SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2021] SC PER 41

PER-CA28-18

JUDGMENT OF SHERIFF L DRUMMOND QC

in the cause

(FIRST) ROBERT JAMES FRANKS, (SECOND) JAMES YUK MAN FUNG, (THIRD) VALY OSSMAN, (FOURTH) QIANWEN ZHU, (FIFTH) MOHAMMED FAWAZ OSSMAN, (SIXTH) MOHOMAD SHAFI SACOOR and SAMEERA NIAZ SACOOR, (SEVENTH) MHAIRI CHRISTINA CORMACK and (EIGHTH) ZHI HAO CHEN

Pursuers

against

PETER INGLIS RIAS RIBA

Defender

Pursuer: MacColl QC; Thorntons, solicitors
Defender: Manson, Advocate; Kennedys, solicitors

21 May 2021

Interlocutor:

The Sheriff, having resumed consideration of the cause, sustains the first, second and third pleas in law for the defender; and assoilzies the defender on the basis that the purported obligations founded on by the pursuers have been extinguished by the operation of prescription; sanctions the cause as suitable for the employment of counsel and reserves expenses meantime.

Background

[1] This is an action brought by the pursuers alleging professional negligence of the defender who is an architect. The pursuers are owners of 8 flats at [ ] Dundee ("the flats"). The flats were built in 2012 and 2013. The defender was engaged to provide architectural services to the developer of the flats in connection with the design and supervision of their construction. The pursuers claim that the flats are affected by a number of defects. They sue the defender as architect in delict. The costs of remedial works, aside from decant costs and professional fees is averred as £2,684,009.18 with each pursuer to bear a proportionate share of that figure. The pursuers accept there is no contract between the defender and the pursuers. Their claim in delict is founded upon professional consultant's certificates (PCC's) provided by the defender. The case came before me for debate on 22 February 2021 on the defender's preliminary pleas.

The defender's submissions

[2] The defender invited the court to sustain the first, second and third pleas in law for the defender and assoilzie the defender on the basis that the action has prescribed or dismiss the action. The pursuers should be found jointly and severally liable to the defender in the expenses of the action. The defender submitted that the pursuers' case is irrelevant, that the claims have prescribed and that material parts of the pleadings are lacking in specification.

The scope of the duty

[3] The pursuers base their case on the duties owed by the defender under the PCCs. However, they make averments which go beyond the scope of any duty set out in the PCCs. The pursuers aver in article 5 of condescendence that "By way of the PCCs, the defender

undertook and extended to each of the pursuers a delictual duty that, acting to the standard reasonably expected of an architect of ordinary competence, he had carried out the tasks set out in the PCCs". Accordingly, the scope of the defender's duty is expressly limited by the tasks in the PCCs. However, the pursuers complain about the performance by the defender of his design services and related obligations which were not owed to the pursuers. No mention is made of design services in the PCCs. The pursuers' averments in article 10 which allege that the defender has breached the certificates as a result of a failure to design the construction of the flats competently are irrelevant. The PCCs relate entirely to the construction phase and what the defender says he observed during that phase. The pursuers' averments under the headings "provision of construction information" where the pursuers complain that the defender made certain omissions and failures in preparing the information for the contractor also relate to the defender's design activities of which no mention is made in the PCCs.

Reliance

[4] More fundamentally the defender submitted that the pursuers have failed to explain the circumstances in which they came to rely on the PCCs when acquiring their interests in the flats. The pursuers' case is pled on the basis that the defender misrepresented the position on the construction of the properties to the pursuers when he issued the PCCs to them. But issuance is not enough and in order for the defender to be liable, the pursuers must be able to prove that they had actual knowledge of the terms of the PCCs and actually relied upon them when purchasing their properties (*NRAM Ltd* v *Steel* 2018 SC (UKSC) 141; *Hunt* v *Optima (Cambridge) Ltd* [2014] PNLR 726; *Hughes* v *Turning Point Scotland* 2019 SLT 651). The pleadings fail to make any such averments. In *Hunt* v *Optima (Cambridge) Ltd*

the claimants failed in their claim in similar circumstances to the present case because they could not show that they had relied on the certificates until after they had purchased their properties. This was despite evidence showing that the purchasers were told they would be receiving the certificates.

[5] The defender submitted that in the present case the pursuers had relevant averments about a misrepresentation and foreseeability of reliance. However, they do not aver how and when they relied on the certificates. Some of the pursuers, the third, seventh and eighth, cannot have relied on the certificates. The pursuers' averment at article 5 that they "relied upon the PCCS and the certification of a state of affairs therein" does not explain the circumstances in which they came to rely on them. A number of the pursuers acquired their properties much later that the date of the certificates and the PCCs are not expressly addressed to them. A number of the pursuers concluded the missives before the PCCs had been exhibited. Not one of the pursuers offers to prove that they even ever saw the certificates and considered them before concluding their missives. Some of the pursuers rely on the agency of their solicitors but there are no averments that the solicitors told them anything about the certificates. The pursuers require to give fair notice of the nature of their case. It is prejudicial for the defenders to hear for the first time about the circumstances of reliance at proof. Even in a commercial action the pursuers are still obliged to give fair notice of the essential elements of their claim. *Heather Capital Limited (In Liquidation)* v *Levy McRae* 2017 SLT 376 per Lord Glennie at paragraph 100.

