 698; *Stephen's Trustee* v *Macdougall & Company's Trustee* (1889) 16 R 779 and *Henderson* v *Stubbs Limited* (1894) 22 R 51. He also referred to certain academic works on the impact of the 1890 Act on the common law of partnership, namely, Lindley *et al The Partnership Act 1890, With Notes, Being a Supplement to A Treatise on the Law of Partnership* (1891), Introduction (p1-11) and commentary on s9 (p31-33) and s17 (p42-44); and Green's Encyclopaedia, 1st Ed, (1898) title on Partnership by LT Napier, advocate, p162-163; 2nd Ed, (1913) title on Partnership by LT Napier, advocate, p 75; 3rd Ed, (1931) title on Partnership by J. Roberton Christie KC, p47-48.

[45] So far as it is necessary to do so, I will set out the relevant passages of the transmission presumption in my discussion of this issue. However, Mr Connal did not refer to the case law in any detail; nor did he respond to this chapter of Mr Brown's submissions.

Accordingly, it will suffice at this stage to summarise what Mr Brown took from the case law. He submitted that there was no analysis in the case of *Ridgeway.* On the facts, matters may have been simplified because the same trustee in sequestration acted in the sequestrations of both partnerships and those of all of the partners. Bell did not regard this case as establishing any new rule, as there is no mention of it in the last edition of his *Principles* (the 4th ed of 1839) for which he was responsible. Again, in *McKeand*, this was another case in an insolvency context and in which there was a common trustee in sequestration. On the facts, the successor had accepted bills. There was no direct claim by the creditor of the predecessor firm against the successor. In *Miller* v *Thorburn*, there was an underpinning of equitable considerations. It was important to note that the mischief there identified did not arise on every dissolution or formation of a new partnership, but was one that arose when a new partner was assumed. It was essentially a remedial decision to tackle the perceived unfairness of what had been a gratuitous alienation in a sort of quasi-tracing. Significantly, whatever the doctrine was, its basis was not explained in that case. The case of *Nelmes* was confined to its own facts. In any event, it represented a narrowing of the approach and the need for actual consent. Lord Young's comments (at p 980) were quite trenchant, that there was no authority for the proposition that a new partner assumes all the liabilities of the predecessor entity (whether that by the firm or a sole trader) and the case was a significant push back against more generally expressed *dicta* in the earlier cases. It was notable, too, that all the parties had been sequestrated and a single trustee was appointed. On the facts, the court found a presumed agreement by the successor to assume the liabilities of the predecessor. *Stephen's Trustee* was one of the last cases before the introduction of the 1890 Act. It did not add to or develop the law as stated in the earlier cases. In *Henderson* v *Stubbs* there was an express stipulation that the successor firm undertook to meet the debts of the old firm. The court held that, nonetheless, this did not suffice to create a *jus quaesitum tertio* giving the creditor a direct right of action against the successor firm. That remained good law, and the case represented the common law as it stood at the time of the 1890 Act. (At a later point, Mr Brown referred to footnote 3 at p 239 of Gloag *On Contract* to vouch that contention.)

[46] Mr Brown then referred to the discussion in some of the academic works as to the impact of the 1890 Act on the common law. The thrust of these treatments was that there was a discontinuity between the 1890 Act and the prior common law. However, he did not propose to reconcile this discussion with the case law.

[47] Upon resuming this chapter of his submissions the following day, Mr Brown referred to several additional authorities. From Gloag on Contract (p 267) he noted the author's description of the cases of *Heddle's Trustees*, *Mckeand* and *Miller* v *Thorburn* as all "very special" cases. Lord Adam had exhaustively examined these and had identified that the ground of liability of a successor firm was active consent. Merely taking over the assets of a predecessor was not sufficient. The same bench as had sat in *Miller* v *Thorburn* heard *Stephen's Trustee*. The latter case did not alter the position, so there was no scope for a more expansive view of whatever the presumption was. In *Henderson* a differently constituted bench was content to follow these earlier cases. Accordingly, the law was settled by 1894. While there was a tension from the commentary on the 1890 Act, after the case of *Henderson* it appears not to have been argued that the 1890 Act changed the pre-1890 Act common law.

[48] In terms of cases post-dating the 1890 Act, in the case of *Thomson & Balfour* in 1936 it was held that the successor partnership was not liable for the debts of its predecessor *inter alia* on the basis that there had not been a universal transfer, nor a gratuitous one. In those circumstances the court held that there was no assumption of liability. The case turned on

its own facts; it did not develop the law. In the first edition of *Miller on Partnership* there was in fact no reference to *Thompson*.

[49] In relation to *Miller* v *McLeod*, on its facts this was a straightforward case of novation. It did not concern a trade debt. It was a curiosity that Lord Justice Clerk Wheatley rejected the findings of the lower court that there was an express assumption of responsibility. The case also contained arguments based on section 17 of the 1890 Act which were less than straightforward.

[50] In relation to the three most recent cases, *Ocra, Sim* v *Howat* and *Heather Capital*, these added nothing. In *Ocra* it was held that the presumption (whatever it was) had not been established on the facts of that case. *Sim* v *Howat* was a dispute *inter se* the partners of a former firm. The liability at issue, being a deficit claim by the Fund, was simply assumed to exist. It determined nothing about current or prior transmission and that issue was simply not addressed in that case. Notwithstanding Lord Hodge's comments about the presumption, it was patent that that case had not determined on the basis of the presumption. *Heather Capital* was simply a case dealing with a motion and was relevant for the limited purposes for the comments on onus. In the light of those comments, the pursuers' "in the absence to the contrary" averments were misconceived,

The Presumption as applied to the Pursers' Factors

[51] In respect of the pursuers' case, the fact that it had not been averred that any transfer was gratuitous was sufficient to undermine their reliance on the presumption. In respect of the suggestion that there was no outward change, this did not bear scrutiny. There was an acrimonious bust-up in 1989, which resulted in one-third of the partnership leaving. The remaining partners were allowed to retain the name. The two new post-bust up firms

traded from premises side by side, having blocked up the interconnecting door. Two new firms carried on. Nothing in the cases addressed this circumstance. There was also professional intimation of these changes. It was not good enough, he said, for the pursuers to ignore this. They had to overcome this disruption, when one firm became two. They failed to do so. This was a change in the outward presentation of the business of the prior iteration. The events in 2001 and in 2006 posed similar difficulties for the pursuers. In 2001 the second defender acquired the assets of a different sole trader and used different premises. There followed a three-way merger, including with a Mr Stirling. The new firm traded from two premises. Mr Stirling had traded from the 1970s in Hamilton. He brought his own business in together with that of the second defender. It was not good enough for the pursuers to rest behind a “not known and not admitted” averment. They must aver why Mr Stirling did not acquire the liabilities of the predecessor, but the second defender did. This cried out for explanation but the pursuers provided none. In 2006, Mr Stirling fell out and there was a demerger. This was a patent outward change involving a three-partner firm, with two premises in two towns, which became two firms in two towns. It was incumbent upon the pursuers to address this in their pleadings but they failed to do so.

[52] In relation to the fact of payments, relied upon by the pursuers, Mr Brown’s submission was that this did not matter. Deficit payments only began in 2003. It cannot avail the pursuers in respect of the first 15 prior iterations. It was legally illiterate to claim this against the second defender as an individual. The last employment of any of the three Members was in the early 1990s. None of the payments made was referable to the sum now sued for. It was not enough for the pursuers to rely on payments made by mistake and which would be the subject of the *condictio indebiti*.

[53] Looking at the pursuers' averments, he argued that there were no specific averments of any transmission. The pursuers did not deal at all with particular circumstances which would tend to negative transmission. In particular, they did not deal with the execution of formal minutes of dissolution recording agreement of dissolution accounts and granting mutual discharges. Nor did they deal with the events of 1989. There was no case in which an acrimonious dissolution leading to the very public and obvious split of one firm into two separate successor firms had led to the imposition on one successor of all liabilities, with the necessary consequence that the other successor was relieved of them. As the contemporaneous correspondence made clear, all parties proceeded at the time on the basis that liability fell on the partners of the predecessor firm.

[54] The merger and subsequent demerger with Stirling Dunlop was not dealt with either. For the pursuers to carry their argument on transmission they must establish two core propositions: first, that the business was outwardly the same after the formation of the new firm as it had been before; and secondly, that all partners of the new firm must tacitly or impliedly have consented to assume the liabilities of the old firm. There was no authority that the principle applied to a merger of two distinct predecessor businesses rather than a simple change in membership of a single identifiable business. If any of the partners of the post 2001 merged firm (MRM16) were bound, then all must have been bound. It followed that a creditor of Mr Stirling in respect of a pre-merger liability must have been entitled to say that the merged firm of Marshall Ross and Munro, incorporating Stirling Dunlop and JWB Caldwell & Co, and trading from both Motherwell and Hamilton with three partners, was outwardly the same as the sole practitioner businesses carried on by Mr Stirling alone from Hamilton under the trading style of Stirling Dunlop. That was obviously absurd, and it was destructive of the proposition that liability transmitted to the merged firm. Moreover

transmission of liability would require the imputation of a mutual intention on the part of all three partners to become jointly liable for the pre-merger latent liabilities of all predecessor firms, when none of them had any such liability before the merger, and when each predecessor business kept separate accounts and brought them to a close. This too was obviously unsound. The principle was an exception to the general rule, which was that partners were not liable for debts contracted prior to their assumption, and it required to be kept within proper bounds.

[55] By the same reasoning, he argued, the 2006 de-merger was fatal to the pursuers' case. If the pursuers were to be believed, Mr Stirling merged his business with that of the second defender in 2001, and in doing so saddled the second defender and the third defender jointly and severally with all latent liabilities of that business while himself assuming a like obligation in respect of all latent liabilities of the second defender's two businesses. But when the businesses were de-merged in acrimonious circumstances five years later Mr Stirling, it seemed, managed to leave those liabilities behind him and pass them all back to the second defender and the third defender. Since what was relied upon is a general transmission of liability for all latent debts it must follow that the second defender and the third defender have latent liability for all Stirling Dunlop debts too. That was not an intention which can rationally be imputed to any of the parties. As with the merger, it was apparent that the de-merger caused an obvious outward change. The presumption had no applicability and, on any view, the pursuers have not pled themselves within it.

Prescription

[56] Mr Brown began this chapter of his submissions by noting that by the interlocutor of 10 November 2016, the Court had ordained the pursuers to intimate "a note explaining

clearly and fully the legal basis of the defenders' liability (including the nature of the obligation founded upon and how it arises)". The pursuers purported to comply by intimating a note on 22 November 2016 (part of which is set out above, at para [15]), but on examination it was apparent that it did not meet the obligation imposed by the interlocutor. In particular, the nature of the transmitted obligation for which the pursuers contend remained entirely unspecified. The consequence was that the defenders have been forced to address the prescription issues which arose on the basis of every possible case, rather than, as was plainly intended by the Court when the interlocutor of 10 November was pronounced, being able to focus on a specific identified case.

[57] In relation to the suggestion that the obligation was based on promise, Mr Brown noted that in *Sim* v *Howat,* Lord Hodge suggested, somewhat tentatively, that the basis of the transmitted obligation was unilateral promise. Given the pursuers' general reliance upon *Sim* v *Howat* and their failure to identify any alternative basis the defenders reasonably assumed that was the obligation contended for. It was however clear that any such obligation was subject to the short negative prescription: Prescription and Limitation (Scotland) Act 1973, section 6 and schedule 1, paragraph 1(g). If the basis of the transmitted liability was implied unilateral promise, given to the world at large by the new partnership at the point of taking over the assets of the predecessor partnership, then *prima facie* time began to run at the date the promise was given. Presumably, this was the date of formation of each new partnership. It was for the pursuers to plead themselves within any exception.

[58] Any alternative basis, such as contract or unjustified enrichment would similarly be subject to the short negative prescription.

[59] Furthermore, there was no basis to suppose that any obligation of this nature was imprescriptible. That being so, and regardless of whether it was also subject to the short

negative prescription, it is on any view subject to the long negative prescription. On any view, he said, the liability arising from employment of Ms W, who had retired in 1986, and Mr H, who had retired in 1989, had been extinguished. The liability of all predecessor firms dissolved more than twenty years before service of the action has been extinguished.

[60] The consequence of sustaining the plea of prescription, rather than the plea to the relevancy would be decree of absolvitor rather than dismissal: Johnston, *Prescription and Limitation* (2nd Ed) at para 4.101.

