SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2020] SC GLA 27

CA30/19

JUDGMENT OF SHERIFF S. REID, ESQ

in the cause

WPH DEVELOPMENTS LIMITED

Pursuer

against

YOUNG & GAULT LLP (IN LIQUIDATION)

Defender

Act: Mr D Johnston QC; instructed by Mitchells Robertson, Glasgow
Alt: Mr S. Manson, Advocate; instructed by DWF, Glasgow

Glasgow, 8 April 2020

The sheriff, having resumed consideration of the cause:

1. Repels, in part, the defender's pleas-in-law numbers 2 & 3 so far as directed at the relevancy of the pursuer's averments anent prescription; *quoad ultra* Reserves the defender's said preliminary pleas;

2. Sustains, in part, the pursuer's plea-in-law number 5 so far as directed at the relevancy of the defender's averments anent prescription whereby, Excludes from probation the defender's averments in Answer 3 from (and including) the words "more particularly…" (on page 5, line 23 of the Record number 16 of process) to the end of the said Answer; *quoad ultra* Reserves the pursuer's said preliminary plea; thereafter,

3. Allows parties a proof before answer of their respective remaining averments, reserving, so far as extant, the parties' preliminary pleas (namely, the defender's

pleas-in-law numbers 2 & 3 and the pursuer's pleas-in-law numbers 4 & 5), on dates to be hereafter assigned;

4. meantime, Reserves the issue of the expenses of the diet of debate and preparation therefor.

NOTE:

Summary

[1] A patient suffers an internal injury at the hands of a negligent surgeon in the course of a botched operation. The injury is unknown and unknowable. So the patient pays the surgeon's fee. Five years elapse. The patient falls ill as a result of the injury. Has the surgeon's obligation to make reparation to the injured man prescribed?

[2] In reliance upon a report from a negligent structural engineer, a man engages contractors to build a house, but on inadequate foundations. The man is oblivious to the fatal deficiency nor could it reasonably have been discovered by him. So the building contractors are paid in full. Five years elapse. The house is condemned for demolition. Has his damages claim against the structural engineer been extinguished by prescription?

[3] A solicitor gives negligent advice to a client. In reliance on the advice, the client settles, at an excessive sum, a claim made against it by a third party. The client is unaware that any loss has occurred and could not reasonably have become so aware. Five years elapse. The client discovers the loss. Has the client's claim against the negligent solicitor prescribed?

[4] Each of these hypothetical scenarios raises a vexed question in the context of the short negative prescription, namely whether a creditor's mere awareness of expenditure incurred by it (which only in hindsight is known to have been wasted), in reliance upon

negligent advice, precludes the operation of section 11(3) of the Prescription & Limitation (Scotland) Act 1973 ("the 1973 Act"). The problem is particularly acute the context of professional negligence claims.

[5] The present case involves a similar dilemma.

[6] An architect draws up plans for a client who is a property developer. The plans erroneously depict the outer boundary of the developer's site. In reliance on the erroneous plans, the developer incurs expenditure to contractors in building a housing estate on the site, of which the outer boundary wall encroaches onto neighbouring land. The encroachment is unknown and unknowable. Time passes; the developer is alerted to the encroachment; and it is compelled to demolish and relocate the offending wall. But five years have elapsed since the developer first spent money building the wall. Has the negligent architect's obligation to make reparation to the client prescribed?

[7] Relying upon *Midlothian Council* v *Bracewell Stirling Architects & Others* [2019] CSOH 29 and *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287, the defending architect argues that any obligation to make reparation has prescribed.

[8] Two propositions are advanced for the architect. First, for the purposes of section 11(1) of the 1973 Act, viewed with the benefit of hindsight, *damnum* occurred, as a matter of objective fact, as soon as the developer, in reliance upon the erroneous plans, incurred expenditure to contractors building upon land it did not own, because the expense in doing so was thereby wasted. Second, since the developer was fully aware that it was incurring expense (albeit only in hindsight known to have been wasted), the developer cannot rely on section 11(3) to postpone the date of commencement of the prescriptive period.

[9] In my judgment, the first proposition is correct, but the second proposition is wrong.

[10] In summary, the second proposition conflates sections 11(1) & 11(3) of the 1973 Act, it frustrates the essential purpose of the latter, and it is illogical. Section 11(1) is aimed at identifying the date of *occurrence* of *damnum* (as a matter of objective fact); section 11(3) is aimed at identifying the date of the creditor's *awareness* (actual or constructive) of the occurrence of *damnum*. These are different concepts. Hindsight is properly applied to determine the former (the date of *occurrence* of *damnum* under section 11(1) of the 1973 Act), but it has no part to play in determining the latter (the creditor's *awareness* of the occurrence of that *damnum* under section 11(3)). To apply hindsight to establish a creditor's actual or constructive knowledge at a point in time is conceptually illogical. Besides, in essence, section 11(3) is concerned with cases of latent damage. If hindsight is to be applied to establish whether a creditor was *aware* of the occurrence of *damnum*, no *damnum* could ever be truly latent. Section 11(3) would thereby be rendered redundant.

[11] Accordingly, in my judgment the developer has made relevant averments which, if proved, would entitle it to avail itself of the protection afforded by the "special rule" in section 11(3) of the 1973 Act, and to postpone the date of commencement of the prescriptive period.

[12] In reaching this decision, I have sought to identify and apply the true *ratio decidendi* of *Gordon's Trustees,* and I have concluded, with respect, that *Midlothian Council* was wrongly decided.

Procedural history

[13] The action was served on 21 November 2018.

[14] On 15 February 2019, on joint motion, the action was remitted to the commercial roll.

[15] After sundry procedure, on 12 June 2019, parties were allowed a debate on their respective preliminary pleas.

[16] On 28 October 2019, I heard submissions from counsel for both parties, supplementing their respective written notes of argument. Of consent, I was invited to confine my decision to the relevancy of the pleadings anent prescription and otherwise to reserve the parties' preliminary pleas challenging the relevancy and specification of certain unrelated issues. This translated to an agreement that the issues raised in paragraphs 28 to 35 of the defender's written note of arguments and paragraphs 23 to 30 of the pursuer's note of arguments were not ventilated at the debate and were, instead, to be reserved, if necessary, for proof before answer.