[6] Furthermore, the pursuers case on reliance is contradictory. They aver at article 12 of condescendence that as a consequence of believing what was in the PCCs they "were induced to refrain from making a relevant claim in relation to the relevant obligations until they instructed and received expert opinion in May 2016 which undermined their erroneous

belief". However, the pursuers also aver that the third, seventh, and eighth pursuers concluded their purchases between December 2016 and May 2017, after that expert opinion was received. Those pursuers cannot have relied on the statements in the PCCs if they knew at that time there might be something wrong with them.

Prescription

[7] The defender further submitted that the obligations founded upon by the pursuers have prescribed. The effect of section 6, 9 and 10 of the Prescription and Limitation (Scotland) Act 1973 is to extinguish an obligation to make reparation if it has subsisted for a continuous period of 5 years after "the appropriate date" without the pursuer having made a relevant claim or the subsistence of the obligation having been relevantly acknowledged by the debtor. The "appropriate date" is the date when the obligation relied upon became enforceable (section 11). An obligation to make reparation becomes enforceable when a legal wrong (*injuria*) concurs with the loss arising from that legal wrong (*damnum*) *Dunlop* v *McGowans* 1980 SC (HL) 81. The prescriptive clock begins to tick when the pursuer is actually or constructively aware of the occurrence of negligence whether or not he is aware of the cause (*David T Morrison & Co Ltd* v *ICL Plastics Ltd* 2014 SC (UKSC) 222 at p228, 230 and 233). The phrase "loss, injury or damage" in section 11 is a reference to physical damage or financial loss presented as an objective fact (*Gordon's Trustees v Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287, per Lord Hodge at paragraph 21). Section 11 does not postpone the start of the prescriptive period until such time as the pursuer is actually or constructively aware that he has suffered detriment in the sense that "something has gone awry" or "made him poorer or disadvantaged" (*Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* at paragraph 21-22.

[8] Although the Scottish Parliament has amended the 1973 Act to mitigate the impact of this interpretation, it nonetheless remains the law and is not necessarily harsh (Lord Doherty in *Khosrowpour* v *Taylor* [2018] CSOH 64 at paragraph 32.)

[9] In this case the proceedings were served upon the defender on 4 January 2019. The five-year period had completed uninterrupted before these proceedings were served. That is because *damnum* and *injuria* occurred more than 5 years before 4 January 2019. Once a defender puts prescription in issue it is for the pursuer to plead and prove that the claim has not prescribed (*Pelagic Freezing Ltd* v *Lovie Construction Ltd* [2010] CSOH 145 per Lord Menzies at paragraphs 86 and 94; Johnston, Prescription and Limitation (2nd edition) paragraph 6.107.) On the pursuers' pleadings the *injuria* was the issuance of the PCCs which is when the misrepresentation was made. That was on 7 January 2013.

[10] The key question thereafter is when loss was sustained. The defender submitted that was clearly on the date when the properties were purchased. The first set of purchasers concluded missives and completed their transactions more than 5 years ago. It is a matter of agreement that any subsequent purchaser only acquired whatever part of the prescriptive period was left to run, assuming they relied on the PCCs. That the completion of the first purchase constituted loss is supported by *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* where Lord Hodge at paragraph 19 gave the specific example of a person purchasing a property on negligent advice when he was illustrating situations of knowledge and loss for the purposes of section 11. There is no material distinction between a pursuer who relies on the negligent advice of a surveyor, and a pursuer who relies on the negligent statement of an architect, when purchasing a property. That is consistent with a long line of authority: *Beard* v *Beveridge Herd and Sandilands WS* 1990 SLT 609 at p6111 I-K; *Jackson* v *Clydesdale Bank*

plc 2003 SLT 273; *Khosrowpour* v *Taylor at paragraphs 26, 28 and 30; Kennedy* v *Royal Bank of Scotland* 2019 SC 168.

[11] The pursuers offer three answers to the pleas of prescription. They argue first that the PCCs provide that the defender is to be liable for a period of 6 years and that the action was raised within the 6-year period. Section 13 of the 1973 Act prohibits "agreements" that purport to provide that the prescription regime shall not have effect. The pursuers appear to be submitting that the defender agreed or undertook to remain liable for the 6-year period. If that is an offer made by the defender, then the pursuers seek to accept it in their pleadings. The pursuers are therefore attempting to construct an agreement out of it. But the intent of section 13 is to strike at any such agreement which aims to alter the statutory scheme of prescription which extinguishes rights after 5 years and promotes certainty between the parties. Prescription has operated independently of what is in the certificates and the pursuers averments should be excluded from probation.