Submissions on behalf of the Pursuers

[61] I refer to the several articulations of the pursuers' case as set out in written notes submitted prior to the debate (recorded at paras [10] to [17], above). Mr Connal divided his oral submissions into the following chapters:

(1) Background;
(2) General principles of transmission;
(3) The ability to transmit a contingent liability;
(4) The general approach to the administration of pension funds;
(5) Payment and other actings relied upon by the pursuers and the inferences to be drawn;
(6) The assenting employer issue;
(7) Prescription;
(8) Other documentation;
(9) The pursuers' alternative case against the second defender.

(It should be noted that no submission was in fact made under chapter (7), concerning prescription.)

The Background

[62] Mr Connal referred to the pursuers' Note of Basis of the Defenders' Liability (No 20 of process) and the pursuers' Note of Basis of Calculation. The arguments were presented at a level of generality as, he explained, there were other cases waiting in the wings.

[63] He began by noting that the first defenders had been paying for a long period of time and had participated in the administration of the Fund. After the 2003 deficit issue arose, it was clear that the pursuers had accepted their liability. Their payments to the Fund from time to time demonstrated that. Mr Connal did not accept that there was any argument that payment had been made in error. There was no need to look at the statutory pension materials. The pursuers had a duty to make up the deficit. Their case turned on the terms of the scheme.

[64] He submitted that it was part of the relevant factual matrix to note that the pension funds operated over a long time-frame. Payments might be made in respect of a member who might not start drawing his pension until decades later. Once one "pushed the trigger" by enrolment, the die was cast and this created an obligation. Mr Connal referred to the observation of Lord Reid in *Inland Revenue* v *Graham's Trustees* 1971 SC (HL) 1 at page 20, that the "layman would be greatly surprised to be told by the partners of the new firm created by such a change [ie following the assumption of a new partner] that his contract with the old firm no longer existed". This, he said, illustrated the "commercial realities" of partnerships. This was useful background.

[65] In relation to the prior iterations, it was no part of the pursuers' case to bring claims against them. Nor was this case concerned with retiring partners. Mr Connal did not propose to work through these matters. Section 17(2) of the 1890 Act was not intended to

deal with retiring partners. He accepted that a change in a prior iteration would lead to dissolution. He did not dispute this as a general proposition. He was not sure, however, that dissolution of a firm could be equiperated with the death of an individual, as Mr Brown had suggested. (Mr Connal did not develop further the nature of his qualification to this proposition.) He did not address the cases relied upon by Mr Brown (eg *Hoey*) that death or dissolution determined a contract. He confirmed that he did not seek to rely on any concurrent or joint and several liability with any prior iteration. The pursuers relied on the transmission presumption.

General Principles of Transmission

[66] Mr Connal began this chapter by observing that it was clear from the cases that what "actually happened" was more important than the "documents". He referred to section 17(1) of the 1890 Act and the approach to construction of it, as set out by Lord Reid in paragraph 17 of *Duncan* v *MFV Marigold PD155* 2006 SLT 975. It was not helpful to look at pre-1890 case law; section 17 did not lay down any general rule. The key cases were those of *Thomson* v *Balfour*, *Miller* v *MacLeod* and *Sim* v *Howat* and, possibly, *Ocra*. In terms of the factors said to be relevant to the transmission presumption, his initial position was that these were the gratuitous transfer from the old firm to the new and a "continuation of the business as it presents to the outside world". He did not accept the narrower formulation in *Nelmes* but relied on what he said was the broader formulation in *Miller* v *McLeod.* At later point, as I have him noted, Mr Connal retracted his position that one of the factors was the gratuitous transfer of the business. He relied essentially on the formulation by the joint Law Commissions in the second sentence at paragraph 10.65 of their report (set out in full at para [102], below). When pressed as to any discrepancy between that formulation and any

of those found in the cases, his position was that he relied on this formulation by the joint Law Commissions. All that was required was a continuity of the business, in the sense that it appeared to the outside world to be the same. It was not necessary therefore to analyse the formulation in the cases, eg such as that of the Lord President in *Thomson & Balfour*. A pre-dissolution creditor will not have a contract with the new firm. That was the import of the *Inland Revenue* case. *Ocra* was dealing with a different point.

[67] In relation to *Miller* v *McLeod*, Mr Connal referred to passages at pages 179 (foot), 181, 182, 183 and 187. What he appeared to take from this case was that there was a general presumption (of liability) which could be displaced by circumstances. This was not a narrow principle. He suggested that *Sim* v *Howat* demonstrated the fact that the partners have a continuing liability to the Fund. Mr Connal accepted that in that case it was common ground between the parties that the partnership concerned was an assenting employer (ie liability *qua* assenting employer was assumed to exist). In relation to the observation of Lord Hodge at paragraph 15 of *Sim* v *Howat*, which appeared to include as a precondition of the application of the presumption that the transfer be gratuitous, Mr Connal's position was that this was a factor that might be taken into account at a later stage. The mischief was that identified by Lord Hodge at paragraph 28. He also referred to paragraph 32 of *Sim* v *Howat*. The critical fact was that there was no significant outward change in the firm and that substantially the same business continued. If there had been a winding up, the presumption would be displaced. The presumption applied if, for example, the new firm paid the debts of the old. When asked if there was a conflation of the actings relied on for the presumption and for the creation of the debt, Mr Connal's position was that this was a difficult area. If a party paid, that was sufficient to bring the presumption into play.

[68] In respect of Lord Hodge's surmise as to the juridical basis of an obligation of a partnership to meet a shortfall, Mr Connal was content to adopt, without further developing, what Lord Hodge had said (eg at para 33) that this was a unilateral obligation. He stressed that it was not his task to identify the nature of the obligation of the predecessor firms. It was a contingent liability (*per* para 34 of *Sim* v *Howat*). As I understood Mr Connal's final position, it was that what was important was the continuation of the business and not the precise business structure. Even if there were a retiral leading to the dissolution of one iteration and the formation of a new one, if the business continued then the presumption applied. It therefore did not matter that there had been an acrimonious bust up or dissolution of the prior iteration. While he accepted that each case turned on its own facts and circumstances, he maintained the proposition that if there was a continuation of the business, that was enough for the presumption to operate. *Sim* v *Howat* showed that the presumption must have been implied in many cases. In this case, there was an unbroken line linking all the prior iterations of the first defender. This was clear from the different editions of the solicitors White Book.

The Ability to Transmit a Contingent Liability

[69] The Fund had closed to new members or to accruals in 2003. Prior to that time, the obligation was to pay the regular contributions to the Fund in respect of any employer's employees. That was the only actual demand on the employer. So far as the information in relation to the three Members, the last date on which such a payment was made was in 1994 in respect of Mr H. It was only thereafter that problems emerged in final salary pension schemes. Schemes were closed. There was a requirement to fund existing obligations. Trustees began to calculate the deficit and to apportion this to employers within a scheme.

Deficit contributions were sought. This is what happened here. Accordingly, he said, each firm incurred a contingent liability for any sum demanded in future arising from any change of circumstance or demanded in accordance with amendments to scheme rules that employers agreed.

[70] Mr Connal did not refer to any provisions in any of the different sets of rules applicable to the scheme from time to time. He accepted there was not much change as between the 1947 Rules, the 1980 Rules and the 1990 Rules (before they were substantially amended.) The source of the contingent liability he asserted arose simply from membership in the scheme and the ability for amendment for those rules. Each form of the rules had a power of amendment. All of the rules contained a potential reference to amendment. Something needing to be done about the Fund deficit. It did not matter that this did not occur until 2003.

[71] He argued that by staying in the scheme, the first defender had accepted any amendment that might be made. If analysed, this was a contractual obligation. Each liability of a prior iteration transmitted and accumulated until the last Member left. At that stage a contingent liability arose. This was not unfair.

[72] When matters resumed for a third day, parties not having been able to conclude their submissions in the two days allocated, Mr Connal sought to develop his submission about the character of a contingent liability. To that end he lodged documentation relating to the actuarial investigation and additional authorities (including *Ben Line Steamers (in liquidation), Noter* 2011 SLT 535 ("*Ben Line*") and paragraphs 1, 8 and 278 to 284 (only) of *PNPF Trust Co Limited* v *Taylor* [2010] Pens LR 261). The other cases were produced to demonstrate that *Ben Line* had been favourably cited: *Bavaird* v *Sir Robert McAlpine* [2012] CSOH 157 (at para 15);

BAE Systems v *Selex Communications* [2011] EWHC 2006 (Ch) (at paras 16 to 20); and *Nortel GmbH* [2014] AC 209 at 242 (para 96).

[73] The essential factors informing the contingency, here, were that fact that an employee was a member of the Fund and the rules contained a power of amendment. The former versions of the rules, being those in 1947, in 1980 and in 1990, all contained a power of amendment (in rules 19, 21 and 22, respectively). (Mr Connal relied on the narrative of these matters in *Sim* not the rules themselves.) Parties could be bound by later amendments of pension fund rules. The maintenance of a pension fund over the long term was recognised as an important factor. The contingent liability does not exist until the amendment power is exercised and the liability is then crystallised. Reference was made to paragraph 25 of the case of *MNOPF Trustees Ltd* v *F T Everard & Sons Ltd & Ors* [2005] Pens LR 225 ("*Everard*"). While in terms of the scheme under consideration in that case there was no power of an employer to withdraw, Mr Connal said that this was not a point of distinction. At paragraph 40 of *Everard* the court quoted Arden LJ's principles applicable to the interpretation of pension schemes (set out in *British Airways Pension Trustees Limited* v *British Airways Plc* [2002] EWCA Civ 672). Mr Connal argued that these were more than principles of interpretation. Rather, they went beyond a reading of the words in the document: they identified as an objective the reasonable and practical effect of a scheme. He drew from this the proposition that if there was a broad power of amendment, given that the purpose of a pension scheme was to provide pensions, then, absent any other consideration, a general amendment power could be exercised to impose a contingent liability. Mr Connal accepted that this was not discussed in such broad terms in *Everard.* He also made reference to *Ben Line Steamer* (at paras 19 to 21, 27 and 36) as further illustration of this principle. This had been approved by the House of Lords in *Nortel* (at para 96). Brief mention was also

made of *PNPF Trust Co Ltd* (at para 278) and its discussion of the "wrong question" (being to ask, whether it would have been in the reasonable contemplation of the parties at the time of the amendment in question that such a large liability would be imposed). As I understood him, Mr Connal's final position was that the terms of any pension scheme were irrelevant, so long as there was a power of amendment. That feature, coupled with the fundamental long-term purpose of a pension scheme, was sufficient to bring into play a contingent liability such as to impose liability on scheme employers that they didn't previously have. He referred to *MNRPF Trustees Ltd* v *Stena Lines Ltd & Ors ("Ratings")* at paras 318 (recording a submission about fairness) and 327 (recording the judge's determination of the fairness question). That case appeared to be concerned with whether the amendment under consideration was a proper exercise of the trustees' powers). Mr Connal did not relate that passage (and whatever he drew from it) to the facts of this case or the arguments presented.

[74] In respect of the legal character of that obligation, Mr Connal suggested this was contractual. He departed from the suggestion (in one of his notes of arguments) that this might also be a unilateral promise. He no longer insisted on that position.

The Approach to Fund Administration and Construction

[75] Mr Connal suggested that there were observations in the cases that disclosed a supportive approach taken by the court to pension schemes. This was to the effect that the courts would strive to find a way to give reasonable and practical effect to such schemes. This did not mean that pension schemes always won, but it did mean that the courts rejected technical arguments that might frustrate the operation of a scheme. He referred to comments at paragraphs 8 to 10 of *Low & Bonar & Low & Bonar Pension Trustees Limited* v *Mercer Limited* [2010] CSOH 47 and to paragraphs 10 and 16 of *Trustees of the Scottish*

Solicitors Staff Pension Fund v *Pattison and Sim* 2016 SC 284. In *Pattison and Sim* the Inner House approved Lord Drummond Young's comments in *Low & Bonar.*

The Presumption of Regularity

[76] Mr Connal also relied on the discussion of the presumption of regularity at paragraph 19ff in *Pattison and Sim*. While there were more recent cases, he said that these did not add anything. Mr Connal argued that he did not rely on the presumption. It simply formed part of the approach of the courts to give pension schemes practical effect. He did not rely on it for the purpose of any undertakings by employers to become assenting employers which, he said, should preclude the defenders relying on it in the context of dissolution and the formal winding up they referred to. It was not suitably applied to a single event, such as the defenders sought to do. (He did not explain why it was inapposite to that circumstance.) He suggested it was counter-intuitive for an employer to give notice to withdraw, where its employees remained members of the scheme.