The pleadings

[17] The pursuer is a residential property developer. The defender provides architectural services.

[18] The pursuer avers that on 26 October 2012 it appointed the defender to provide architectural services to the pursuer in relation to a proposed residential development of land at Barrance Farm, Kirkhill Road, Newton Mearns. Specifically, the pursuer avers that it instructed the defender to plot the precise location of the boundaries at the development.

[19] On 8 November 2012, at the pursuer's request, the defender provided the pursuer with a revised version of a "finalised drawing" of the development site "for construction purposes". The pursuer avers that this drawing and all subsequent drawings provided by the defender (I shall refer to these as "the construction drawings") incorrectly identified the legal boundaries of the development in that the boundary depicted on the defender's drawings did not align with (i) the geometry of the site as outlined in the Land Certificate

from which the pursuer's title was derived or (ii) the geometry of the site as depicted on the then current Ordinance Survey map. Specifically, it is averred that the boundary on the construction drawings crosses over the line of the legal boundary and encloses a larger piece of ground extending into Kirkhill Road.

[20] In reliance on the construction drawings, the pursuer avers that it proceeded to construct the development, comprising large family homes with garden areas, surrounding walls and driveways, all according to the defective plotting of the boundary in the defender's construction drawings.

[21] The following specific dates are averred: the pursuer appointed a contractor for the construction works on 6 November 2012; it commenced works on site (under a licence from the seller) on 7 November 2012; it purchased the site with a date of entry on 12 November 2012; full construction works commenced on site on 28 November 2012 (included foundation works to plots 7 & 11); construction works to the foundations of plot 6 commenced on 17 December 2012; construction works to the foundations of plot 12 commenced on 25 March 2013; construction works were concluded on 20 December 2013 (though "material works" on plots 6, 7, 11 and 12 were completed prior to that date); and completion certificates were issued for plots 6 & 7 on 3 October 2013, for plot 11 on 5 December 2013, and for plot 12 on 19 December 2013.

[22] In or around autumn 2013, the defender provided further drawings to the pursuer of the individual plots that were then being developed for sale. (I shall refer to these as "the individual plot sale plans"). These individual plot sale plans are said to have been used by the pursuer in dispositions to third party purchasers, and that each plan contained the same incorrect depiction of the legal boundary of the pursuer's title. Four of the plots constructed by the pursuer *ex adverso* Kirkhill Road (known as plots 7, 6, 12 & 11) were disponed to third

party purchasers in, respectively, September 2013, October 2013, February 2014 and April 2014, each delineating the plot boundary by reference to the defender's incorrect individual plot sale plan. In each of these four dispositions, the pursuer granted warrandice in favour of the third party purchasers. (Though it is not expressly averred, I have assumed that absolute warrandice was granted and not merely some form of qualified warrandice.)

[23] On 20 February 2014, the pursuer's solicitors received an email from agents for the neighbouring landowner (who was, in fact, the original owner of the development site) "raising issues as to the boundary". On 24 February 2014, the pursuer's solicitors received a further email from the neighbouring landowner's agents stating that they had obtained an opinion from a surveyor that the pursuer had constructed walls outwith the northeast boundary of the pursuer's title and encroaching on the neighbouring landowner's property. On 27 February 2014, a copy of that surveyor was provided to the pursuer's solicitors, with a request that the encroaching boundary walls be relocated.

[24] On 20 May 2014, the pursuer avers that its solicitors received correspondence from agents acting for the purchaser of plot 12, informing the pursuer that the Keeper of the Land Registers of Scotland had refused to register the disposition of plot 12 due to discrepancies between the boundary depicted in the individual plot sale plan appended to that disposition and the boundary depicted in the pursuer's registered title. Though the relevant dates are not averred, the pursuer also avers that the Keeper similarly rejected the dispositions granted in favour of the purchasers of plots 7 & 11; and that, while a land certificate was issued to the purchaser of plot 6, the registered title was for materially less ground *ex adverso* Kirkhill Road than was purportedly disponed to the purchaser of plot 6 in the disposition.

[25] Various heads of loss are sought by the pursuer including (i) legal and professional fees in investigating the disclosed defective plotting and title discrepancies, and thereafter in

negotiating compromise settlements with the neighbouring landowner and third party purchasers (regarding, respectively, the encroachment claim and breach of warrandice claims); (ii) the cost of demolishing and relocating parts of the boundary walls that were constructed on the neighbouring landowner's property; and (iii) damages, by way of relief, representing the compromise sums agreed extra-judicially with the neighbouring landowner and each of the affected third party purchasers. The total sum sued for is £300,000.

[26] The pursuer avers that "the vast majority of the construction costs" incurred by the pursuer were "unaffected by the defective plotting". The plots constructed were said to be "marketable and attractive dwellings" and all were sold for market value. In an averment that was the subject of some discussion, the pursuer avers that the expenditure incurred by it in developing the site "was not wasted, barring costs relating to the garden grounds and boundary garden grounds *ex adverso* Kirkhill Road" (article 3 of condescendence, page 4, lines 29 to 31). (In the event, no claim is made in this action for any wasted construction costs.)

[27] The defender avers that any obligation incumbent upon it to make reparation to the pursuer has been extinguished by operation of the short negative prescription (defender's first plea-in-law). The defender's second and third pleas-in-law are, respectively, general and specific pleas to relevancy and specification.

[28] It is not in dispute that the present action commenced on 21 November 2018; that there were no relevant claims or acknowledgements prior to 21 November 2013; and, therefore, that the relevant question for the court was to ascertain whether the five year prescriptive period had started to run prior to 21 November 2013.

[29] With reference to section 11(3) of the 1973 Act, the pursuer avers that it was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage

had occurred prior to 20 May 2014 (being the date of receipt of the correspondence from solicitors acting for a third party purchaser, notifying the pursuer of the title discrepancy); or, alternatively, that the pursuer was not aware, and could not with reasonable diligence have been aware, that *damnum* had occurred prior to receipt of correspondence on 20 February 2014 from the neighbouring landowner's agents querying the extent of the pursuer's boundary.