[12] Second, the pursuers argue under s11(3) that there was no awareness of loss at a time when the first purchases were made. Section 11(3) operates to postpone the start of the prescriptive period until the pursuers were actually aware of the loss. That argument is without merit if the ratio of *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* is applied. Knowledge is to be tested objectively and with the benefit of hindsight. The pursuers were aware of loss in the form of committing themselves to the purchase of the defective property. That is so even if they did not know it was defective at the time. Further support for that can be found in *Midlothian Council* v *Raeburn Drilling and Geotechnical Ltd* 2019 SLT 1327. The decision in *WPH Developments Ltd* v *Young and Gault LLP (In Liquidation)* 2020 SLT (Sh Ct) 185 where Sheriff Reid held that the fact that the pursuer did not have knowledge of the loss could postpone the operation of prescription under s11(3), was plainly

wrong. The judgment is under appeal and has been disapproved of in the Outer House (*Glasgow City Council* v *VFS Financial Services Ltd and others* 2020 SLT 1227 per Lord Tyre at paragraphs 98-105.)

[13] Third, the pursuers contend that under s6(4) of the 1973 Act periods of time should be left out of the operation of the prescriptive period if the pursuers can prove that they were induced into refraining from suing the defender by an error brought about by his words or conduct. However, the pursuers do not have a relevant basis on which to prove that they ever saw or relied upon the PCCs. Nor do they have any averments specifying the period of time the court is asked to leave out of account. In any event the third, seventh and ninth pursuers cannot have been induced as they were already aware of the problems with the PCCs and flats when they purchased them. The pursuers cannot in any event rely on the 6-year period in a certificate as being an inducement. That is an ineffective provision incapable of being founded on as a matter of law.

The pursuers' submissions

[14] The pursuers invited the court to appoint the case to a proof before answer on the pleadings as they stand, reserving all questions of expenses until the substantive issues have been determined. As is specified in articles 4 and 9 of the pleadings and the report of Mr Gibb, there are significant defects that have now appeared in the building comprising the flats. The pursuers are offering to prove that the defender breached his delictual duties and failed to use the skill and care reasonably to be expected of an architect of ordinary competence in (a) checking at the development site (i) progress; (ii) conformity with drawings approved under building regulations; and (iii) conformity with drawings and instructions issued under the building contract, and (b) certifying (so far as could be

determined by periodic visual inspection) that the property had generally been considered to be (i) a satisfactory standard and (ii) in compliance with the drawings approved under the budding regulations. The pursuers offer to prove that these breaches of duty caused each of the pursuer's loss. The pursuers offer to prove that, had the defender not issued the PCCs the pursuers would not have acquired the properties which are in need of remedial works and would not have suffered the distress and inconvenience they have all suffered. The pursuers bought their properties at a price that proceeded on the basis that remedial works were not necessary. The pursuers offer to prove that the sums claimed by way of the cost of remedial work are a reasonable estimate of the loss suffered by each pursuer. It cannot be said that the pursuers are bound to fail (*Jamieson v Jamieson* 1952 (HL) 44).

Reliance

[15] The pursuers offer to prove that the defender, in issuing the PCCs assumed an ongoing delictual liability to the purchasers of the properties for 6 years. The assumption of responsibility is plain from the clear terms of the PCCs. The complaint about a lack of specification comes to no more than a complaint that the pursuers have not pled sufficient evidence, something which the pursuers are not required to do at all. That is so particularly in the context of a commercial action where the courts have repeatedly cautioned against the need or desirability of extended pleadings *Marine and Offshore (Scotland) Limited* v *Hill* 2018 SLT 239 per the Lord President at paragraph 16; Practice Note 1 of 2020 of the Sheriffdom of Tayside, Central and Fife at paragraph 10.

[16] In any event the pursuers have pled when and how they obtained knowledge of the PCCs and how each came to rely on them, particularly in Article 5 sub-paragraphs (a) to (h). The defender's suggestion that that the knowledge and reliance has not arisen where the

conveyancing transaction (including consideration of the PCCs) was in the hands of agents, is without merit. If there were any substance to that criticism, it would be impossible for a duty of care ever to arise by way of an assumption of responsibility in relation to any company or LLP. The quantification of loss is a jury question to be determined on the facts. Specification of the pursuers' losses has now been provided.

The scope of the duty

[17] The court should reject the defender's argument that the defender's design obligations are outwith the scope of the obligations owed to the pursuers under the PCCs. The pursuers relied on paragraphs 3 and 7 of the PCCs where the defender represented that so far as could be determined by each periodic visual inspection, the property has been generally constructed (a) to a satisfactory standard and (b) in general compliance with the drawings approved under the building regulations. In paragraph 7 the defender stated "I confirm that I have appropriate experience in the design and/or monitoring of the construction or conversion of residential buildings."

[18] The defender who is, and was known to be, the designer of the works, has certified that the flats have been generally constructed to a satisfactory standard. A property that has been constructed to a design that fails to meet the standard of skill and care reasonably to be expected of an architect of ordinary competence is not a property that has been constructed to a satisfactory standard. Similarly, a property constructed in accordance with drawings that were not prepared to the standard of an architect of ordinary competence is not a property that has been constructed to a satisfactory standard. Accordingly, where the certifying professional is also the person who has carried out the design, the provisions of clause 3 of the PCCs impose duties which extend to matters of design. Clause 7 makes that

further clear. Were the defender's suggestion that there is no design responsibility on his part correct, the inclusion of clause 7 would make no sense. The pursuers' construction gives meaning and content to this provision. The pursuers' averments about the scope of the duty are relevant and should be permitted to proceed to probation.