Payments and Other Actings and Inferences to be drawn from them

[77] Mr Connal referred to contribution cards (No 6/19 of process) which showed payments in respect of the Members until the 1990s. Payments toward deficit contributions were made, in whole or in part, between 2003 and 2012. Throughout this period, they were made without comment or explanation. From time to time, in the period from 2006 to 2010, the defenders attended meetings of the Fund. All of this supported a *prima facie* inference that the defenders accepted an obligation to pay.

The Assenting Employer and Miscellaneous Matters

[78] Under reference to *Crichton* (at para 21) Mr Connal argued that in that case there was no evidence that the employer had given an undertaking to be become an assenting employer. He argued, it was possible to become an assenting employer by implication. That reasoning should apply, here, in relation to the payments he had already referred to. If a payment had been made, that was equivalent to giving an undertaking to be an assenting employer. While there were no payments being made from either 1991 or 1994 to 2003, that simply meant that no one was employed. So at that point there was only a contingent liability. From 2003 onwards, the obligation was to pay a deficit contribution. It did not matter, therefore, that there was no undertaking lodged. This was an example of the practical operation of the scheme, with a view to meeting the primary obligations of the scheme, which was to pay pensions.

[79] In relation to the suggestion that there was a winding up, Mr Connal's position was that this was a non-point, if the business was ongoing. That was a purely formal step. Any agreement could trump the operation of section 17 of the 1890 Act.

[80] In response to a question as to when the contingent liability crystallised, Mr Connal's answer was that this was in 2003, when the Fund closed and deficit contributions were demanded. At that point the dormant liability awakened and assenting employers were asked to make deficit payments. Prescription started to run from that point.

Documentation

[81] Mr Connal's only point under this heading was to argue that the statement from the first defenders' website, of being in business for 100 years, inferred continuity.

The Pursuers' Alternative Case

[82] Mr Connal referred to the case of *Muir* v *Collet* (1862) 24 D 1119 at p 1122. This provided the rationale for the need to call all parties, namely that this was in case there was a defence that was not known to all of the defenders. It was not necessary to constitute a debt against a partnership. He did not propose to respond to the other cases cited by the defenders. The second defender was the only one who was an employer of any of the Members. If the case against him failed, he relied on the primary case against the first defenders.

Reply on behalf of the Defenders

[83] Of the pursuers' contention that dissolution or winding up of the prior iterations did not matter, Mr Brown said that this was to pile up fallacy upon fallacy. Once a partnership was dissolved, it ceased to exist. It could not exist in some "zombie state". In terms of the 1947 rules, one required to be an assenting employer. On dissolution, the firm ceased to exist and necessarily ceased to be an assenting employer. If one had no capacity to contract, ie because one was dead (as in a natural person) or dissolved (the like state for a partnership), one could not give any undertaking, much less a continuing undertaking, to be an assenting employer. It required capacity to attend an AGM, to cast a vote or otherwise participate in the scheme. On the pursuers' approach, the dissolved prior iterations were, like Schrödinger's cat, simultaneously alive and dead. This could not be correct. The pursuers failed to address this fundamental difficulty. On the pursuers' approach, there would be a sub-class of former assenting employees, who lacked capacity to withdraw, or to take any other juristic act, but who remained bound forever. On a contract analysis, the pursuers required to show that the former iterations had consented to be bound after they

ceased to exist. The lack of capacity of the now-dissolved iterations was fatal, on a parity of reasoning with Lord Glennie's decision in *Crichton* (in which the lack of legal personality of the office of auditor was fatal to the pursuers' claim.)

[84] Another fallacy was the proposition, inherent in the pursuers' approach, that it was not enough for an assenting employer to terminate its membership of the scheme upon dissolution but, it had also to give express notice of withdrawal, as well. There was no warrant in the scheme for such an approach. There was nothing to suggest that the giving of six months' notice to withdraw, as expressly provided for in the rules, was the only way to cease to be an assenting employer. Dissolution, like death, operated to determine contracts. If it had that effect in relation to contracts of employment, as in *Hoey*, there was nothing to preclude it operating in relation to participation in the Fund by the prior iterations. The case of *Sim* v *Howat*, relied on by the pursuers in this context, was of no assistance. In that case it was simply assumed that the liability had transmitted, and the fight in that case was restricted to the question of who would pay: the old partner or the new firm. The case was devoid of analysis of the doctrine of transmission.

[85] In relation to the contention advanced that if notice was required, none of the prior iterations gave it, Mr Brown argued that this was not enough for the pursuers. The dissolution in 1962 was 55 years ago. That had been effected with a formal winding up by a probative deed. Accordingly, the defenders did rely on the presumption of regularity. Having undertaken this formal process, there was no reason not to suppose that when a firm was being wound up, it also closed off any liability in relation to the Fund. The pursuers' case proceeded on the basis that every dissolution of the prior iterations were all deficient in this respect. There was no warrant for that view. This was just assertion. In the absence of records, the question was what the law presumed.

[86] In relation to Mr Connal's submissions about a contingent liability, this appeared to arise from the nature of the scheme. However, the Fund was not originally a final salary scheme, nor was it one that prohibited withdrawal by employers. Mr Brown accepted that obligations to the Fund were paid during periods of employment of the Members. But what, he asked, was the contingency? The pursuers appeared to suggest that this arose from the power to amend at a future point in time, to introduce a liability for a potential for a deficit. Properly understood, the Fund as operated under the 1947 rules was incapable of creating a deficit. But the pursuers' case was devoid of analysis of this or any of the other rules. The concept of a contingent liability was, Mr Brown suggested, a red herring. The true question was simply: was there an obligation capable of transmission?

[87] The pursuers' analysis of what was necessary to constitute a contingency was deficient. The cases showed that a contingency that can be avoided by a unilateral act did not create a contingent liability. He referred to Lord Reid's example about the watch in the shop in the *Sutherland* case. Another example would be payment of road tax. The obligation to pay road tax in future years was not a contingent liability, as one may avoid that by disposing of the car before the next year's road tax was due. Consider the dissolution in 1962. If the firm proposing to dissolve had written to the Fund, there was no deficit at that stage. Indeed, at that stage, the firm was free to withdraw (and whether it did so, was the subject of the argument relying on the presumption of regularity). If one can get out of the obligation unilaterally, as the employer could by withdrawing from the scheme, then there was no sufficient nexus to create a contingent liability. The core issue was whether there was the necessary commitment or underlying obligation to create a contingent liability. The pursuers did not identify any.

[88] There was a lack of any analysis on the pursuers' approach. If one considered the position when MRM1 joined the scheme, there was no prospect of a deficit, in the modern sense, accruing under the 1947 scheme rules. There were fixed contributions, held separately for each Member (see eg rule VI), and at retirement these contributions were amalgamated. The pension payable was simply whatever that accumulated sum could purchase. No shortfall was capable of arising. It cannot be the case that the iteration of the defenders existing in 1955 could be bound by a substantial re-writing of the rules in the 1980s to meet deficits that were not in contemplation during the existence of that iteration. Nothing in the language of the scheme or the surrounding circumstances would support this construction. There was no nexus between the Fund and those iterations. In any event, the effect of dissolution ended the liability of that iteration.

[89] In relation to the 20th Century cases on transmission, in none of them did the court innovate on the law as it had been established by the 19th Century cases. The law was established by *Heddle, Stephen's Trustee* and *Henderson.* It was not permissible for the defenders to discard features of the case-law in favour of a bland formulation of the joint Law Commissions. The pursuers could not sidestep *Ocra* as confined to its facts. Even on the pursuers' reduced formulation, it required averment and proof of the transfer of the whole of the assets of the business. There was simply no case where a partial transfer of assets carried the liabilities of the former entity and imposed these on the successor: see *Stephens* and *Balfour*. The pursuers simply failed to address the 1989 reconstruction of one of the prior iterations, achieved without a transfer of the whole assets, or the 2006 demerger. Nor were these transfers gratuitous. The partnership agreements of the former iterations recorded the capital contribution of their partners. Further, there was no case in which

liability transmitted consequent upon a winding up, as had occurred in 1962 and 1967. The pursuers had to overcome each and every hurdle, but there was no attempt to do so.

[90] Finally, if the analysis of the obligation was contract, then the case of *Henderson*, which held that there was no *jus quaesitum tertio*, precluded a direct action by the pursuers. The question of enforceability was simply not considered in *Sim*. There was no policy reason to confer a direct right of action on the trustees of a pension fund. The fundamental weakness of the pursuers' case was that there was nothing to be transmitted.

Discussion

The Pursuers' Alternative Case against the Second Defender

[91] I am persuaded by Mr Brown's submissions, and the authorities he cites, that the pursuers' alternative case against the second defender as an individual is incompetent. As noted above, at paragraph [82], Mr Connal did not seek in his oral submissions to address these. Nor does it suffice to dismiss this as a procedural rule, as was contended in one of the pursuers' written notes. In my view, these cases clearly show that a pursuer must call all defenders of whose existence it knows (the qualification that this be restricted to persons within the jurisdiction may no longer apply in modern times), and that the failure to do so renders the pursuers' action incompetent *quoad* the second defender as an individual.

[92] The alternative case is in any event irrelevant. At no point during the period when any Member was actively employed by any of the prior iterations were they employed by the second defender. The second defender was at all material times a partner in one or more of the prior iterations. These firms each had separate legal personality (apart from its partners). It is a legal solecism to ignore that separate legal personality, and to argue that the second defender was himself an employer (or an "assenting employer") in relation to

any of the Members, as the pursuers' bare averments purport to do. I therefore dismiss the pursuers' alternative case.

[93] That leaves for consideration the pursuers' primary case, based on the transmission presumption, and argument about which took up the majority of the discussions during this three-day debate.

Pursuers' Critical Reliance on the Transmission Presumption

[94] The basis of liability relied upon by the pursuer remains less than clear. It is perhaps easier to state what is not the basis of the pursuers' case against the defenders. It would appear to be the case that none of the following grounds is relied upon:

(i) *Not an orphan liability:* It was suggested in terms of the scheme, that where there was no longer an extant assenting employer in respect of a member, the accrued liability in respect of a member could be classified as an "orphan liability". As I understand it, under the Current Rules an orphan liability may be apportioned among all the remaining assenting employers in the scheme. That basis of liability is not invoked here. (It was not suggested that the deficit could not be met in this manner, assuming the correct procedural steps to do so were taken. If that is correct, there is a means available to the trustees under the scheme rules to enable the pursuers to make up the deficit.)

(ii) *Not on basis that any of defenders was an assenting employer in relation to the Members*: Furthermore, none of the defenders ever employed any of the Members. The last iteration to employ the latest of the Members to retire was iteration MRM13. Neither the second nor third defenders employed any of the Members in an individual capacity.

(iii) *Not some restitutionary basis:* While there are one or two curious averments to the effect that the firms, of which the second or third defenders were partners from time to time, benefited from the employment of one (or more) of the Members, that was not developed in submissions. Even assuming that contention to be correct as a matter of fact, the 'beneficiary' was the particular iteration of the partnership employing the Members at that time. The implication of the averment is that the nature of that benefit was either some contribution to the profitability of the firm in question or, possibly, to its goodwill. However, it is difficult to see how this can avail the pursuers. Such a benefit does not readily translate into an asset available to meet the claims of that iteration's creditors. In any event, the pursuers did not make any submissions to develop the consequence, if any, of this averment.

(iv) *Not on the basis of any cautionary liability*: It is trite law in Scotland that a partnership has separate legal personality. While the partners of a firm may in certain circumstances become liable *qua* cautioner for the liabilities of the partnership if the partnership assets are insufficient to meet its liabilities, the transmission of any surplus assets of a partnership (once its liabilities are met) is dealt with by other provisions in the 1890 Act. The pursuers do not rely on any liability transmitting to the second or third defenders *qua* cautioners for any of the prior iterations of which it was a partner.