Submissions for the defender

[30] For the defender, I was invited to sustain its first, second and third pleas-in-law on the basis that the defender's averred obligation to make reparation had been extinguished by the operation of the five year short negative prescription.

[31] Reference was made to the defender's detailed written note of arguments. It was submitted that *injuria* occurred prior to 21 November 2013. This was because, on the pursuer's averments, the defender had acted in breach of contract *et separatim* negligently as early as 8 November 2012 when it "incorrectly identified the legal boundaries of the development" in the construction drawings; and that it allegedly made the same mistake when issuing the individual plot sale plans in autumn 2013 (article 3).

[32] *Damnum* was said to have occurred prior to 21 November 2013. This was said to arise because, on the pursuer's averments, in reliance on the defender's erroneous drawings, the pursuer proceeded to construct the development (article 3). It was not in dispute that the pursuer incurred expenditure in doing so (to its contractor and, presumably, to solicitors in conveying the plots), work on site having begun on 7 November 2013, with "full construction works" commencing on 28 November 2012. On that hypothesis, the pursuer was, prior to 21 November 2013, paying its contractors to build structures on neighbouring

land which it did not own, and, moreover, it was doing so with a view to selling those plots, with warranted good title, to third parties. Further, two of the plots were averred by the pursuer to have been sold, with the benefit of warrandice, in September and October 2013. Therefore, it was submitted that the pursuer had thereby bound itself into further detriment at those points in time. It was also submitted that the pursuer had admitted in its own averment (article 3 of condescendence, page 4, lines 29 to 31) that it had incurred wasted expenditure prior to 21 November 2013, at least to the extent of the costs relating to the construction of the garden grounds and boundary garden walls *ex adverso* Kirkhill Road. Therefore it was submitted that the pursuer's own pleadings disclosed that it had sustained loss, injury and damage prior to 21 November 2013 which loss "immediately concurred" with the relevant averred breach of contract and negligence.

[33] Critically, the defender's counsel submitted that the pursuer's reliance upon section 11(3) was irrelevant. That was because "with the benefit of hindsight and as a matter of objective fact, the pursuer had the requisite degree of knowledge of loss prior to 21 November 2013" (defender's written note of arguments, paragraph 23). Detailed reference was made to *Gordon's Trustee's, supra*, in particular the examples cited by Lord Hodge at paragraph 19 therein. Counsel submitted that the words "loss, injury or damage" have the same meaning in both sections 11(1) & 11(3) of the 1973 Act, that is, they refer to *damnum* as a matter of objective fact, ascertained with the benefit of hindsight; therefore, it does not matter (according to *Gordon's Trustees, supra*, at paragraph 21) that the creditor is unaware that "something has gone awry rendering the creditor poorer or otherwise at a disadvantage"; and, instead, it is sufficient that the creditor is aware that it has "incurred expenditure" (per Lord Hodge at paragraph 21, *Gordon's Trustees, supra*). In the present case, as a matter of objective fact, and with the benefit of hindsight, the pursuer's

wasted expenditure in constructing boundary walls and garden ground on land that it did not own was "loss, injury and damage" for the purposes of sections 11(1) & (3), not least because it was expenditure that failed to achieve its purpose. From the moment the pursuer spent money "breaking ground on land it did not own", it had suffered loss because, as a matter of objective fact and with the benefit of hindsight, that (or at least some of that) construction cost was wasted and would require remedial expenditure. Likewise, in subsequently conveying to the third party purchasers that it did not own, the pursuer was said to be "fated" to suffer loss in that it was "bound into detriment", in the sense that it had bound itself into an onerous obligation and was facing encroachment and breach of warrandice claims as a result. These were said to be matters of objective fact. It did not matter that, in the present action, the pursuer was not seeking to recover wasted construction costs under any of its heads of loss; and it was said to be "no answer" for the pursuer to say that it did not know of the encroachment and title discrepancies at the time. According to *Gordon's Trustees*, it was sufficient that the pursuer knew that it was incurring expenditure in building upon land, in reliance on the defender's advice; and it was sufficient that the pursuer knew that it was selling the land thereafter with the onerous grant of warrandice. This comprised the "requisite knowledge" for the purpose of section 11(3) of the 1973 Act. Reference was made to *Beard* v *Beveridge Herd & Sandilands WS* 1990 SLT 609; *Jackson* v *Clydesdale Bank plc* 2003 SLT 273; *Khosrowpour* v *Taylor* 2018 CSOH 64 ; and *Kennedy* v *The Royal Bank of Scotland plc* 2019 SC 168.

[34] The defender's counsel submitted that this analysis may seem harsh on creditors but it was the settled, authoritative and binding position. The Prescription Act 2018, which had been enacted to temper some of that harshness, did not apply here.

Submissions for the pursuer

[35] For the pursuer, I was invited to repel the defender's first plea-in-law (anent prescription) and to allow a proof before answer, reserving the parties' preliminary pleas.

[36] Senior counsel for the pursuer adopted the pursuer's written note of argument, paragraphs 1 to 22 (number 17 of process). He acknowledged that the action commenced on 21 November 2018, that the prescriptive period had not been interrupted prior to 21 November 2018, and that the issue for the court was, accordingly, whether the prescriptive period had started to run prior to 21 November 2013.

[37] I was invited to reject the defender's submissions for three reasons.

[38] First, between September 2013 and April 2014, the pursuer had sold the four housing plots for full market value (Record, page 3, lines 15 to 16; page 4, line 32). Therefore, it was submitted that the pursuer had not sustained loss either at the date of sale or earlier at the date of reliance on the defender's drawings. It was submitted that the pursuer could not have sued for loss prior to November 2013, having sold two of the plots for full consideration and for market value, the other two still being in its ownership. No loss had therefore been sustained prior to November 2013. It was submitted that loss only occurred in 2014 when the pursuer required to purchase extra land and relocate parts of the boundary walls, following protracted negotiation with the neighbouring landowner. By extension, no loss having been suffered prior to November 2013 (for the purposes of section 11(1) of the 1973 Act), it followed that the pursuer could not have been aware of any such loss prior to 21 November 2013 (for the purposes of section 11(3) of the 1973 Act).