Prescription

[19] The pursuers further submitted that the defender's contention that any obligation owed by him to the pursuers has been extinguished by operation of prescription should not be upheld. The pursuers' claims were all brought within the six-year time frame within which the defender had stated in the PCCs that he would be liable to first time and subsequent purchasers. Section 13(1) of the 1973 Act provides applies only to an "agreement" (i.e. a contract or bargain between two or more parties). The PCCs are not "agreements". Indeed, the defender is very clear to maintain that he is not in any contractual relationship with any of the pursuers. In these circumstances, on the defender's own case, section 13(1) is not available to the defender to avoid his liability. Rather, the plain provisions of clause 6 of each of the PCCs fall to be enforced. The defender has undertaken an ongoing delictual liability that is to last for a period of six years (and to be enforceable against him for that period).

[20] In any event, the pursuers offer to prove a relevant case which would postpone, by operation of section 6(4) of the 1973 Act, the emergence of any obligation on the part of the defender to make reparation to the pursuers until May 2016. The pursuers plead that the provisions of the PCCs induced an error in them (as to the compliance of the building with the standards set out in that certificate and the want of any breach by the defender of his obligations) which pertained until they received contrary professional advice in May 2016.

The pursuers further offer to prove that they could not, acting with reasonable diligence, have discovered that error before that time. All relevant dates have been pled in respect of each of the pursuers. This is a relevant case for inquiry as to whether or not the provisions of section 6(4) of the 1973 Act have been met.

[21] Further, the pursuers rely on section 11(3) of the 1973 Act. The pursuers offer to prove that they were not aware (and could not with reasonable diligence have been aware) of any loss prior to May 2016. The fact that monies had been spent on the purchase of the properties (and that this expenditure was known) is neither here nor there. Notwithstanding the (non-binding) views expressed in the Outer House case of *Midlothian Council* v *Raeburn Drilling and Geotechnical Ltd* [2019] CSOH 29, it is submitted that section 11(3) correctly construed postpones the commencement of the prescriptive period until there is knowledge that the pursuers (or their predecessors in title) had acquired a property which would require remedial works. The pursuers' claims are not claims for wasted expenditure as was the case in *Midlothian Council* v *Raeburn Drilling and Geotechnical Ltd* nor is there any claim advanced which seeks recovery of legal or other professional costs, as was the case in *Gordon's Trustees* v *Campbell Riddell Breeze Paterson* LLP. Rather this is straightforward case of a claim being advanced for the costs of repair to latent defects which only emerged within the period of five years of the action being commenced. Section 11(3) is, in these circumstances, relevantly pled. The issue is one best addressed once evidence has been heard. There is no proper basis upon which the Court can either grant decree of absolvitor or decree of dismissal. A proof before answer should be allowed.

Decision

The scope of the duty

[22] The defender issued PCCs dated 7 January 2013 in the following terms:

> "I certify that:
>
> 1. I have visited the site at appropriate periods from the commencement of construction to the current stage to check generally (a) progress, and (b) conformity with drawings approved under building regulations, and (c) conformity with drawings/instructions issued under the building contract.
>
> 2. At the stage of my last inspection on 7.01.13 the property had reached the stage of practical completion.
>
> 3. So far as could be determined by each periodic visual inspection, the property has been generally constructed: (a) to a satisfactory standard, and (b) in general compliance with the drawings approved under the building regulations.
>
> 4. I was originally retained by Valmarshi Properties Limited who is the builder/developer in this case.
>
> 5. I am aware this certificate is being relied upon by the first purchaser [name of first purchaser]…
>
> 6. I confirm that I will remain liable for a period of six years from the date of this certificate. Such liability will be to the first purchasers and their lenders and upon each sale of the property the remaining period shall be transferred to the subsequent purchasers and their lenders.
>
> 7. I confirm that I have appropriate experience in the design and/or monitoring of the construction or conversation of residential buildings.
> Professional Consultant – Peter Inglis RIAS, RIBA
> Professional Indemnity Insurer – RIASIS
>
> 8. The box below shows the minimum amount of professional indemnity insurance the consultant will keep in force to cover his liabilities under this certificate (£2,000,000.00) for any one claim or series of claims arising out of one event. "

[23] In terms of paragraph 3, the architect certifies that, so far as could be determined by each periodic visual inspection, **the property has been generally constructed: (a) to a satisfactory standard, and (b) in general compliance with the drawings approved under**

the building regulations. (emphasis added). At article 4 of condescendence the pursuers aver that Mr Gibb, chartered architect, attended the site on 10 December 2018 and "observed significant issues relating to how the building has been constructed". The pursuers further aver that "Some of these flow from errors in the building's design. Others relate to the construction methods adopted by the contractor, omissions by the contractor, matters of workmanship and non-conformity with the defender's drawings.". In article 10 of condescendence they state that the defender made certain design failures and failed to design the building in conformity with normal and competent practice or in accordance with Building Regulations and the Building warrant. The pursuers also aver, in article 10, that the defender provided insufficient information to ensure that a contractor would construct the development in accordance with the Building Regulations and good building practice.