(v) *Not a joint and several liability with prior iterations*: On the averments, one or more of the Members was employed by more than one of the prior iterations of MRM17. However, it is not suggested that an entity that is an assenting employer of member A becomes jointly and severally liable with any (or every) other assenting employer of that member. Accordingly, where two different assenting employers employed member A, each assenting employer is *prima facie* liable for the liabilities accrued in respect of its own employment of member A. So, for example, if a member was employed by two assenting employers to the scheme for 40 years, one who employed A for 39 years and the second one who employed member A for a final one year, the assenting employers' respective liabilities for member A would reflect this. (While the Fund's obligation to each member may be expressed as a single obligation or may be represented by a single figure (eg the value of the accumulated contributions), nothing was placed before the court to suggest that all assenting employers of that member were jointly and severally liable in respect of that figure or any shortfall.) There was no suggestion that, if the first employer ceased to exist or became insolvent, the second employer thereby also became responsible for the liabilities accrued by the first assenting employer to the Fund in respect of its employment of member A for 39 years. (Again, there may be a way to establish liability anew, as it were, if the obligations of the now dissolved or insolvent first firm (or the members in respect of the accrual of benefits while employed by that firm) were characterised as orphan liabilities. That is not the basis of liability involved here.)

[95] The sole basis of liability discernible from the pleadings or from the many other articulations of the pursuers' written submissions is their reliance on the transmission

presumption. Indeed, the reliance on the presumption is, in fact, inconsistent with the proposition that any of the defenders were assenting employers in respect of any of the Members (and which would be a direct liability). The pursuers seek to hold the last iteration of a firm liable for all obligations incurred by any and all of the predecessor iterations. On this presentation, the pursuers' case is premised on three further assumptions:

(i) that the totality of what is now claimed was capable of transmission,

(ii) that there was an unbroken transmission of the accrued liability from each firm always transmitting to its immediate successor, and

(iii) that the totality of what had accumulated (assuming there was a prestable or contingent obligation in respect of each iteration) had transmitted to the first defender.

In respect of the second assumption, as soon as one link in that chain of transmissions is broken, any liabilities accrued up to that point in time would be irrecoverable as against any later iteration in that chain. In other words, any disruption in transmission would preclude recovery of any liability accrued up to that point and attributable to the status of the prior iteration or iterations as an assenting employer. The pursuers did not address this point or respond to the defenders' submissions regarding this issue.

[96] In respect of the first assumption, the pursuers sue for an undifferentiated sum. In other words, the pursuers ignore the logic of their own approach, that this is an aggregate of liabilities incurred by individual iterations that accumulated as they transmitted from iteration to iteration. In the absence of some form of joint liability, each assenting employer would ostensibly be accountable *qua* assenting employer only for the liabilities incurred or attributable to its period as an assenting employer <u>and</u> its employment of one of the Members. The defenders argued that a dissolved firm cannot be bound by rules created

after its dissolution. In other words, the defenders challenge the assumption that liability may be attributed retrospectively to prior iterations pursuant to a change in the rules that occurred after those iterations ceased to exist. Again, the pursuers fail to meet this criticism. If the defenders are right on this point, at the very least, that portion of the sum sued for and referable to iterations that ceased to exist before any rule change imposing a retrospective or contingent liability (if, indeed, the amended 1990 Rules or the Current Rules achieve this) is irrecoverable. (This would include iterations MRM1 to MRM14, for the reasons submitted by Mr Brown, at para [34] and not contradicted by Mr Connal.) As the pursuers make no attempt to identify the individual apportionments which cumulatively made up the sum sued, their case is technically irrelevant on this basis alone. Having regard to the arguments presented, however, particularly in relation to the regularity presumption, this would be an unsatisfactory basis on which to dispose of this case.

[97] In the light of the foregoing, the pursuers' case is critically dependent on establishing that the transmission presumption applies. If they fail to do so, it does not matter that they might also fail to establish that the totality of the sum sued for is recoverable.

One Presumption or Two?

[98] The pursuers rely on what is said to be a presumption in the law of partnership, arising in certain circumstances, that results in the transmission of liabilities from one entity to its successor. As is apparent from the case law and the academic discussion, the scope of the presumption and the circumstances potentially giving rise to it are not straightforward. As will be seen, in some of the academic discussion as well as in some of the cases, there is also an unfortunate conflation of that issue with what in my view is the separate question of the liability of a newly-assumed partner for any act done by the partnership prior to his

assumption. (There may be less scope for conflation in English law, because it does not recognize a partnership as having a separate legal personality distinct from that of its individual members.) The assumption of a new partner may or may not raise a question of the liability of any successor partnership *qua* partnership for the liabilities of its predecessor. However, if the partnership provided for its own continuity, notwithstanding the assumption (or retiral) of partners, then strictly, there is no new *successor* partnership, and hence no question of the liability of any successor. In that circumstance, the only question is the liability (if any), of the new partner for anything done by the firm before he joined it. It is that circumstance which section 17 of the 1890 Act governs. If section 17 of the 1890 Act applied in this case, this, in turn, had the potential to raise a subsidiary question as to whether or not section 17 altered or affirmed the common-law position in Scotland, and the answer to which informed the approach to be taken to pre-1890 Act cases on that issue. In my view, section 17 has no application to the pursuers' case. It is nonetheless helpful to note the operation of section 17 in order better to distinguish it from the transmissions presumption (and to disentangle the conflations between these two presumptions where they appear in the case-law).

Section 17 of the 1890 Act

[99] Section 17 of the 1890 Act provides that:

> "A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner."

[100] It is important to note the qualification introduced by the word "thereby". Admission as a partner does not, itself, render the new partner liable to the creditors of the firm for anything done before he became a partner. It leaves open the prospect that, by

reason of other factors, he may become liable. Section 17 appears to reflect the pre-1890 Act common law position, as illustrated by the case of *Nelmes*, which was cited in Lindley's Commentary to section 17 of the 1890 Act, in 1891. In *Nelmes*, the 2nd Division of the Inner House held that, in the absence of express or implied agreement to the contrary, the newly assumed partner, Loudon, had not assumed liability for the debts of the former business which had been transferred to the partnership. The creditors' action against him in an individual capacity therefore failed.

[101] Lindley's Commentary, however, then notes the cases of *McKeand*, *Heddle* and *Miller* v *Thorburn* as being in apparent tension with *Nelmes*. After considering these cases, it concluded that any presumption derived from those cases was "overruled" by section 17(1) of the 1890 Act. This respectfully seems to me to involve a conflation of two separate presumptions: the liability of an incoming partner for anything done before his assumption (now governed by section 17 of the 1890 Act) and the liability of a successor partnership for the liabilities incurred by the predecessor entity (which, on the cases, may be a sole-trader or a partnership). It is this second presumption which the pursuers invoke.

[102] The conflation of these two presumptions may also be found in the three editions of Greens *Encyclopaedia* (of 1898, 1913 and 1931). All three editions discuss the cases noted above under the rubric "the liability of incoming partners". The text of the 1898 and 1913 editions are quite similar and end with the presumption in section 17 being "against the new firm being liable for the old firm's debts". Again, that discussion appears to conflate two possible forms of liability: the incoming partner's liability for anything done by the old firm (section 17(1) being against such a liability) and; separately, whether the new partnership is liable for the debts of its successor (to the extent that the answer is yes, and the successor has insufficient assets to meet those liabilities, then the new partners are liable, but indirectly as

cautioners to the new firm). This state of confusion subsisted in the reworked 1931 edition, in which there was a reference to section 17 coupled with the observation that that section may make the transmission presumption "more heavy". Gloag correctly distinguished the two presumptions. He referred to the cases relative to the transmission presumption as "special cases". The most insightful discussion of the confusion in the case-law may be found in the anonymous contribution "Partnership Liability Questions" in the Scottish Law Review of 1925 at p 65.

What is the Ambit of the Transmission Presumption relied upon by the Pursuers?

[103] Mr Connal contends that the transmission of liabilities between partnerships is preserved where there is a "continuation of substantially the same business" and that the rationale of the rule is for the protection of the creditors. As it was put in the Pursuers' Note of Basis of Liability (at para 5):

> "Transmission of liabilities between partnerships is preserved where there is a continuation of "**substantially the same business["**][*sic*]. The purpose is the protection of creditors. By the defenders' own admission, they have traded under the name of "MRM" for "over a hundred years". Other than every day changes, to the outside world, and in particular, to creditors, the business remained the same. While there is no dispute that a "new partnership" is formed upon the assumption or departure of a partner, the business entity remained the same. (*William John Sim –v- David John Howat and Bridget Mary McLaren* [2011] CSOH 115 ("*Sim –v- Howat*"))." (Emphasis added.)

When pressed in oral submissions to articulate the precise terms of the presumption, Mr Connal eschewed any of the formulations from the case law and relied principally on the formulation by the joint Law Commissions from their Consultation Paper on Partnership Law (and especially the second sentence of para 10.65) ("the Consultation Paper"), which was as follows:

"10.65 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.** [The case of Miller v Thorburn (1861) 23 D 359 at 362 is footnoted.] This presumption may be displaced. [The footnote to this sentence is: See, for example, Thomson & Balfour v Boag & Son 1936 SC 2, where a sole trader formed a partnership with his foreman, the latter having contributed a substantial sum of capital to the partnership."] (Emphasis added.)

[104] I am not persuaded that this is a sufficiently full description of the presumption as articulated in the case-law (which I will consider, below). Indeed, in the passage immediately following that relied upon by Mr Connal, the joint Law Commissions observe:

"….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 have been taken over by a new partnership which is substantially similar, in terms of business and constitution, to the old firm. [The footnote to this passage is: *Thomson & Balfour v Boag & Son* 1936 SC 2, 10, per Lord President Normand.] 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. [The footnote reads: 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) p 267.]

And in the next paragraph:

"10.66 The case law is unclear as to whether the "**agreement**" or "**undertaking**" need be only within the partnership itself, or whether it must be between the new partnership and the creditor seeking to enforce the debt. The only conclusion that can be drawn from the case law is that the courts **will look to 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. **"** (Emphasis added.)

The sentence Mr Connal relies on, in isolation from these other passages, has the potential to be misleading. It is interesting to note in the passages preceding this, at paragraph 10.62, that the joint Law Commissions observed that there was no problem in principle where one entity took over the business of another: "X is not in general liable for Y's debts unless X has agreed, in a legally effective way, to assume liability". Even if that transfer were effected gratuitously, it was noted that there was no legal policy against donation by solvent persons. "So, in principle, a partnership which takes over the assets and business of another partnership should not be liable for the first partnerships' [*sic*] debts unless it has agreed, in a legally effective way, to assume liability." (This observation is a material qualification of the passage relied upon by Mr Connal.) Mr Connal did not however, have regard to this qualification or otherwise modify his extremely wide proposition.

[105] The joint Law Commissions noted that this transmission of liability was approached in different ways within the two jurisdictions. Consistent with this analysis of the need for a legally effective means to assume liability, the cases of *Heddle's Executrix* and *Stephen's Trustee* were noted. In the former case, it was noted that in the absence of any written contract, where the new partnership took over the whole business (including all trade debts of creditors), the successor was liable to the creditors of its predecessor. However, the express provision in the partnership contract in the latter case that excluded such liability was given effect to. The successor was not liable to a creditor of the predecessor firm.

[106] Collectively, in these passages from the joint Law Commissions paper it is acknowledged in the first place that there is nothing objectionable about a solvent firm transferring its whole business to another entity (even if done gratuitously) and, in the second place, that the takeover by one firm of the business of its predecessor may give rise to questions about any liability (if any) of the successor for the debts of its predecessor, but that factor is not sufficient to establish liability. The juridical basis the joint Law Commissions identified as necessary to impose liability on the successor or transferee firm was the agreement, express or implied, of the successor to assume the liabilities of its predecessor. Accordingly, if the discussion of the joint Law Commissions is correct, the pursuers must

plead and prove an agreement of each of the successor iterations to assume the liability of the predecessor firms. However, there are no averments by the pursuers of any express or implied agreement.

[107] I turn now to consider the case-law relative to the transmission presumption in more detail.

Review of the Case-Law to Ascertain the Juridical Basis and Scope of any Presumption

[108] At first blush, the cases Mr Brown referred to are not easy to reconcile. Two distinct rationales are discernible as seemingly underpinning the presumption:

1) whether the successor partnership expressly or by implication agreed to assume the liabilities of the former partnership (or of the sole trader) whose business it was understood to have taken over ("the agreement hypothesis"), and
2) the perceived injustice to creditors of the first entity in circumstances where there has been a gratuitous transfer of the whole business of the first entity (whether that be a sole trader or a former partnership) to a successor business or firm, but without first settling the liabilities of those creditors, and where insolvency intervenes ("the equitable hypothesis").

[109] The case of *Ridgeway* v *Brock* (1831) 10 S 105 is an early illustration of the agreement hypothesis. In that case, a partnership had contracted a debt. It assumed a third partner, with the consequence that a new partnership was formed. The third partner contributed no capital. The contract of copartnery had provided (in effect) that the net assets of the first firm (ascertained after a final winding up and balancing of the books) would be transferred to the successor firm. The second firm became insolvent. Creditors of the first firm, who had obtained decree against it, sought to be ranked in the sequestration of the second firm.