[39] Second, on the pursuer's averments (Record, page 3, line 29 to page 4, line 4; and page 9, line 30 to page 10, line 4) it was only in February 2014 that the neighbouring proprietor first "raised an issue" concerning the location of certain boundary walls. There

was no averment that there was anything defective about any of those walls. While it was acknowledged that part of the walls had been built on land that was not owned by the pursuer, it was submitted by counsel that there was no certainty, as at the date of construction (or at the date of the pursuer's reliance on the defender's drawings), that the true proprietor of the *solum* beneath the encroaching walls would require any part of the walls to be demolished or relocated. Accordingly, at those dates, there was no certainty that the pursuer would sustain any loss as a result of the error in the drawings. Therefore, as at April 2014, the pursuer had yet to sustain any loss. It was only after protracted negotiation with the neighbouring proprietor that any certainty or conclusion was reached, whereby the encroaching walls required to be relocated. This was said to be different from the *Midlothian Council* case in which a fundamental defect in design was present at the outset (namely the absence of an essential gas membrane). In *Midlothian Council*, the development as a whole was "destined to fail from the start" (per Lord Doherty, supra, at para [17]), which was a reference to loss, injury or damage for the purposes of section 11(1).

[40] Third, properly understood, the "loss, injury and damage" in *Gordon's Trustees* was the pursuer's inability to obtain vacant possession of the land on 10 November 2005. Section 11(3) did not postpone the commencement of the prescriptive period beyond that date because the loss coincided with the creditor's "awareness" of that loss. Further, when looking at the concept of "loss, injury and damage" counsel submitted that the court required to look at "the big picture" or the "big grievance" and not at the detail of individual heads of loss. Looking at the big picture, the loss in *Gordon's Trustees* was the failure to obtain vacant possession, a detriment that was clearly known to the pursuers at that date. Further, in Lord Hodge's examples (at para [19] of *Gordon's Trustee's, supra*) the reference to "incurring expenditure" should be read as meaning incurring expenditure that can be

categorised as *damnum*. In the present case, the "big picture" or "big grievance" was that the boundary walls were constructed on land the pursuer did not own. That was the *damnum*. Beneath that big picture, multiple individual heads of loss (professional fees, demolishing costs, reconstruction costs etc), could be grouped but the global loss occurred when the boundary walls were constructed on the land. On the pursuer's averments, the pursuer first became aware of that "big loss" only in 2014.

[41] I was invited not to follow *Midlothian Council, supra.* Counsel submitted that it failed properly to apply the ratio of *Gordon's Trustees.* It failed to identify the "main loss" or "global loss" but, rather, focused upon admitted "wasted expenditure" in constructing the development. In any event, it was submitted that *Midlothian Council* was distinguishable because the pursuer in that case had admitted that that it had incurred considerable wasted expenditure in completing the development. Not so here. The loss sought to be recovered in the present case was the cost of remedial work, not any part of the original construction cost (which in any event was not admitted to have been wasted).

[42] As for *Gordon's Trustees*, counsel observed that the legal expenses incurred by the pursuers in that case were expenses that had been incurred (in February 2006) after the date of the relevant *damnum* (on 10 November 2005). Therefore, the decision in *Gordon's Trustee's* did not turn on expenditure incurred in reliance upon negligent professional advice. Rather, the expenditure in *Gordon's Trustee's* was expenditure incurred in an attempt to remedy a loss which had already been sustained (and of which the creditor was already aware), namely, the failure to obtain vacant possession. I was invited not to be distracted by obiter examples provided by Lord Hodge.

Supplementary submissions for the defender

[43] In a supplementary submission for the defender, counsel argued that, when the pursuer sold two of the plots in 2013 with warrandice, it thereby bound itself into a material detriment or, at least, a material threat to its rights. Reference was made to *Kennedy* v *Royal Bank of Scotland, supra*, paragraph 42. Since loss was to be ascertained objectively, with the benefit of hindsight, the pursuer was said to have the requisite knowledge because it knew it had sold the properties with warrandice.

[44] Further, it was irrelevant that the pursuer had chosen not to seek recovery of the wasted construction costs in this action. By so framing its claim, it could not avoid the conclusion that that expenditure had indeed been wasted and that the pursuer had indeed suffered loss at the date those costs were incurred. Loss was suffered when the expenditure was incurred in building on land the pursuer did not own. Further damage was sustained when the pursuer purported to sell land that it did not own, with the benefit of warrandice. Again, the pursuer knew it had acted in this way. Therefore, as a matter of objective fact, viewed with the benefit of hindsight, it had thereby bound itself into an inevitable detriment and a material threat to its rights as creditor.

The statutory provisions

The short (five year) negative prescription

[45] The short (five year) negative prescriptive period is regulated by section 6(1) of the 1973 Act. It provides:

> "(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".

[46] The short (five year) negative prescription applies *inter alia* to "any obligation arising from liability….to make reparation" (1973 Act, schedule 1, paragraph 1(d)), subject to specified exceptions. For such obligations, the "appropriate date" (that is, the date from which the five year prescriptive period begins to run) is "the date when the obligation became enforceable" (1973 Act, section 6(3)).

[47] Of course, this merely begs the question: for the purposes of the short (five year) negative prescription, when does an obligation to make reparation "become enforceable"? The answer is found in the so-called "general rule" in section 11(1) and in two "special rules" in sections 11(2) & (3) of the 1973 Act (*David T Morrison & Co Ltd* v *ICL Plastics Ltd* 2014 UKSC 222, paras [11] to [13] per Lord Reed). These sections provide:

> "(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… 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 a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware."

[48] Lastly, the short negative prescription can also be interrupted or suspended in certain circumstances namely, during periods when the creditor was subject to a legal disability or was induced to refrain from making a relevant claim due to the fraud, or error induced by words or conduct, on the part of the debtor (section 6(4), 1973 Act).

The long (twenty year) negative prescription

[49] The long (twenty year) negative prescription is regulated by section 7 of the 1973 Act. It provides, so far as material:

> "(1) If, after the date when any obligation to which this section applies has become enforceable, the obligation has subsisted for a continuous period of twenty 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…".