[24] The defender argues these averments are irrelevant as outwith the scope of the PCCs because these relate to the defender's design services and not the construction phase of the development. The defender has only certified that the properties have been *constructed* to a satisfactory standard and in accordance with the approved drawings. I accept that the plain terms of the certificate are to certify that the building has been constructed to a certain standard. However, it is not obvious to me that the defects complained about by the pursuers listed above would fall outwith that warranty. To take an example, the pursuers offer to prove that the ground floor of the building is formed from a curved wall but is drawn by the defender as a straight line meaning that the setting out of the entire building is inaccurate and the roof design compromised. If the pursuers can prove that there has been such an error in the design and that this has resulted in defects in the roof when constructed, then the pursuers may be able to prove that the building has not therefore been constructed to a satisfactory standard. The averments that the defender failed to provide sufficient

information to ensure the building is constructed to a satisfactory standard are also potentially relevant if the pursuers can prove that because of a lack of such information, the building was not constructed to a satisfactory standard. Of course, the pursuers would also require to show that the defects could have been determined by each periodical inspection as is set out in paragraph 3. That interpretation seems to me to be consistent with paragraph 7 of the PCCs where the architect has narrated that he has the appropriate design experience. It is a reasonable inference that his design experience was included as relevant to the certification he was providing. Accordingly, I am not satisfied that the pursuers' averments in condescendence 10 as criticised by the defender are irrelevant and I would, had I not reached the views I have in relation to the other issues in this debate, have allowed those averments to proceed to proof.

Reliance

[25] I broadly agree with the defender's submissions on this issue as set out in full above. In the leading Scottish case of *NRAM Ltd* v *Steel* 2018 SC (UKSC) 141 Lord Wilson JSC in a discussion on the law governing negligent misrepresentation by professionals identified that the foundation of the liability is the concept of assumption of responsibility by the representor to the representee (paragraphs 19-22 and 24); that it is essential that the representee reasonably relied upon the representation (paragraph 19); that it essential that the representor could reasonably have foreseen that the representee would so rely (paragraph 23)and that the two foregoing enquiries are essentially distinct but feed into one another. In *Hughes* v *Turning Point Scotland* 2019 SLT 651 Lord Clark, at paragraph 84, referring to *NRAM Ltd* v *Steel*, makes it clear that it is essential for the representee reasonably to have relied upon the misrepresentation.

[26] Reliance was explored by the English Court of Appeal in *Hunt* v *Optima (Cambridge) Ltd*, a case based on negligent misrepresentation in where the facts show significant similarities to the present case. The purchasers of flats brought claims in negligence against the second defendants contending that the architect's certificates amounted to negligent misstatement and that the defendants owed the claimants a duty of care in negligence to carry out the services referred to in the certificates with reasonable skill and care. Before exchange of contracts, the purchasers were told that they would be provided with an architect's certificate on completion of the purchase. The claimants succeeded at first instance but the second defendants appealed the decision insofar as it related to the claimants who had received their certificates after completion of purchase. The appeal was allowed, the court holding that in order to recover damages for negligent misstatement, the claimant had to show that, after the statement was made, he relied on the statement and that the statement acted on him in such a way that he suffered loss on account of his reliance upon it. Where the architect's certificate had not existed at the time when the purchaser committed to buy the property, it could not be said that the purchaser had relied on the statement. This was despite the fact that the claimants themselves had been told that they would receive the certificates at the time of purchase and the claimant's solicitors were sent the draft certificates before the purchase. However, as explained by Clark LJ at paragraph 55, the claimants could not be considered to have relied on the statements in committing themselves to the purchase because the statements did not exist at the time. At best they could be said to have relied on an understanding that there was a certificate in place or that they would receive it on or after completion. However, since reliance must follow representation and cannot be retrospective, they could not establish that they had

relied on the certificates to purchase the properties. Reliance on the certificate cannot be present before the certificate comes into existence. (paragraph 67).

[27] In contrast to the facts in *Hunt* v *Optima (Cambridge) Ltd*, in this case, certificates were in existence from 7 January 2013 before any of the purchasers completed their purchases. However also in contrast to *Hunt*, there are no averments that the pursuers themselves were ever told of the existence of the certificates or had any understanding or knowledge of what was contained within them. The general averment at article 5 that "All of the pursuers have relied upon the PCCs and the certification of a state of affairs therein" does not, in my view, provide any clarity about the circumstances in which they came to know about and rely on the certificates. However, more specific averments are made in relation to each of the pursuer's knowledge and reliance on the certificates in article 5 paragraphs (a) to (g) which I summarise in the following table:

Pursuer and property no	Person named on the certificate	Knowledge of the certificate as averred	Date of certificate	Date of settlement of transaction
First – no 92	First pursuer	Certificate exhibited to solicitors on 11 January 2013 **before missives** concluded on 30 January 2013.	7 January 2013	30 January 2013
Second – no 94	Second pursuer	Certificate exhibited to solicitors on 28 June 2013 **after missives** concluded on 18 June 2013.	7 January 2013	28 June 2013

Third – no 96	Robert Spencer Franks – not a party to the action	Certificate exhibited to solicitors on 17 January 2013 **after missives** concluded on 20 December 2016.	7 January 2013	19 January 2017
Fourth – no 98	Xiu Yun Chen – not a party	**No missives.** No solicitors involved.	7 January 2013	13 October 2015
Fifth – no 100	Fifth pursuer	Certificate exhibited to solicitors on 8 May 2013 **before missives** concluded on 8 May 2013.	7 January 2013	9 May 2013
Sixth – no 102	Sameer Sacoor-second named sixth pursuer	Certificate exhibited to solicitors for second named sixth pursuer on 7 March 2013 **before missives** concluded on 12 March 2013.	7 January 2013	Transaction with second named sixth pursuer settled 13 March 2013. Title transferred into joint names of first and second named sixth pursuers on an unspecified date.
Seventh – no 104	Andrew and Helena	Certificate exhibited to solicitors on 21 March 2017 **before missives**	7 January 2013	28 April 2017

	Johnston – not a party	concluded on 6 April 2017.		
Eighth – no 106	Eighth pursuer	Certificate exhibited to solicitors on 23 May 2013 **on the same day as missives concluded.**	7 January 2013	30 May 2017

[28] As can be seen from above, the second and third pursuers concluded missives before any certificate was ever produced. In the case of the third pursuer the certificate was never addressed to them. No averments are made that these pursuers understood or believed that certificates would be produced either before or after they purchased the property. Nor are there any averments that they concluded the contract on the basis that they understood what was to be represented in the certificate or had any knowledge of it. It is essential to their claim, that the pursuers can show they reasonably relied upon the representation. Reliance must be placed by the pursuer on the certificate before the purchase is made and cannot be retrospective (*NRAM Ltd* v *Steel*; *Hunt* v *Optima (Cambridge) Ltd*).

[29] I reject the pursuers' submission that the averments that some of the certificates were exhibited to the pursuers' solicitors is enough to establish that the pursuer reasonably relied on the certificates. It is the purchaser who must show reliance on the representation in the certificate and not the solicitor. Where there are no averments that the solicitor ever informed the pursuer about the existence of the certificate, far less its contents, the case is not relevantly pled. I also reject the submission that the situation of the solicitor acting for the pursuer is akin to a director acting on behalf of a company. Decisions that bind the company are for directors (acting on legal advice where appropriate) whereas the decision

on whether to purchase a property, and on what terms, is for the pursuer: the solicitor acts on the instructions of the purchaser in a conveyancing transaction.

[30] The fourth pursuer's position is even weaker. The fourth pursuer never entered any missives. Although the certificate existed at the date of the fourth pursuer's purchase, it was addressed to a different party entirely. There are no averments explaining the circumstances in which the fourth pursuer came to rely on the certificate before making the purchase or even knew that it existed. Again I find the case not relevantly pled by the fourth pursuer.

[31] In the case of the first, fifth, second named sixth, seventh and eighth pursuers, the certificate was exhibited to their solicitors before or on the same date that missives were concluded. The seventh pursuer's certificate is addressed to a different person. But again, in respect of all these pursuers, there are no averments explaining the circumstances when these pursuers first came to see the certificates, or understood their terms and placed reliance on them before purchasing. Title was transferred to the first named sixth pursuer on an unspecified date and without any averments that solicitors were involved or how the first named sixth pursuer came to know about the certificate and rely on it before acquiring title. The case pled by these pursuers is therefore not relevantly pled.

[32] I also agree with the defender's submission that the third, seventh and eighth pursuers' case on reliance is contradictory. The pursuers aver in article 12, that as a consequence of believing what was in the PCCs they "were induced to refrain from making a relevant claim in relation to the relevant obligations until they instructed and received expert opinion in May 2016 which undermined their erroneous belief". However, the pursuers also aver that the third, seventh and eighth pursuers concluded their purchases between December 2016 and May 2017, which postdates the expert report indicating that there were defects in the properties. It is difficult to see how these pursuers can have relied

on the representation in the PCCs that the properties were built to a satisfactory standard if they knew at that time there were defects in the properties.

[33] I do not regard the defender's arguments as requiring the pursuers to plead evidence. It is an essential element of the pursuers' case in law that they can prove they have relied on the certificates. The pursuers require to give fair notice of the essentials of their case and require to identify the circumstances in which they came to rely on the certificates ahead of the proof (*Heather Capital Limited (In Liquidation)* v *Levy McRae* 2017 SLT 376 per Lord Glennie at paragraph 100). They have not in my view done so. At best they have set out how the certificates came to be received by the pursuers' solicitors but not made any averments explaining that the pursuers themselves knew about them and relied on them before deciding to purchase their properties. Without such proof of reliance, the pursuers are, in my view, bound to fail.