The trustee in sequestration rejected that claim *inter alia* on the basis that their claim was in respect of a debt of the old firm, not the successor one. The Lord Ordinary allowed the creditors' appeal. He did so by construing the provision in the partnership contract, that the stock contributed by the first firm was its "free fund after payment of their debts existing at the date of the contract", as constituting express consent by the successor partnership to take over the liabilities of the old firm. The *ratio* of that case illustrates the agreement hypothesis. Accordingly, as he had found that there was an express agreement that the successor was liable for the debts of the predecessor, he did not need to resort to any "presumed" consent to reach that result.

[110] It is clear, however, that the court would have been prepared to find presumed consent from the circumstances of that case. After noting that it was admitted that the debt was "a just" debt incurred by the predecessor firm, the Lord Ordinary stated:

> "In this situation 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, and calling on all their creditors to demand payment of their debts, and the debtors of the company to pay what they are owing. Any person entering into such copartnery without such previous measures, appears to the Lord Ordinary (to use the gentlest language) 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. But in this case, there is no need for presumed consent."

[111] These comments are *obiter*. Mr Brown is correct that there is no analysis or reasoning to support these comments. As will be seen, too, in the later cases, it comes to be accepted that there the transfer of the whole assets of an entity to a successor entity is not, itself, sufficient to trigger the presumption. That case was followed 30 years later, in the case of *Mckeand*.

[112] In *McKeand*, a sole trader, known as Robert Laird, had large debts when he took on two of his shopmen as partners. In the partnership contract with them, he agreed to put in the sum of £600. Significantly, that figure represented the net balance of his whole business assets and liabilities, and which included debt of £8,438 he owed to the pursuer. The other partners accepted that the net value of the stock satisfied the requirement to contribute £600. There was no stipulation in the partnership contract that the firm should take over the liabilities of any of the individual partners or that it should have the benefit of their assets beyond the sum of £600. The new partnership traded with the business stock under the name "Robert Laird", which had been his manner of trading as a sole trader.

[113] Upon the firm's insolvency, the pursuer submitted a claim for its debt. The trustee in sequestration rejected this claim, as being one incurred by Robert Laird as an individual, prior to the formation of the partnership. The sheriff upheld the trustee's deliverance, on the basis that, even though the firm had the benefit of the use of Robert Laird's assets, this did not infer liability for a debt of his owed as an individual. The absence of a clause in the partnership contract to take over the individual debts of any partnership also mitigated against the assumption of responsibility. The express clause in the partnership contract was to the contrary. Accordingly, the pursuer had failed to prove that the debt "was ever assumed, taken over, or admitted as a debt due" by the firm (ie applying the agreement hypothesis). On the facts, the other partners were not aware of the size of Robert Laird's debt to the pursuer. The creditors appealed to the Inner House. The First Division (comprised of the Lord President, Lord Ivory, Lord Curriehill and Lord Cowan) was equally divided and so the matter was heard by a bench of seven (including Lord Justice Clerk Inglis, Lord Benholme, Lord Cowan and Lord Deas).

[114] The principal opinion for the majority was given by Lord Inglis. In a lengthy opinion he first dealt with the partnership contract. He began with a consideration of the evidence concerning the treatment of debts (including that of the pursuer appellant), at a level of detail which was remarkable for cases of that era. After doing so, Lord Inglis determined that the partnership contract did not accurately reflect the agreement as operated among the partners. In turn, this enabled him to differ from the trustee and the sheriff. He noted (at foot of p 851) that the trustee's deliverance "rested almost exclusively on the contract of copartnery". A little further on (at p 852) he noted that "the whole of [the] reasoning" on the part of the sheriff "proceeds on the assumption that the articles [of the partnership] do accurately and truly state the nature of the contract between [the partners]. I am humbly of the opinion that they do not." Having determined that the partnership contract did not govern parties' rights, Lord Inglis then turned to consider the evidence. He determined that the effect of the contribution of the equivalent of £600 net by Laird to the partnership could only be understood on the basis that the firm took over the debts as well as the assets. He reasoned (at p 853) that if the partnership had taken over only the assets, then Laird's contribution would have been about £9000 worth of assets, which proposition, Lord Inglis rejected. He then turned (at p 853) to consider the "true nature" of the transaction. After narrating that Mr Laird had taken on his two shopmen as partners, "for the purpose of stimulating their zeal and energy in the promotion of the interests of his concern" (at p 853 as he described it), Lord Inglis posed the following rhetorical question:

> "But was it ever heard before, that when a transaction was entered into, the beginning, and end, and whole meaning and distinctive character of which amounted to this, that the two shopmen were to have each one-eighth share in the business as part of their remuneration for their services, that that constitutes a new company to the effect of handing over to the new firm the whole stock of the individual trader, and depriving the prior trade creditors of that individual trader of all recourse against his stock and property? Did any man ever hear of such a result

> flowing from such a transaction? The doctrine is perfectly new to my mind, and it is the most startling thing I ever heard..."

[115] The modern view (see, eg, in the joint Law Commissions' Consultation Paper) is that there is no public policy objection to such a transaction. As will be seen, in subsequent cases this objection is quietly departed from.

[116] After noting that the whole assets of the business had been transferred – "the source and fountainhead of the whole means of [the successor]"- and used by the successor, that the trade had "gone on exactly as before", and that the two new partners had not contributed any capital, Lord Inglis continued (at p 855):

> "Now it humbly appears to me, that when parties take up a going business **in that way**, and take the stock, they must also take the liabilities. I cannot imagine that the two can be separated; and, upon **that ground**, I am very clearly of opinion that this interlocutor is not well founded, and that the appellants' claim should be allowed, …… I forbear to go farther into the evidence in the case, because I think it quite immaterial. This is a question of fact, and the evidence is quite satisfactory to my mind." (Emphasis added.)

A little further on, Lord Inglis emphasized the continuity of the business of the sole trader and the firm, as evidenced in the books of the business ("I should see no evidence of the existence of [the firm] if it were not for the existence of these books…").

[117] Lord Justice Clerk Inglis gave the most fully reasoned opinion. However, in order to discern the correct *ratio* of the majority in that case, it is necessary to consider the other opinions. Lord President Colonsay and Lord Curriehill were in the minority. In his opinion, Lord Colonsay also regarded it as a question of the evidence, as to "whether the new company had taken over the debts of the old company…" (see p 857). He differed from the majority (represented by Lord Inglis) and their ability "to throw to one side" the partnership contract, whose terms he regarded as conclusive. Having regard to its terms, he agreed with the trustee and the sheriff. But for that, he would have sided with the majority.

[118] Lord Curriehill concurred with the Lord President in his dissent. The contract of copartnery did not recognize any of Laird's debts as the debts of the new firm. He referred to the parole evidence as reinforcing this view, as there was no express agreement of the other partners to take over Laird's debts. Indeed, on the evidence, they never saw the account book (relied on by the majority as incorporating the pursuer's debt into the business of the successor), as Mr Laird kept it in a safe to which he kept the key, and they were unaware that he had been including his own debts in an annual balancing of accounts with the creditor. They were also wholly unaware of the size of this debt.

[119] Of those judges in the majority who gave opinions, the concurrence by Lord Cowan and Lord Benholme that the appeal should be allowed, was explicitly on the basis that by reason of the inclusion of the pursuer's debts in the records of the firm, this constituted an assumption of that liability. (See pages 855 and 856, respectively.) In other words, the decision of the case in favour of the creditor was on a basis that reflected the agreement hypothesis as applied to the specific facts, and on no wider basis.

[120] Lord Ivory concurred with the majority, but he expressed the basis for his decision quite differently. In his opinion, if the analysis had not been as set out by Lord Inglis then, in his view, no transaction [among the partners] "could have been more inconsistent with their duties to creditors of Laird in his former business, than that which took place". He referred to the fact that if there had been a winding up of Laird's business, then his creditors would have been able to meet their claims from Laird's assets (said to be £9000). The transfer had precluded them from doing so. If the arrangement had been intended as a means to defeat Laird's creditors, then it "would have been a dishonest conspiracy to cheat the former creditors out of their remedies against the property" (see at p 855). This language is reminiscent of that used by courts when striking down a gratuitous alienation in an

insolvency context. These observations illustrate the equitable hypothesis, as I have described it, or the application by the court of an overriding equitable power (and which is more readily recognised in such a context). However, the comments are *obiter* and are not part of the *ratio* of the majority. The common element of the opinions of the majority was the finding that the successor had agreed to takeover the duties of Mr Laird, implied from the whole facts and circumstances.

[121] Lord Deas simply expressed concurrence with all of the opinions already expressed, but he did not comment on the different bases of the decisions reached by, for example, Lord Ivory or Lord Inglis. Accordingly, the *ratio* of the decision of the majority (Lords Inglis, Cowan and Benholme) is on the fact-specific basis that, as disclosed in the books of the firm, it had taken over the debts of Laird, including that owed to the pursuers. This is a narrower ground than the ostensibly broader basis suggested in Lord Inglis' rhetorical question. As will be seen, in the subsequent cases, the narrower basis is what is followed.

[122] The following year, the court decided the case of *Miller* v *Thorburn*. (*McKeand* was heard first, but reported after *Miller.)* In that case, a sole trader formed a partnership with his son. The partnership contract provided that the stock in trade and furniture had been and remained the property of the sole trader but with the further stipulation that if, on his death, his other means were not sufficient, then the stock in trade "would be liable for the deficiency in the first place". The sole trader died and the sequestration of his estate as well as that of the partnership followed. The agreed facts included the following matters: the continuity in the use of the premises used by the sole trader for the business of the partnership; the son had contributed no capital; while there had been public notice of the formation of the partnership, there had been no special notice to creditors; the name of the sole trader remained over the shop door; the partnership paid debts that had been

contracted by the sole trader; while regular books were not kept, sales had continued to be entered into the same sale book as used by the sole trader; the statement of assets prepared for the trustee in sequestration of the firm included some of the stock and trade transferred from the sole trader and it also included pre-partnership debts owed to the sole trader. The trustee rejected the pursuer's claim, which was based on a pre-partnership debt owed by the sole trader. The creditor appealed and in due course the case came before the Inner House.

[123] Lord Justice Clerk Inglis noted the facts just referred to, and he also observed (at p 361) that there had never been any winding up of the business of the sole trader, nor any realization of his estate for the purpose of paying off or otherwise securing the debts owed to his creditors. Having characterized the nature of the transaction, he considered the terms of the partnership contract and concluded that its purpose was to protect the sole trader's trade creditors. He expressed himself in terms which echoed the observations he made in *McKeand*, when he stated (at p 362):

> "As a matter of general principle, it appears absurd to hold that a person in trade, by taking his son into partnership, can do anything to injure the rights of his trade creditors; and the way in which the law interpones, in such a case, to prevent injustice, is by holding that where a new firm takes over the whole stock and business of a going concern, it is held also to take over the whole liabilities. In short, the business being taken over, and not wound up, the business and its liabilities must be held to go together. That is matter of general principle, which was established by the cases of M'Keand and Ridgeway, and I see nothing to take this case out of it."

[124] Lords Wood and Cowan also agreed with Lord Inglis' conclusion that the contract expressly provided for the liability of the successor for the debts of the former firm.

Lord Cowan, for example, observed that:

> "I concur in the principle given effect to in the cases of Ridgeway and McKeand, that in the general case where the whole estate of a company is given over to and taken possession of by a new concern or partnership, the business being continued on the same footing, the estate goes to the new company *suo onere* -that is, the liabilities go along with the effects. To sustain any other principle might result in the greatest injustice. This is the general presumption."

[125] Strictly, the *ratio* of this decision was on the basis of the partnership agreement. This feature brings it squarely within the agreement hypothesis. The result clearly flowed from the terms of the partnership contract. The expressions of equitable factors were *obiter* and may be explained by the insolvency context for these cases.

[126] The next several cases in the joint bundle of authorities illustrate the court's application of the agreement hypothesis, as applied to the particular facts of each case. In *Heddle's Executrix*, the court found on the facts that the successor partnership had assumed the whole business, including the liabilities of the predecessor entity. By contrast, in *Stephen's Trustee* the court gave effect to the express term of the partnership agreement that the new partnership was to have no concern for the debts of the predecessor entity.