[50] The long negative prescription applies to "an obligation of any kind (including an obligation to which section 6 applies)", other than specifically excepted obligations. As with its shorter sibling, the long negative prescriptive period also begins to run on the date when the obligation "has become enforceable" (1973 Act, section 7(1)).

[51] For the purposes of the long (twenty year) negative prescription, when does an obligation to make reparation become enforceable? In contrast with its shorter sibling, the answer is found only in the "general rule" in section 11(1) of the 1973 Act. The two "special rules" in sections 11(2) & (3) do not apply to the long negative prescription.

[52] Further, absent a relevant claim or acknowledgment, the long negative prescription cannot be interrupted or suspended.

Discussion

[53] "Nae man can tether time or tide", wrote Robert Burns in *Tam O'Shanter*. Perhaps Burns had in mind the long (twenty year) negative prescription. Once that prescriptive period starts to run it cannot be stopped, absent a relevant claim or acknowledgment. In the context of an obligation to make reparation, the creditor may be fully aware of the claim but prevented from pursuing it due to some legal disability; or he may have been induced to refrain from claiming by some fraud or error on the debtor's part; or the creditor's loss, injury or damage may be lie undiscovered and undiscoverable for a century; but it matters not, for upon the lapse of twenty years from the occurrence of that loss, injury or damage, any obligation to make reparation therefor is extinguished.

[54] The position is different with the short (five year) negative prescription. Unlike its longer, harsher sibling, the short negative prescriptive period can be interrupted or suspended during periods of legal disability or when the creditor was induced to refrain from making a relevant claim due to fraud, or error induced by words or conduct, on the part of the debtor (section 6(4), 1973 Act).

[55] In addition, by a neat statutory fiction, in two special circumstances, the commencement of the short (five year) negative prescriptive period can be postponed entirely. In effect, the clock can be re-set. Those special circumstances are where, in the context of an obligation to make reparation, there is a continuing wrong (section 11(2), 1973 Act) or where the creditor's loss, injury or damage is latent (section 11(3), 1973 Act).

[56] This case concerns alleged latent damage. The key issues in dispute are (i) when the pursuer's loss, injury or damage *occurred* (for the purposes of the general rule in section 11(1) of the 1973 Act); and (ii) when the pursuer became *aware* of the occurrence of that loss, injury and damage (for the purposes of the special rule in section 11(3) of the 1973 Act).

The three-stage approach

[57] In cases of this nature it is necessary to apply a three-stage approach. First, for the purposes of section 11(1) of the 1973 Act, one must identify the wrongful "act, neglect or default" (the *injuria*) that is founded upon. Second, again for the purposes of section 11(1), one must identify the date of occurrence of the "loss, injury or damage" (the *damnum*) caused by that *injuria*. Third, for the purposes of section 11(3) of the 1973 Act, one must identify when the creditor first became "aware" (or could with reasonable diligence have become aware) that such *damnum* had occurred. I shall address each in turn.

What is the injuria?

[58] The first step is to identify the *injuria* that is founded upon in the action.

[59] In my judgment, in the present case two discrete wrongful acts are averred. The first *injuria* comprises the alleged action of the defender (on 8 November 2012 and repeated thereafter) in providing the pursuer with the construction drawings which erroneously depicted the extent of the legal boundaries of the development land acquired by the pursuer at Barrance Farm, in breach of the parties' contract *et separatim* in breach of the defender's common law duty of care to the pursuer. The second *injuria* comprises the alleged action of the defender ("in or around autumn 2013") in providing the pursuer with the individual plot sale plans erroneously depicting the extent of the individual sale plots, again in breach of the parties' contract *et separatim* in breach of the defender's common law duty of care.

[60] I distinguish each *injuria* because, while they are broadly of the same nature, they bear to have occurred on different dates and appear to have caused different losses. In reliance on the construction drawings, the pursuer avers that it built the development

outwith the extent of its proper legal boundary, thereby encroaching on a neighbour's land (condescendence 3, page 3, lines 4 to 8). Obviously, the construction of the development pre-dated the existence of (and reliance upon) the individual plot sale plans. Thereafter, in reliance upon the individual plot sale plans, the pursuer avers that it disponed plots to third party purchasers, thereby incurring liability *inter alia* to those third parties for breach of warrandice (condescendence 3, page 3, lines 11 to 12).

When did damnum occur?

[61] The second step is to identify the date on which *damnum* (caused by the foregoing *injuria*) "occurred" (per section 11(1) of the 1973 Act)?

[62] This is because, as regards any obligation to make reparation, the negative prescriptive periods (long and short) commence when the obligation becomes enforceable (sections 6(3) & 7(1), 1973 Act); and the "general rule" (*David T Morrison & Co Ltd, supra*, para [11] per Lord Reed) is that the obligation becomes enforceable "on the date when the loss, injury or damage occurred" (section 11(1), 1973 Act).

[63] The general rule simply reflects the common law principle that a right to pursue an action of damages arises only when *damnum* concurs with *injuria.* It recognises that "some interval of time may lapse" between the *injuria* and the occurrence of *damnum* (*Dunlop* v *McGowans* 1980 SC (HL) 73). But it makes clear that the negative prescriptive periods (long and short) start to run only from the date when the *damnum* has "occurred", and not from the earlier date of the *injuria.* So, the focus of section 11(1) of the 1973 Act is upon the date of occurrence of the *damnum*.

[64] Critically, section 11(1) is not concerned with the state of the creditor's knowledge. Knowledge is irrelevant to the fact of occurrence of *damnum*. Loss, injury or damage may

have "occurred" whether or not the creditor was aware of its occurrence, still less of its cause, or its actionability, or the identity of any person(s) responsible for it. The *occurrence* of loss, injury or damage (under section 11(1)) is a matter of objective fact, to be determined with the benefit of hindsight (*Gordon's Trustees, supra,* para [24]*).*

[65] Thus, a person whose body has, unknown to him, suffered injury by inhaling particles of dust, has nevertheless suffered injury. A man whose house has, unknown to him, sustained damage because it was built with inadequate foundations or of unsuitable materials, has suffered damage. But in both cases, the man and the owner have a damaged article when, but for the defender's negligence, they would have had a sound one. It is illogical to hold that the creditor's knowledge of, for example, the state of his lungs, or of the condition of his house, could be the decisive factor in determining whether loss, injury or damage has actually occurred (*Pirelli General Cable Works Ltd* v *Oscar Faber & Partners* [1983] 2 AC 1). This was illustrated by Lord Pearce in *Cartledge* v *E Jopling & Sons* Ltd 1963 AC 758 when he stated (at pages 778 to 779):