Prescription

[34] Under section 6 of the 1973 Act obligations to make reparation prescribe after the short negative prescription period of 5 years. Section 6 of the 1973 Act provides:

> **"6.— Extinction of obligations by prescriptive periods of five years.**
>
> (1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—
>
> (a) without any relevant claim having been made in relation to the obligation, and
>
> (b) without the subsistence of the obligation having been relevantly acknowledged,
>
> then as from the expiration of that period the obligation shall be extinguished…
>
> (2) Schedule 1 to this Act shall have effect for defining the obligations to which this section applies.
>
> (3) In subsection (1) above the reference to the appropriate date, in relation to an obligation of any kind specified in Schedule 2 to this Act is a reference to the date

specified in that Schedule in relation to obligations of that kind, and in relation to an obligation of any other kind is a reference to the date when the obligation became enforceable.

(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section —

(a) any period during which by reason of—

(i) fraud on the part of the debtor or any person acting on his behalf, or

(ii) error induced by words or conduct of the debtor or any person acting on his behalf,

the creditor was induced to refrain from making a relevant claim in relation to the obligation, and

(b) any period during which the original creditor (while he is the creditor) was under legal disability,

shall not be reckoned as, or as part of, the prescriptive period:

Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph.

(5) Any period such as is mentioned in paragraph (a) or (b) of subsection (4) of this section shall not be regarded as separating the time immediately before it from the time immediately after it.

[35] Section 11 provides:

"11.- (1) Subject to subsections (2) and (3) below; any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.

(2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased.

(3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted reference to

the date when the creditor first became, or could with reasonable diligence have become, so aware. "

[36] Under section 6, if the obligation to make reparation has subsisted for a continuous period of 5 years after the appropriate date without the pursuer having made a relevant claim, or the subsistence of the obligation having been relevantly acknowledged by the defender, it is extinguished. The appropriate date is the date when the obligation relied upon became enforceable (section 6(3)). Under section 11(1) an obligation to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 as having become enforceable on the date when the loss, injury or damage occurred. Accordingly, subject to s11(2) and (3) the general rule is that an obligation to make reparation becomes enforceable from the date when a legal wrong (*injuria*) concurs with the loss arising from that wrong (*damnum*). *Dunlop* v *McGowans* 1980 SC (HL) 81 per Lord Keith of Kinkel at p81. In terms of section 11(3), the date is postponed where the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred. Following *David T Morrison & Co ltd* v *ICL Plastics Ltd* 2014 SC (UKSC) 222 (at p228, 230 and 233), the start of the prescriptive period under section 11(3) is postponed until the creditor is aware (actually or constructively) only of the occurrence of the loss or damage, and not of its cause.

[37] In this case the pursuers rely on section 11(3) and offer to prove that as they were not aware (and could not with reasonable diligence have been aware) of any loss prior to May 2016 when they received a report identifying defects in the property, the prescriptive clock does not begin to run until May 2016. On the other hand, the defender argues that the clock starts to tick once the purchasers expended money on the properties regardless of

when they became were aware of the defects. Essentially the defender argues that awareness by the purchasers that they have incurred expenditure is enough.

[38] In my view, this point has been conclusively and authoritatively decided by the Supreme Court in *Gordon's Trustees* v *Campbell Riddell Breeze Paterson* LLP. Lord Hodge held that the clock starts to tick when the pursuer is aware that he has sustained loss in the sense of not obtaining something he sought or has incurred expenditure (paragraph 21). Section 11(3) does not postpone the start of the prescriptive period until such time as the pursuer is actually or constructively aware that he has suffered detriment in the sense that "something has gone awry" or "made him poorer or disadvantaged" (paragraphs 19, 21-22). The phrase "loss, injury or damage" in section 11(1) is a reference to the existence of physical damage or financial loss presented as an objective fact (paragraph 18). Within paragraph 22 Lord Hodge gives as a specific example a person who purchases a house at an overvalue because of negligent advice. The person may be aware of the expenditure on the house, though did not know at the time it was incurred that the expenditure was wasted or would fail to achieve its purpose. Nevertheless, as a matter of objective fact, and with the benefit of hindsight, the expenditure was wasted and it did fail to achieve its purpose. As a matter of objective fact it was "loss, injury or damage" which was incurred at the date of purchase of the house. The decision therefore takes into account both latent injury only discovered subsequently and patent injury.

[39] I agree with the defender's submission that the decision in *Gordon's Trustees* as to when loss is sustained is consistent with a long line of authority: *Beard* v *Beveridge Herd and Sandilands WS* 1990 SLT 609 at p6111 I-K; *Jackson* v *Clydesdale Bank plc* 2003 SLT 273; *Khosrowpour* v *Taylor at paragraphs 26, 28 and 30* and *Kennedy* v *Royal Bank of Scotland* 2019 SC 168. Moreover, *Gordon's Trustees* has been followed by Lord Doherty in *Midlothian*

Council v *Raeburn Drilling & Geotechnical Ltd* 2019 SLT 1327 and by Lord Tyre in *Glasgow City Council* v *VFS Financial Services & Others* 2020 SLT 1227. I recognise that Sheriff Reid in *WPH Developments Ltd* v *Young & Gault LLP (In Liquidation) 2020 SLT (Sh Ct)* reached a different interpretation of the ratio of *Gordon's Trustees*. However, it is in my view inconsistent with the ratio of *Gordon's Trustees* as explained above. *WPH Developments Ltd* is under appeal and was disapproved of in *Glasgow City Council* v *VFS Financial Services & Others*, at paragraph 105.