[127] Turning to consider these two cases further, in *Heddle's Executrix*, in which the trustee of the successor firm rejected the claims of a creditor of the prior partnership, the Lord Ordinary allowed the creditors' claim, finding that the new firm expressly assumed responsibility for the debts of the old (due to having been entered as such in the books of the successor firm). It had, he said, "distinctly adopted" the debt of the old firm (see foot of p 702). The First Division of the Inner House, with Lord President Inglis in the chair, affirmed this decision. Lord Adam, who gave the principal opinion, undertook a review of the cases including those already referred to above. He began by observing that:

> "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. I think in all cases it is **a question of circumstances**, and that it must he 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." (Emphasis added.)

[128] This passage is wholly at odds with the import of Lord Inglis' rhetorical question in *McKeand* (expressing concern at the transfer of a business to a partnership for no consideration) and the similar comments he made in *Miller* v *Thorburn*. Lord Adams noted that the Lord Ordinary had referred to the cases of *Miller* and *McKeand* and found them indistinguishable. He also noted that the Lord Ordinary had quoted from Lord Justice Inglis' opinion in the Inner House in *McKeand* that "when parties take up a going business **in that way** and take the stock, they must also take the liabilities." (Emphasis added. The full text is set out at para [116], above). It is clear, however, that Lord Adam considered that to be potentially too broad a statement of the principle. He said:

> "We must therefore see what the 'that way' was to which your Lordship [ie Lord Inglis, who was also sitting with Lord Adam and Lord Shand in *Heddle's Executrix*] refers, and the facts on which your Lordship and the Court proceeded in that case are thus summarized by your Lordship (23 D. 853). [After quoting the passage set out above, at para [116], Lord Adam continued.] This case was before seven Judges, four of whom concurred with your Lordship. As I read the case, however, the two dissentient Judges—-Lords Colonsay and Curriehill—did not differ as to the law, but only as to facts. The former says—'If I could have, along with your Lordships, thrown aside the contract of copartnery, and have treated this as a case in which two persons were admitted into a share of a going business without any contract of copartnery, I should not have had much difficulty in concurring with your Lordships.'"

[129] Lord Adam explained that he dwelt on *McKeand* as he regarded it "the most authoritative". He also referred to Lord Inglis' observations in *Miller* (set above at para, [x]). Having done so, he observed,

> "In the present case I am of opinion that this general presumption does apply, and that there are no special circumstances not admitting of its application. But I think farther that there are facts and circumstances proved which clearly shew **that the new firm took over the whole liabilities of the old business**. In the first place, they paid the whole trade debts of the creditors of the business other than Mr Heddle. In the next place, they paid the bill accepted by Mrs Marwick for the balance of the debt due to the Union Bank, and for which Mr Heddle was liable to the bank. [After setting out more of the facts, he continued] […] In the next place, the firm distinctly admitted liability for the debt in question in the circular and state of affairs, issued by their authority to the creditors of the firm by Mr Thomson, when the trust-deed was

> granted, and lastly the manner in which the account of the firm against Mr Heddle was dealt with can only be explained on the ground that they knew that he had a contra account against them to a larger amount. On the whole matter I am of opinion that Mrs Heddle is entitled to rank for the amount of the debt now ascertained to have been due by Mrs Marwick at the date of the partnership **on the ground that the new firm assumed, adopted, and dealt with the debt as a debt of the firm**." (Emphasis added.)

[130] Lord Shand concurred, stating that he did not think that the case raised any general issue of law, as the evidence showed that the new firm had expressly adopted the debts of the old. In regard to what had been presented as "a general issue of law", Lord Shand expressed the view that "it **must always be a question of circumstances whether a new firm becomes liable for the obligations of the old**". (Emphasis added.) Lord Shand also made observations about what equity would require in circumstances where a person granted a universal disposition in favour of another. However, this is precisely the circumstance which Lord Adam excluded from his reformulation of the transmission presumption, and with which Lord President Inglis accepted.

[131] Lord President Inglis delivered the shortest opinion. He agreed with Lords Adam and Shand that the evidence had showed that the successor firm had taken over the liabilities of the predecessor such that it became liable for those debts. (This case is therefore another example of the agreement hypothesis.) However, he went out of his way to commend Lord Adam's analysis of *McKeand* and *Miller*. In other words, he specifically endorsed Lord Adam's narrower reading of his own comments in those cases. In relation to the perceived tension between those cases and *Nelmes*, he dismissed this as "more apparent than real". The tension may also be explained if, as I have suggested above, *Nelmes* was considering the distinct question of the liability of the incoming partner (as opposed to the successor firm).

[132] The next case illustrating the operation of the agreement principle is that of *Stephen's Trustee*, although the result was different. The Court again included Lord President Inglis, Lord Shand and Lord Adam. In *Stephen's Trustee*, a creditor lent money to a partnership on the security of certain heritable subjects. The firm used the loan monies to construct a building on the security subjects, part which it thereafter occupied. Several years later after a third partner was assumed a new partnership was formed, trading under the same name as the old partnership. The heritable subjects were not transferred. The new firm paid rent in respect of its occupation of the heritable subjects. The partnership contract stipulated that the successor partnership was not liable for the debts to or by the old firm and its affairs were conducted on that basis. The successor firm became bankrupt. The heritable creditor's claim to be ranked in the sequestration of the successor was rejected. The sheriff allowed the creditors' claim. The First Division reversed that decision and reinstated the deliverance of the trustee in sequestration. The heritable creditor relied on the cases of *Heddle* and *Mckeand* to contend that the successor had assumed the liabilities of the old, and that "there was never any real alteration in the firm, and that there was a mere continuity of the old firm's business" (Lord Shand quoted the averments at the foot of p 786.)

[133] Lord Shand gave the only reasoned opinion, with which the Lord President and Lord Adam concurred. Lord Shand approached matters on the basis that the pursuer required to show that the successor firm had assumed liability for the debts of the predecessor, ie consistent with the agreement hypothesis. He found that the creditor had failed to prove these averments. He noted, in particular, the fact that the debt owed to the creditor was not "in any sense a proper trade debt", as it was secured against the heritable property; that the security subjects and the debt had remained with the original firm; the provisions of the partnership contract expressly provided for the winding up of the old firm;

that the new firm was "started on an entirely new basis"; the partnership contract had excluded any liability of the successor for the debts of the predecessor; the stock had been taken over at valuation, for which the partners of the successor firm became liable to repay to the old; and the affairs of the new firm had been conducted consistently with the partnership agreement. In the light of all of these features, Lord Shand had "really great difficulty in seeing on what grounds the claimant can say that the debt due to her **was adopted**" by the successor partnership (emphasis added). In relation to a separate argument that the successor had not intimated the change to the creditor, Lord Shand gave this short shrift: "I know of no legal principle that supports that view. The failure to intimate to a creditor of the old firm that a new company had been formed cannot infer an undertaking of liability by the new [firm] for the old firm's debts, …..". Having regard to the terms of the partnership contract, Lord Shand said "that nothing short of a direct undertaking by deed or by dealing unequivocal in its character with the individual creditor could infer an undertaking of liability for a debt of the old firm". Accordingly, the case illustrates the court's findings, on the facts, of an agreement by the successor firm to assume liabilities for the debts owed by the predecessor.

[134] In the 90 years following *Stephen's Trustee*, the transmission presumption appeared to be considered in only two cases, those of *Thomson & Balfour* v *Boa & Son* 1936 SC 2 and *Miller* v *MacLeod* 1973 SC 172. Both illustrate the agreement hypothesis. Whatever is the precise formulation of the transmission presumption, the gratuitous universal disposition by a solvent person of his estate is not (or is no longer) sufficient to bring the transmission presumption into play. A striking feature is that, for all of the discussion of the transmission presumption, so far as the cases cited to me disclose, it has never been applied as the basis to establish liability. In each of the cases, the court considered the facts and circumstances, and

either decided that there was an agreement by the successor to assume liability or there was no agreement.

[135] Turning to the case of *Thomson & Balfour* v *Boa & Son* 1936 SC 2 (which concerned three actions heard concurrently), in broad terms the court affirmed the cases of *Miller*, *Heddle's Executrix*, and *McKeand*, and the application of the agreement hypothesis, but it found that the facts and circumstances of the three actions before it were distinguishable from those earlier cases. This was because the pursuers, on whom the onus rested, had failed to establish that the new firm had assumed the liabilities of its predecessor. The Lord President referred to the presumption, but he also noted (at p 10) that it must not be extended beyond the circumstances to which it properly applied and that circumstances might displace it (eg such as a capital contribution made by the incoming partner or if the terms of the new partnership agreement precluded the presumption). Lord Blackburn also distinguished the earlier cases on the basis that, unlike the facts of the case before him, in those earlier cases the assets had been taken over by the successor with no capital contribution. (He also appeared to identify the issue as concerning the liability of an incoming partner for the debts of the firm he was joining, ie one falling within section 17 of the 1890 Act.) Lord Morison considered that it had not been proved that the new partner assumed any liability for the debts of the old firm. Lord Fleming came to the same conclusion. He stated (at p 15) the general rule to be that "when a new firm is constituted by a person becoming a partner in the existing business, the firm is not liable for the debts of the old". The ground of decision in *McKeand* was that "the whole assets of a business had been transferred to a new firm without consideration given therefor, without provision being made for the liquidation of the liabilities, and without any capital being provided by the incoming partner. It was held in such circumstances, that the new firm must be deemed

to have accepted liability for the debts of the old business" (see p 16). On its facts, this case is a further example of the application of the agreement hypothesis.

[136] In *Miller* v *Macleod* 1973 SC 172, which concerned the liability of a firm of solicitors to account for the intromissions prior to the formation of the partnership, the court considered that the correct question was whether it had been shown "that the new firm agreed to adopt the old debts and become liable for them" (*per* Lord Justice Clerk Wheatley, at p 183). In other words, it is a further example of the application of the agreement hypothesis. In the course of reversing the sheriff, the Inner House made 46 additional findings in fact (see pp 173-176). Lord Wheatley reviewed the case law, but took care to note (at p 182) that "the facts of each case have to be examined and not merely the result, since the result is dependent on the facts, and each case may have its own special facts". Lord Kissen noted that one of the factors that may rebut a presumption that the new firm assumed the liabilities of the old, was the payment of a capital contribution by a new partner. He also noted that there may be other factors that may displace the presumption. On the expanded facts, the Inner House found that the firm had assumed the liability to account for pre-partnership intromissions.

[137] Finally, three recent Outer House cases were also cited in relation to the transmission presumption, namely *Ocra (Isle of Man) Ltd* v *Anite Scotland*, *Sim* v *Howat* and *Heather Capital*. In *Ocra* Lord Eassie reviewed several of the cases referred to above, and rejected the contention that the fact that the assets and goodwill of the predecessor business were acquired for valuable consideration in the case before him was irrelevant. Lord Eassie understood the presumption potentially to arise "only where the original trading entity passes its business to a technically new entity gratuitously and without any outward change in the form or way on which the business was carried on": see p 1235J-K. He noted the

observations of the Lord President in *Thomsons & Balfour* that the presumption must not be extended beyond its proper application.

[138] In *Sim* v *Howat* a dispute arose between the retiring partner, Sim, and his remaining partners, the defenders, McLaren and Howat. The parties had formed a new firm, upon the assumption of Ms McLaren in 1999. The predecessor, of which Mr Sim was the principle, was not an assenting employer under the scheme. Some time after Mr Sim retired, the Fund trustees (who are also the pursuers in this action) made a deficit claim against the firm. Mr Sim had not disclosed any such liability at the time that he negotiated the terms of his retirement. The remaining partners (the defenders in Mr Sim's action for payment) refused to pay Mr Sim any further instalments in respect of their purchase of his interest.

[139] It should be noted, as Mr Brown correctly observed, that there is no discussion of the transmission presumption in that case. All parties simply assumed that whatever liability there was in respect of the Fund deficit, it was valid and had transmitted to the new firm.