> "It would be impossible to hold that while the X-ray photographs are being taken he cannot yet have suffered any damage to his body, but that immediately the result of them is told to him, he has from that moment suffered damage…"

[66] For many years, judges and practitioners struggled with the notion that the negative prescriptive periods commenced merely upon the occurrence of *damnum*. For example, a person may know that water is penetrating through the roof of his new house, but he does not know whether it is caused by defective construction (by the builder) or defective design (by the architect). Ingenious attempts were made to interpret section 11 to add further prerequisites (to the benefit of the creditor), such as that, in order for the (five year) prescriptive clock to start, the creditor required to have knowledge not merely of the occurrence of loss but also of its attributability (ie that it was caused by some act or

omission) (*Greater Glasgow Health Board* v *Baxter, Clark & Paul* 1990 SC 237; *Kirk Care Housing Association* v *Crerar & Partners* 1996 SLT 150; *Glasper* v *Rodger* 1996 SLT 44); or of its *prima facie* legal actionability (*ANM Group Ltd* v *Gilcomston North Ltd* 2008 SLT 835, para [58]); *Pelagic Freezing Ltd* v *Lovie Construction Ltd* [2010] CSOH 145, paragraph 111); or of the identity of the wrongdoer (*David T Morrison & Co Ltd, supra*). These attempts were generally founded upon clever interpretations of the words "caused by an act, neglect or default" (in section 11(1)) and "caused as aforesaid" (in section 11(3)) which, it was argued, had effect to import some or all of the foregoing additional requirements.

[67] All such arguments were comprehensively quashed by the Supreme Court in *David T Morrison, supra*.

[68] Incontrovertibly, section 11(1) is concerned solely with the objective fact that *damnum* has "occurred"; section 11(3) is concerned with the creditor's *awareness* (actual or constructive) of the occurrence of that same *damnum*; and all issues beyond that (such as awareness of attributability, legal actionability, or wrongdoer identification) are irrelevant to sections 11(1), (2) & (3) of the 1973 Act.

[69] I pause to observe that section 5 of the new Prescription Act 2018, when it comes into force, will have effect to insert some additional factual requirements into section 11(3) of the 1973 Act namely, knowledge of the attributability of the *damnum* to a person's act or omission, and of the identity of that person. The new legislation does not apply to the present case, nor does it address the defender's principal argument.

[70] So, what is *damnum,* in the context of section 11 of the 1973 Act?

[71] *Damnum* is "an abstract concept of being worse off, physically or economically" (*Rothwell* v *Chemical & Insulating Co Ltd & Another* [2008] 1 AC 281, para [7]). In *Gordon's Trustee's, supra* (para [14]), Lord Hodge explained that *damnum* (or "loss injury or damage",

to use the words in section 11 chosen by Parliament) describes "the detriment suffered by the creditor". He also went on to describe the actual *damnum* in that case (the failure to obtain vacant possession of the leased land) as "a detriment" (para [24]).

[72] This "detriment" may take varying forms but it will always fall into one of two recognised categories: physical damage or economic loss. The former tends to be easier to identify; the latter, by its nature, is less well-defined. Conventional individual heads of economic loss (loss of profits, wasted expenditure, remedial costs or the like) are easy to spot. However, *damnum* (in the form of economic loss) can be an elusive creature. In very general terms, it may be said to comprise the failure to obtain something that was sought or, conversely, the acquisition (or incurring) of a liability, burden or expense that was not sought. In both cases, the creditor is financially "worse off" (*Rothwell*) or has suffered "a detriment" (*Gordon's Trustees*), but in more complex cases a subtler analysis may be required in order to identify whether and when *damnum* has occurred.

[73] The English courts have developed an approach known as the "damaged asset" rule and the "package of rights" rule, as an aid to the identification of actionable damage in the context of English limitation provisions. The rules are not intended to be mutually exclusive, nor to provide a rigid codification of the circumstances in which *damnum* occurs (*Cooperative Group Ltd* v *Birse Developments Ltd (in liquidation) & Others* [2014] EWHC 530, paragraph 53). In my judgement they offer a useful aid to understanding a tricky concept.

[74] Looking first at the "damaged asset" rule, *damnum* may be said to occur when a creditor's interest in an asset (whether that be physical property or intangible contractual rights) is diminished or devalued, due to a debtor's breach of duty, breach of contract or the like, by non-performance or defective performance. The "damaged asset" rule is illustrated by *Forster* v *Outred & Co* [1982] 1 WLR 86. In that case, Mrs Forster's interest in her house

was devalued because, due to her solicitor's negligence, she had granted a security over her house to her son's creditors. Her property was now encumbered with a charge; her interest in the free equity was diminished in value, to the extent of the debt owed from time to time by her son; she could not sell without discharging the mortgage; she could not prevent her son from borrowing on the security of that mortgage to the extent of her full value in the asset. Her interest in her asset was thereby diminished or devalued. She was financially "worse off" (per *Rothwell*). She had suffered "a detriment" (per *Gordon's Trustees*).

[75] The same analysis can explain why and when *damnum* occurred in the Scottish cases of *Kennedy*, *Jackson, Midlothian Council, Dunlop* and *Gordon's Trustees, supra.* In *Kennedy*, a bank notified its customer of the imminent premature termination of three term loans. The customer's interest in those assets (the loan contracts) was thereby diminished (if not wiped out entirely). The customer no longer had the benefit of his contractual credit facilities. He was worse off. He had suffered a detriment. In *Jackson*, in breach of their duties, the receivers of a company concluded a contract obliging the company to sell its assets to a third party at an under-value. The company's assets were thereby diminished. Under the contract, the company was not entitled to a return of equivalent value. It was financially worse off. It had suffered a detriment. In *Midlothian*, in reliance upon negligent professional advice, the creditor incurred expenditure to contractors in building a housing estate on its land. The foundation was deficient (due to the absence of a gas membrane), necessitating the demolition of the entire estate. The creditor's assets were diminished because the money expended by it in building the estate was wasted. The creditor did not obtain a return of equivalent value. It was financially worse off. It had suffered a detriment. In both *Dunlop* and *Gordon's Trustees, supra*, due to the negligence of solicitors, landlords failed to obtain vacant possession of their properties from sitting tenants on due dates. In both cases, the

landlords' plans for the residential redevelopment of the land were stymied for a period of time. The landlords' interest in their assets was thereby diminished. The land was worth less to them with the unwanted extant burden of a shop lease (per *Dunlop*) and two agricultural holdings (per *Gordon's Trustees)* than with the benefit of vacant possession for residential redevelopment. So, in both cases, the landlords were financially worse off by failing to obtain vacant possession. They had suffered a detriment.