[40] I note that section 5 of the Prescription (Scotland) Act 2018 will substantially amend section 11(3) and make amendments to clarify when the prescriptive clock starts to run. However, it is not yet in force and I therefore decide the case based on the provisions currently in force and as unamended.

[41] In the application of *Gordon's Trustees* to the circumstances of this case, I find that there was *injuria* when the PCCs were issued with the purported negligent misrepresentation. *Damnum* occurred when the purchasers expended money to purchase their properties. They were not aware until 2016 of any defects, but following the decision in *Gordon's Trustees* the clock starts to run from the date of the wasted expenditure regardless of whether the purchasers knew of the defects at that date. What they received in return for that expenditure was, with the benefit of hindsight, less than they should have, had the defender properly performed his duties. The pursuers effectively aver that they relied on the certificates to purchase a property at overvalue. The purchase of the properties represents loss and starts the prescriptive clock.

[42] There is no dispute that the proceedings were served on the defender on 4 January 2019 which interrupted the prescriptive period. Nor that that the first set of purchasers completed missives more than 5 years before January 2019. It is a matter of admission by

the pursuers at article 12 of condescendence that in terms of clause 6 of the PCCs the subsequent purchasers only acquired whatever part of the prescriptive period was left to run when they acquired title. Accordingly, the pursuers' claim has prescribed, it having been served on the defender more than 5 years after the prescriptive clock began to run.

[43] I am not persuaded that section 6(4) is of any assistance to the pursuers. I have already held that the pursuers have not pled a relevant case to prove that they ever saw or relied upon the PCCs. If the pursuers do not offer to prove the circumstances in which they knew of or relied upon the certificates, they cannot prove that by reason of error induced by words or conduct of the defender they were induced to refrain from making a relevant claim. Furthermore, the pursuers are required to make specific averments about the period the court is being asked to leave out of account so that they can prove both the beginning and end of the inducement period (Johnston, *Prescription and Limitation* (2nd edition) paragraph 6.107). They have failed to make any such averments. Accordingly, in my view this argument would be bound to fail.

[44] The pursuers also argue that the terms of the PCCs provide that the defender shall remain liable for a period of 6 years and that a relevant claim has been made within that timescale. The defender contends that section 13 of the 1973 Act prohibits "agreements" purporting to contract out of the obligations under section 6 and that given the alleged reliance by the pursuers on the certificates, this constitutes an agreement between the parties.

[45] Section 13 provides:

> **"13. Prohibition of contracting out**
>
> Any provision in any agreement purporting to provide in relation to any right or obligation that section 6, 7, 8 or 8A of this Act shall not have effect shall be null."

[46] "Any provision in any agreement" is not defined in the 1973 Act. I was cited no authority on how it has been interpreted by the courts. The purpose of section 13 seems relatively clear, namely that the prescriptive provisions of the 1973 Act should not be avoided by "any provision in any agreement". No qualification is made in the legislation distinguishing between provisions in agreements that extend, or shorten, the prescriptive period. I do not therefore consider it to be of any particular relevance that the defender purported to extend the period of liability in the PCCs to 6 years rather than shorten it. The case is brought in delict on the basis that there was no contractual relationship between the defender and the pursuers. Nonetheless, in my view, the reference to "any agreement" in section 13 is unqualified and broadly expressed. Consistent with the purpose of section 13, to prevent parties avoiding the prescriptive periods set out in the Act, in my view it should be given a broad meaning and not one necessarily restricted to a provision in a formal contract. In the current case is it a statement or undertaking by the defender given in the PCCs which, according to the pursuers, they relied upon. In my view the statement by the defender in the PCCs that he will be liable for 6 years to the purchaser, can be characterised as a provision in an agreement by him to be so liable. I therefore conclude that the attempt to extend the prescriptive period in the PCCs falls foul of section 13.

[47] I am aware that the Prescription (Scotland) Act 2018 amends s13 to allow an extension of the prescriptive period by agreement. However, the amendments are not likely to come into force for some time and are not intended in any event to resurrect claims lost under the current provisions, or to apply to court actions that are already underway. They are not therefore relevant and I have not taken them into account.

[48] Accordingly, I find that the obligation to make reparation founded upon by the pursuers has been extinguished by the operation of the 5-year short negative prescription in accordance with sections 6 and 11 of the1973 Act.

Expenses

[49] As requested by the defender, I sanction the cause as suitable for the employment of counsel in respect that it is reasonable in all the circumstances of the case taking account of (i) the difficulty and complexity of proceedings; (ii) the importance and the value of the claim in the proceedings; and (iii) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel. I reserve all questions of expenses meantime.