[140] In *Sim* Lord Hodge reviewed some of the cases. He also identified that where the third- party creditor "is able to enforce his claim against the new partnership…, both [the partnership] and the new partner…must have accepted liability either expressly or tacitly to meet his claim" (see para 29). (In other words, he applied the agreement hypothesis.) Whether there was acceptance depended on the facts and circumstances of each case. Lord Hodge noted the presumption and (in para 32) the kinds of factors that might be relevant to its application. Insofar as there was discussion of the mechanism of how the successor comes to be under a liability to the creditor of the predecessor, he tentatively suggested that this might be a unilateral undertaking to pay the third-party creditor's debts (see para 33). Notwithstanding those general comments, when it came to the application of the law to the facts of the case, Lord Hodge did not in fact rely on the presumption. Rather,

he found on the basis of four factors that the new partnership "assumed responsibility for the prior liabilities" of the former business. Only the first factor featured as one of the pre-conditions to the presumption, namely the continuity of the business. The other three factors were all rooted in the specific facts, including the failure to keep separate accounts for the new and old partnerships; that there was no apportionment of fees between work done by the former partnership and that done by the new one; and that the liabilities of the old partnership were not allocated between the old partnership and the new firm, but were paid by the new partnership out of its receipts. In other words, these particular facts led him to find that the new firm had assumed the liabilities of the old. The transmission presumption played no part in the decision he reached on the facts before him.

[141] The last of the recent cases is that of *Heather Capital Limited*, which is a very short decision concerned with a pleading point. Lord Woolman referred to a number of the cases and drew the proposition that the onus was on the pursuer to aver that the successor firm had expressly or tacitly agreed to take over the liabilities of the predecessor firm. As the pursuers in that case had no relevant averments, the case was (insofar as based on this issue) dismissed. The only point to note, for present purposes, is that the onus is on the pursuer to make relevant averments to bring the presumption into play.

The Scope of the Presumption as Disclosed in the Case Law

[142] As will be clear from the parties' submissions recorded above, Mr Brown made extensive reference to the cases and to the academic discussion of this issue. He helpfully identified the difficulties in these cases. He was explicit that it was not his role to resolve these or to reconcile the cases. As the party challenging the relevancy of the pursuers' pleadings he is, of course, correct. It was enough for Mr Brown's purposes to note that,

whatever the scope of the presumption, the pursuers' pleadings did not relevantly invoke it. As noted above, Mr Connal relied on the joint Law Commissions' formulation. As I have him noted, while he relied in his written notes on *Sim* v *Howat* and *Heather Capital*, in his oral submissions, he did not address these cases or the substance of Mr Brown's submissions on this issue.

[143] While I have not had the benefit of considered submissions from both parties, from the case law I have considered, the following may be said in respect of the scope of the transmission presumption. The starting point, in modern times, is that a successor firm is not liable for the debts of its predecessor entity: see *per* Lord Fleming in *Thompson* at p10 or Lord Hodge in *Sim* v *Howat* at paragraph 13. In any event, this follows from first principles and the consequence that a partnership has separate legal personality. The transmission presumption may potentially be brought into play if a trading entity (which may be a partnership or a sole trader) voluntarily transfers its whole business to a technically new entity (usually a partnership), without any outward change in the form or way in which the business was carried on, and without any contribution (eg by way of purchase by the successor entity or by capital contribution from an incoming partner) to the successor firm. While that may be sufficient *potentially* to bring the presumption into play, it is clear on the authorities that that circumstance alone will not suffice. It is in this context that Lord Adam's refinement (in *Heddle's Executrix*) of Lord Inglis' rhetorical question (in *McKeand* and echoed in *Miller* v *Thorburn*) is significant: see paragraphs [114], and [128] to [131], above. It is for this reason, having regard to binding Inner House authority, that the limited formulation by the Consultation Paper at paragraph 10.65 founded upon by Mr Connal will not suffice. (In any event, as I have endeavoured to show, at paras [103] to

[105], when all the relevant passages are considered in their Report, the joint Law Commissions' understanding of the case-law was more nuanced.)

[144] Insofar as there is a discernible legal ground underpinning the transmission presumption for allowing a creditors' claim, the common basis in the cases is where it can be shown that the successor agreed, expressly or by implication (eg the inclusion of the creditor's debt in the books of the successor), to assume liability for the debt owed by the first entity. On this approach, the rules about *jus quasetum tertio* – as set out in *Henderson* and which remains good law—is respected.

[145] On the case law one or more of the following factors may be sufficient to displace the presumption: (1) the transfer was not gratuitous; (2) a partner of the second entity contributed capital; (3) not all of the assets of the business were transferred; (3) there has been a winding up; (4) there has been due notice of the transfer; and (5) the nature of the business carried on by the successor entity is not sufficiently similar so as to satisfy the requirement of continuity.

[146] One of the curious features of the cases, is that the presumption played no part in the actual result, as, on the cases considered, the court found on the facts and circumstances that the successor entity agreed to assume responsibility for the liabilities of the predecessor. This is suggestive that the presumption may simply be an evidential one and, further, one that operates principally in an insolvency context. *Prima facie* the debt is owed by the first entity; the rules of *jus quaesitum tertio* preclude a direct action by the creditor against the successor (even if it agreed with the first entity to assume liability). In the cases where the claim against the successor succeeded, this was because the court found as a matter of the facts and circumstances that the successor agreed to or assumed the liabilities of its immediate predecessor. Another notable feature of the cases is that, in all but one of the

cases referred to, the matter came before the court on the creditors' appeal against the deliverance of a trustee in sequestration rejecting its claim. In that insolvency context, there may be more scope for the courts to have regard to equitable factors. The equitable hypothesis, as I have termed it, appears to come into play. (See *Ben Line* at paras 21 to 22, and especially the observations of Lord Inglis quoted at para 22.) Further, given that one of the purposes of a sequestration process is to adjudicate finally and definitively on all creditors' claims, and to realise all assets for that purpose, this would militate in favour of the court admitting a creditor's claim. To fail to do so would preclude any prospect of it being met from the assets which had been those of the first entity and which had been transferred to the second entity.

[147] This may also explain the significance of the winding up as precluding the operation of the presumption. The purpose of a winding up of a partnership is the same as that of a sequestration: it is a once and for all adjudication on all claims which are to be met from the estate of the partnership being wound up. Absent issues of fraud, that process is conclusive in respect of any creditor's claim. (In contrast to the position of a limited company, there is no mechanism to revive a dissolved firm in order to advance a claim against it or against an asset discovered post-dissolution: see *Balmer*). The absence of a mechanism to revive a dissolved partnership may be ameliorated in part by an action against the former partners *qua* cautioner for the firm's obligations. Once the winding up or sequestration is completed, however, it is not competent to make a claim in respect of a pre-winding up or pre-sequestration debt.

[148] For completeness, I should record that I reject as ill-founded the pursuers' proposition that a winding up did not affect the operation of the transmission presumption (see para [79], above). This is contradicted by case-law which is binding on me. It is also

inconsistent with the provisions for winding up in the 1890 Act, the significance of which was explained by Lord Reid in *Duncan* v *The MFV Marigold PD145* [2006] CSOH 128; 2006 SLT 975 at paragraphs 19 to 21.

[149] In the final analysis, what the case law on the presumption discloses is that it is always a question of facts and circumstances as to whether the successor has agreed to assume, and has assumed, the liabilities of its predecessor. That may be all that one can safely extrapolate from the case-law on the transmission presumption.

Consideration of the Pursuers' Case Based on the Presumption

[150] The factors the pursuers relied on for the transmission presumption were that: (1) there was an uninterrupted business practice (said to derive from the repeated use of the name of "Marshall Ross & Munro"); (2) there were no significant outward changes to the business as it transferred from one partnership to the next (but considered without reference to the factors put in issue by the defenders); (3) the creditors were entitled to assume that the entity with which they contracted remained the same; and (4) in the absence of evidence to the contrary, the iteration MRM17 inherited the liability of former iterations of the partnership. Factors (1) to (3) do not advance the pursuers' case beyond the limited formulation Mr Connal relies on from para 10.65 of the Consultation Paper. I have already explained why that formulation is not, in my view, a correct or complete reflection of the law concerning the transmission presumption.

[151] Returning to the pursuers' factors, in my view it is not enough to state that there was an uninterrupted business practice. It is not clear what is to be encompassed within a "business practice" (as distinct from the entities that conduct it?) or what "uninterrupted" means in the context of some 16 iterations subsequent to the original firm and the other

factors put in issue by the defenders. In any event, this first factor is an essentially neutral one. It is the transfer of the whole business, carrying with it the assets <u>and</u> liabilities, that is required to bring the presumption potentially into play. Further, it is not clear that the qualification of "substantial" in the pursuers' formulation of their second factor accords with the characterisation in the case law that there be no outward change. Even the combination of the first two factors is, in my view, not sufficient. The third factor is simply an unsupported assertion. Given the normal consequences of dissolution, all other matters being equal, what is the legal basis for the assertion that a creditor is entitled to assume that "the entity remained the same"? This contention is also inconsistent with the narrower formulation of the transmission presumption, discussed above (at paras [127] and [143]) and accepted by the joint Law Commissions (see the end of para [104], above.) There is a circularity to the pursuers' fourth factor: it is relied on as a factor to bring the transmission presumption into play, but it is also the result of the application of that presumption (on the pursuers' approach). The fourth factor also purports to reverse the onus and to require the defenders to show why the transmission presumption should not apply. What is clear from *Heather Capital* and cases like *Stephen's Trustee* is that the onus is on the pursuer to aver a relevant case to bring the presumption (whatever its precise scope) into play. It is not sufficient to aver the presumption in bare terms. All that is relied on is the asserted continuity of the business, seemingly based on claims made on the website of MRM17, with all prior iterations. There must be averments of facts specific to the case that engage the presumption and from which a court may infer that the successor did assume liability for the debts of the predecessor. This is, pre-eminently, a question of facts and circumstances. The underlying basis of the transmission presumption is, as the review of the cases above (at paras [103] to [141]) makes clear, a tacit or express agreement to assume the liabilities of the predecessor. The pursuers have no such averments.

[152] It follows from the foregoing that the pursuers' primary case, based on the transmission presumption, is fundamentally irrelevant. I come to this conclusion not only because Mr Connal's reliance on part of the formulation in the Consultation Paper of the joint Law Commissions is, in my view, wrong in law; but also because the pursuers fail to engage with or aver essential features of the presumption as articulated above. The pursuers do not aver that the whole business of each iteration was transferred to its immediate successor; they do not aver that these transfers were gratuitous; they do not aver that the successors (or the partners thereof) did not make any capital contribution. More fundamentally, given that the rationale underpinning the presumption is the need to prove that the successor agreed expressly or by implication to assume the liabilities of its predecessor, the pursuers do not plead this at all, much less do they plead facts and circumstances from which this could be inferred. This alone, in my view, is fatal to the pursuers' case. The fact that the pursuers rely on multiple transmissions over many years, and which is nowhere found in the case-law, makes it all the more incumbent upon them to aver this with sufficient particularity. Their general, omnibus averments are inadequate. This conclusion suffices to dispose of the case. It is nonetheless appropriate that I address the other arguments advanced.

The Averments of Payments from 2003

[153] There is reference in the pursuers' pleadings to payments having been made from about 2003, once the deficit in the Fund had arisen (or been identified) in 2003. (These averments appear to be directed to the transmission presumption, not prescription: see the

submission recorded at para [63], above.) Notwithstanding this, in my view, these averments do not assist the pursuers in their reliance on the transmission presumption. Payment by the immediate successor may be a relevant factor from which the court could infer the requisite agreement by it to meet the liabilities of its predecessor. Here, the last payment made by an assenting employer in respect of one of the Members was in February 1994. About a year later, the iteration that had made that payment (MRM14) was dissolved in about April 1995. The critical point, for the purposes of the operation of the presumption, is whether any payment was made by MRM15 and referable to the contingent liability of MRM14 to the Fund in respect of that part of any deficit attributable to the Members. However, there are no averments of any payment by MRM15. Indeed, having regard to the pursuers' other averments that the deficit did not arise until 2003, there could be no averments of payment at the material time by the immediate successor (MRM15) to the last assenting employer (MRM14) of the last Member to be employed. Given the pursuers' reliance on the transmission of all accrued liabilities from iteration to iteration, this break in the chain is fatal to the pursuers' case. Any payment that may have been made at a later point is, for the purposes of the transmission presumption, too late. These averments are irrelevant. Further, on the information the defenders provided, MRM15 subsisted until its dissolution on 31 March 2001. MRM16 was not formed until several months later, in about May 2001. This may be a further, fatal, break in the chain of transmission, not addressed by the pursuers.

The Character of the Obligation

[154] Ultimately, Mr Connal did not adhere to the suggestion in his Supplementary Note that the nature of the underlying obligation owed by an assenting employer to the Fund was

a unilateral promise. That left his suggestion of something "akin to an agreement" or a contractual obligation.