[76] Turning to the "package of rights" rule, *damnum* may also be said to occur when a creditor acquires fewer rights or less valuable rights (that is, a disappointing "package of rights") due to a debtor's breach of duty or contract or the like (*Axa Insurance Ltd* v *Akther & Darby and Others* [2010] 1 WLR 1662).

[77] Again, the "package of rights" rule can helpfully be deployed to explain several Scottish cases. In *Beard* v *Beveridge Herd & Sandilands WS*, due to a solicitor's negligence, landlords failed to obtain a properly drafted lease with an operable rent review clause. The client thereby acquired fewer rights or less valuable rights (that is, a disappointing package of rights) due to the solicitor's breach of contract or duty. The client was thereby financially worse off. It had suffered a detriment. Lord Cameron's opinion has clear echoes of the "package of rights" analysis. Notwithstanding difficulties in precisely quantifying the loss at the date of execution of the lease, he concluded (at page 610):

> "…the pursuers having got less than that which they should have got, they could at any time from that date onwards have raised an action of reparation against the [solicitors] as drafters of the lease claiming damages for the difference in value between a lease with a botched rent review clause and one with a valid and operable rent review clause".

In *Khosrowpour* v *Taylor, supra,* a son funded his mother's purchase of her council house on the understanding that he would inherit the house on her death. Due to his solicitor's negligence, the son failed to obtain a legally enforceable written agreement by means of

which he would acquire his mother's house upon her death. Instead, all the son obtained for his payment was a "precarious expectancy which could be defeated at any time". He thereby acquired a disappointing package of rights. This is precisely how Lord Doherty analysed the *damnum*. He stated (at para [28]):

> "In my opinion, on a proper analysis the pursuer suffered *damnum* immediately he parted with the £8,000. In my view it is self-evident that what he got in return for that payment was less than he ought to have got had the defender duly performed his duties";

and again (at para [30]):

> "The rights which [the pursuer] obtained were not as valuable as they would have been had the defender duly performed his duties."

Therefore, the pursuer was financially worse off. He had suffered a detriment. *Damnum* "occurred" (per section 11(1)) as soon as he parted with his money, getting nothing of equivalent or expected value in return.

[78] The "package of rights" rule need not be confined to cases in which a creditor is seeking to acquire rights for the first time. It can also apply to cases where a creditor's existing "package of rights" is devalued or diminished by the wrongful act or omission; or, put another way, where a creditor's existing legal position has otherwise changed to its financial detriment as a result of that wrongful act or omission (*Cooperative Group Ltd* v *Birse Developments Ltd (in liquidation) & Others, supra*). For example, where a creditor becomes, in effect, a "contract-breaker" with a third party as a result of a debtor's breach of contract with, or duty to, the creditor, the creditor's "package of rights" (with the third party) may be said to have been devalued or diminished (or, put another way, the creditor's financial position may be said to have altered to its detriment) by reason of the debtor's wrong.

[79] This more complex scenario is illustrated in *Birse Developments, supra*. The Cooperative Group ("the Employer") owned land. It engaged Birse as the "design and

build" main contractor to construct a large warehouse on the land. In turn, Birse engaged multiple specialist sub-contractors. The warehouse was completed, it was handed over to the Employer, but it was defective. The Employer sued Birse and, in turn, Birse claimed against its various sub-contractors. A limitation issue arose. When did Birse first suffer damage? Was it upon practical completion (when the development, with all its defects, was handed over to the Employer); or was it later, when the Employer first made a claim against Birse; or was it later still, when Birse's liability (if any) to the Employer was finally ascertained in the litigation?

[80] Applying the "package of rights" rule, Stuart-Smith J concluded that (i) the defects complained of by Birse were attributable to breaches of contract by the sub-contractors; (ii) those breaches of the sub-contracts had, in turn, placed Birse in breach of its contractual obligations to the Employer under the main contract; therefore (iii) damage to Birse "occurred" (at latest) when Birse had handed over a defective development to the Employer (on the date of practical completion). He stated (at paragraph 53):

> "I conclude that the present case is within the 'package of rights' rule because when Birse transferred the defective development to the employer, its legal position changed to its financial detriment as it became a contract-breaker whose rights under the main contract were devalued by its liability to the employer."

Interestingly, the same conclusion was reached by applying the "damaged asset" rule (paragraphs 45 & 46). Birse's accrued rights in the main contract with the Employer included a right to payment, subject to an obligation to remedy defects or, failing that, for liability in damages for breach of contract. Stuart-Smith J concluded that Birse's interest in the development and in the benefit of its contractual rights:

> "…are properly to be regarded as 'assets' within the scope of the 'damaged assets' rule" (paragraph 45).

He continued:

> "The object of the sub-contracts was to provide Birse with the necessary design and inspection to ensure that the development as built was satisfactory and that Birse's rights were not prejudiced. The 'assets' are capable of being devalued [by the sub-contractors' breaches] and the devaluation is measurable by reference to the cost of remedying the defects…."

[81] Turning then to the present case, in my judgment, by any measure, for the purposes of section 11(1) of the 1973 Act, *damnum* "occurred" prior to 21 November 2013.