[155] Considered as a generality, the character of the obligation *inter se* an assenting employer to the scheme and the trustees is contractual. Contractual obligations where third parties enter into obligations with an entity (eg a club or a company) on the same terms as other third parties is not unknown in the law. An assenting employer joins the scheme and thereby becomes bound by its rules, including any valid amendment, much in the way that a person subscribing to the articles of association of a limited company is bound by those articles. I am fortified in this view by Lord Drummond Young's contract analysis (at para 19) of the scheme under consideration in *Ben Line Steamers Ltd*.

Was there a Contingent Obligation Owed by the Prior Iterations?

[156] So far as I understood Mr Connal's submission, it was simply that the inclusion of a power of amendment in the rules sufficed to create a contingent liability.

[157] Mr Brown made detailed submissions under reference to all three forms of the rules that were in force during the periods of employment of the Members by any prior iterations (see para [34], above), to the effect that, properly construed, those rules did not give rise to a contingent liability incumbent on the iterations subject to those rules.

[158] For his part, Mr Connal was reluctant to consider the terms of the rules at all. After being ordained to do so, he lodged a further document in advance of the third day of debate setting out the definitions of an assenting employer under the several sets of rules. In submissions, he did not refer to these. His approach appeared to be that the precise terms in which that power was expressed did not matter, which may explain why he made no

detailed submissions on the terms of the rules. He did not offer any analysis of the source of the contingent liability.

[159] The onus is on the pursuers to aver (or advance) a relevant case. I am not persuaded that the pursuers have discharged that onus in respect of the obligation (or obligations) relied upon for the purposes of the transmission presumption. The contention on behalf of the pursuers, that the existence of power of amendment is sufficient to bind all successors, is simply too broad to be accepted as a basis for the contingent liability the pursuers seek to rely on in this case. The pursuers' contention is not itself a recognised legal proposition. Nor did Mr Connal seek to support it by any reasoned argument or by reference to any authority supporting a contention in such broad terms.

[160] Whether or not a set of rules is habile to create a contingent liability is in my view assessed according to the terms of the rules, in particular the power of amendment and its proper scope, but potentially also having regard to other features of the scheme that might inform the proper interpretation of the rule conferring a power of amendment (eg whether or not it was a scheme capable of giving rise to a deficit, or whether or not an assenting employer was free to withdraw from the scheme and on what terms) or, possibly, what might be within the reasonable contemplation of the parties (either at the time that the rules containing that amendment power was assented to or at the time of dissolution of an iteration (and hence its withdrawal from the scheme)) as regards the purpose of providing for a power to amend a scheme. The case of *Ben Line* provides an example (at paras 14 to 18) of the kind of analysis one would expect of the scheme rules under consideration as well as consideration (at paras 19 to 20) of the important features of the scheme for the purpose of ascertaining whether or not a contingent liability arose under the scheme. Mr Connal offered no such analysis here.

[161] As the case law makes clear, the interpretation (and exercise) of amendment powers by trustees of pension schemes directed to addressing scheme deficits can raise complex issues. These potential complexities were passed over. To the extent that there was any submission, it was the reference to what was said to be the courts' supportive approach to fund trustees, albeit this was not advanced as a rule of interpretation.

[162] I accept Mr Brown's submissions about the terms of the rules, which I have set out above, at paragraph [34]. On the basis of the submissions presented to me, and to the extent that there was reference to the terms of some of the rules, I am persuaded that there was no contingent liability in respect of any deficit in the Fund capable of arising under the 1947, 1980 or 1990 Rules (prior to their substantial amendment in 1997), either at the point when each iteration joined the scheme or at the point of its presumed dissolution (applying *Hoey*) on its dissolution or otherwise ceasing to exist. Mr Connal did not contradict this analysis. He did not suggest that Mr Brown was incorrect in any way. He did not respond to Mr Brown's submissions. The sets of the rules Mr Brown analysed applied to all the iterations which were assenting employers in respect of the Members, ie that is up to and including iteration MRM14. There was no iteration of the first defender after this point (ie under the Current Rules or any version of the 1990 Rules as amended from 1997 onwards) who was an assenting employer in respect of any of the Members.

[163] The existence of a general power of amendment in a scheme which, at the material time, was incapable of generating a deficit and from which assenting employers could readily withdraw is, in my view, not sufficient to constitute a contingent liability incumbent upon those assenting employers for a deficit arising years later under an amended scheme. It respectfully seems to me that in order for a contingent liability to be capable of materialising, there must be some pre-existing legal relationship or nexus between the

parties that provides for and defines the scope of that obligation. While Mr Connal referred to Lord Drummond Young's definition of a contingent liability in *Ben Line* (which I accept and which was not disputed in this case), he did not seek to apply it to the rules or scheme in this case. The onus is on the pursuers to make relevant averments as to the source of the contingent liability. Mr Connal did not suggest otherwise, however, the pursuers' case was never developed beyond the assertion (without reference to the rules other than the existence of a power of amendment) that there was a contingent liability.

[164] Here, the obligation giving rise to the contingency has to be constituted before the dissolution of the partnership said to be subject to the contingency. Death, like dissolution, determines the contractual relationship. (It is for that reason that the pursuers' case is necessarily dependent on the operation of the transmission presumption, not the status of the subsequent iterations as assenting employers.) I accept Mr Brown's submission that if the Fund trustees had been asked at the point of the dissolution of each of these iterations to state the extent of its liabilities, it would simply have included the arrears due (if any) in respect of payments for any members it employed but would not include the kind of contingent liability for a deficit now claimed. (I note, parenthetically, that all three sets of the rules discussed by Mr Brown, and which were the rules applicable to the prior iterations of the first defender for as long as they were assenting employers of one or more of the Members, included a provision enabling an employer to terminate its obligations on giving six months' notice. This was without prejudice to the right of the Fund "to recover sums… **due at or before**" the notice of termination takes effect (emphasis added). This formulation is not readily habile to include a contingent liability.) Likewise, if the question had been posed as to what further liability (if any) was envisaged at that time, based on the then applicable scheme rules (including the fact that it was not then in deficit or a final salary

scheme), the answer would have been none. Accordingly, there was no contingent liability to be transmitted, even if the transmission presumption had been relevantly pled.

[165] Any amendment made in the Amended 1990 Rules comes too late, as none of the iterations after that point was an assenting employer in relation to the Members. Accordingly, no new or contingent liability was capable of being constituted or incurred by those iterations in respect of the by-then retired Members. These iterations may or may not have been assenting employers in respect of other members, but that is irrelevant to the question of ascertaining what obligation, if any, they had acquired or owed in respect of the Members and for which the pursuers now wish to make them liable.

No Relevant Averments that the Defenders were Assenting Employers

[166] I have already commented on the pursuers' averments that these defenders were assenting employers in respect of the Members: see paragraph [17], above. It seems to me legally illiterate to assert that the first defender was an assenting employer of the Members at a point in time before the first defender came into existence. The dissolution of each iteration determined the employment contract of any Member employed by it. Absent averments of some conduct or agreement establishing that the employment relationship was established anew with the successor iteration, the successor was not an assenting employer in respect of that Member. In any event, upon the dissolution of the last iteration to employ the last of the Members to retire (which was, at the latest, in February 1994), *prima facie* there ceased to be an assenting employer in respect of the Members.

[167] Turning to the position of the second and third defenders, if the second or third defender were partners in a prior iteration that may have employed one or more of the Members, that does not thereby render them *qua* individuals assenting employers of the

Members. The absence of relevant averments that the defenders were assenting employers in respect of the Members may not have adversely affected the pursuers' position, given that the logic of the pursuers' primary case is that the contingent obligations of prior iterations *qua* assenting employers (under the rules and the scheme as they then were) has transmitted to the first defender. That contention does not, it seems to me, depend on establishing the status of the first defender as an assenting employer. However, as this was not fully argued, I express no concluded view.

Prescription

[168] I have already determined that there was no contingent liability capable of arising under the scheme and owed by the prior iterations MRM1 to MRM15 (ie to 31 March 2001). Accordingly, there was no obligation susceptible to transmission, even if there had been relevant averments of the transmission presumption. In light of the foregoing, I can deal with the issue of prescription briefly.

[169] As the scheme is a contractual one, the quinquennium applies. For the purpose of applying the five-year negative prescription, it would have been necessary to identify the *terminus a quo* or the point in time from which prescription would run. This would entail further consideration of the contingent liability in question. In *Ben Line*, Lord Drummond Young reviewed the authorities for the purpose of defining a contingent liability. After doing so, he observed:

> "Erskine, following Roman law, treats the *existence* of the obligation as dependent on the occurrence of the uncertain event; Gloag, by contrast, treats the obligation as existing from the moment when it is entered into but regards its *enforceability* as dependent on the existence of the uncertain event. I do not think that there is any practical difference between these formulations, but at a conceptual level Gloag's may be preferable, because it makes clear that a contingent obligation involves an existing legal relationship, even if the outcome of that relationship is not clear."

While the distinction may not have mattered for the case before him, it may be highly relevant for the purpose of determining the *terminus a quo* for the running of prescription. Like Lord Drummond Young, I am also attracted to Gloag's analysis, for the reason he identified at the end of the passage just quoted. However, I have heard no submissions on this point.

[170] Returning to the submissions I have heard, it cannot be correct, as the pursuers contend (see the quotation from their Supplementary Note, quoted at para [17], above), that the obligations of "the defenders" became enforceable when each Member joined the scheme. Even assuming the terms of the scheme were such as to give rise to a contingent liability, until the contingency occurred that obligation was not prestable. In like manner, one could not claim under a buildings insurance policy against the insurers unless and until an insured risk occurred, causing recoverable loss under the policy. If the pursuers' contention were accepted, *prima facie* their claim was extinguished by the long negative prescription decades ago. It was not suggested that the transmission presumption overcame prescription or had the effect of establishing anew the obligation transmitted. Not having heard argument on this point, I reserve my opinion as to the *terminus a quo* for the purpose of prescription of a contingent liability.

[171] I accept Mr Brown's submission that once a party puts prescription in issue, the other party has the onus of establishing that the obligation on which the action rests has not prescribed. Mr Connal did not demur from that proposition. In my view, the pursuers have failed to discharge this onus. The Supplementary Submission submitted by the pursuers to obtemper Lord Doherty's interlocutor is inadequate for this purpose. In his oral submissions Mr Connal did not address the issue of prescription at all. The pursuers'

pleadings are wholly inadequate. The averment of payments, referred to above, were seemingly made to support the pursuers' reliance on the transmission presumption, and were not related to the issue of prescription. There is no averment, for example, that this constituted a relevant acknowledgement. Even on the pursuers' approach there was no contingent liability until some point in 2003. Payment was made, it is said, in 2008. Yet the pursuers do not make the necessary averments that these payment were prior to the expiry of the five-year negative prescription. The pursuers' averments on this issue are irrelevant.

The Regularity Presumption

[172] In my view, this presumption is more apposite to proof than a debate. I would not have upheld the defenders' arguments on this issue, but would have left these pleadings to go to a proof before answer, had the case otherwise merited it.

The Pursuers' Contention that there is a Special Rule of Interpretation Applied to Pension Schemes

[173] In both his written and oral submissions, Mr Connal invoked certain judicial observations as support for a special or supportive rule that he said was applied by the courts in consideration of the interpretation of pension schemes. In particular, Mr Connal complained that the defenders were relying on "unduly technical legal arguments" to resist the sums claimed and, further that on the recent case law in relation to occupational pension schemes, the courts were not attracted to an "overly technical interpretation" of scheme arrangements. Reference was made to *Pattison & Sim* at paragraph 18. In oral submissions, Mr Connal drew back from suggesting that there was any rule, so much as an "approach" endorsed by the Inner House: see para 9 of the Summary Principles for the Pursuers. These observations are in my view directed to questions of interpretation of pension schemes. On

that question, I respectfully agree with the observations of Arden LJ in *British Airways Pension Trustees Limited* v *British Airways Plc* [2002] EWCA Civ 672 (cited at para 40 of *Everard*), and especially her observation that there is no philosophical predisposition adopted by the court in that interpretive exercise. However, having regard to the way that this case was presented, no question of interpretation arises. Rather, the pursuers' case was critically dependent upon the accumulation of the liabilities of some of the prior iterations of MRM17 and, further, the transmission of all such liabilities from each of the prior iterations to MRM17. In any event, I am not persuaded that the comments he relied on support such an approach or would displace the normal rules of interpretation or pleading. However sympathetic the approach, it does not relieve the pursuers of the obligation to plead a relevant case in law. The pursuers have failed to do so. Their action falls to be dismissed.

[174] I shall put the case out By Order to discuss the terms of the interlocutor and any ancillary matters.