[82] To explain, firstly, as a matter of objective fact assessed with the benefit of hindsight, *damnum* (caused by the first *injuria*) occurred as soon as the pursuer, in reliance upon the defender's erroneous construction drawings, spent money building boundary walls and garden ground on the neighbouring land. On that date, the pursuer had permanently encroached upon land that it did not own. This had two real and immediate consequences: first, in law, the pursuer thereby incurred a legal liability to remove the encroachment (at its expense); and, second, the pursuer thereby wasted the original expense involved in constructing the encroaching boundary walls and garden ground, because they would require to be demolished and relocated. According to the pursuer's own pleadings, completion certificates for plots 6 & 7 were issued on 3 October 2013. Therefore, it can properly be inferred that the encroaching boundary walls and garden ground must have been *in situ* by that date and that the pursuer had incurred corresponding expenditure to its contractors by that date in so constructing the encroaching walls and garden ground.

[83] This *damnum* (caused by the first *injuria*) is readily identifiable by any of the usual methodologies or rules of thumb.

[84] Applying the "package of rights" rule, the pursuer's existing "package of rights" (whether in the form of the development itself or its assets generally) was devalued or diminished (at least to the extent of remedial costs) because the pursuer had incurred the

unwanted burden of a legal liability to the neighbouring proprietor to remove the unlawful encroachment (thereby incurring further unwanted expenditure to contractors). Put another way, by building on land it did not own, in reliance upon the defender's erroneous construction drawings, the pursuer's "existing legal position had changed to its financial detriment" as a result of the defender's wrongful act or omission, because it had incurred an unwanted liability to its neighbour to remove the encroachment and restore the neighbour's ground (*Birse Developments, supra).*

[85] Alternatively, applying the "damaged asset" rule, by paying contractors to build upon land it did not own, in reliance upon the defender's erroneous construction drawings, the pursuer's assets were thereby diminished to its detriment, because the expenditure was wasted. The pursuer's money had been spent to no avail, for no good purpose, and for no return of equivalent or anticipated value.

[86] I pause to observe that there is no dispute that the defender incurred expenditure in developing those plots affected by the title discrepancy. It might readily have been presumed (i) that a portion of that expenditure related to the construction of the encroaching garden ground and boundary walls of those plots and (ii) that that portion had thereby been wasted. However, there is no need to presume. The pursuer expressly avers that it did indeed incur wasted expenditure in relation to the construction of the garden grounds and boundary garden walls *ex adverso* Kirkhill Road. It avers (condescendence 3, page 4, lines 29 to 31):

> "The expenditure incurred by the pursuer with the development of the plots and construction of the houses was not wasted, barring costs relating to the garden grounds and boundary walls *ex adverso* Kirkhill Road".

In fairness to the pursuer, the context of this averment is a preceding positive averment that "the vast majority of the construction costs incurred by the pursuer were unaffected by the

defective plotting" (condescendence 3, page 4, lines 27 to 29) and that most of the expenditure incurred by the pursuer in developing the plots was not wasted. But the clear meaning of the averment is that at least some expenditure was indeed wasted. The wasted costs may well represent a small proportion of the total cost of the development, but there is no averment or suggestion that those costs are trivial or otherwise immaterial. It can be inferred to be sufficiently material to pass the low threshold of seriousness or materiality to constitute *damnum* for prescription purposes (*Strathclyde Regional Council* v *W A Fairhurst & Partners* 1997 SLT 658).

[87] Therefore, in each of the foregoing senses, by paying contractors to build on land it did not own, in reliance upon the defender's erroneous construction drawings, the pursuer was thereby rendered financially "worse off" (*Rothwell, supra*) because that particular expenditure was wasted. It had suffered "a detriment" (*Gordon's Trustee's, supra*). *Damnum* (caused by the first *injuria*) occurred prior to 21 November 2013, because, by that date (indeed by early October 2013), on the pursuer's own averments, work on plots 6 & 7 (being two of the plots affected by the title discrepancy) was complete and completion certificates had been issued.

[88] Secondly, as a matter of objective fact assessed with the benefit of hindsight, *damnum* (caused by the second *injuria*) "occurred" as soon as the pursuer, in reliance upon the allegedly erroneous individual plot sale plans, purported to sell, and thereafter convey to third party purchasers with the benefit of absolute warrandice, land that it did not own. That is because, on that date, the pursuer thereby incurred a liability in law for breach of contract *et separatim* breach of warrandice to the third party purchasers of the four affected plots. According to the pursuer's own pleadings, the four affected plots (known as plots 7,

6, 12 & 11) were disponed to third party purchasers in, respectively, September 2013, October 2013, February 2014 and April 2014.

[89] Again, this *damnum* (caused by the second *injuria*) is readily identifiable by the usual methodologies.

[90] Applying the "package of rights" rule, the pursuer's existing "package of rights" (in the form of its contracts of sale with the third party purchasers) were devalued because it incurred the unwanted burden of a legal liability to each of the purchasers to pay damages for breach of missives *et separatim* breach of warrandice. Put another way, by purporting to sell and convey land it did not own, in reliance upon the defender's erroneous individual plot sale plans, the pursuer's "existing legal position had changed to its financial detriment" as a result of the defender's wrongful act or omission, because it thereby incurred an unwanted liability to its purchasers and disponees to make good, by way of damages, the breach of missives *et separatim* breach of warrandice (*Birse Developments, supra).* As in *Birse*, the pursuer had become, in effect, a "contract-breaker" with each of the third party purchasers, by reason of the defender's negligence and breach of contract with the pursuer.

[91] Alternatively, applying the "damaged asset" rule, it may also be said that the pursuer's interest in the sale contracts, and related conveyances to, the third party purchasers were "assets" (see *Birse, supra*, paragraph 45); that those assets were devalued by the defender's breaches of contract with, and breaches of duty to, the pursuer; and that the devaluation is measurable by reference to the extent of the resulting legal liability incurred by the pursuer to each third party purchaser (including the cost of remedying the title defects).

[92] Therefore, in the foregoing senses, for the purpose of section 11(1), as a matter of objective fact viewed with the benefit of hindsight, by obligating itself to the sale of land it

did not own (with the accompanying grant of warrandice), in reliance upon the defender's erroneous individual plot sale plans, the pursuer was rendered financially "worse off" (*Rothwell, supra*). It thereby suffered "a detriment" (*Gordon's Trustee's, supra*).

[93] On the pursuer's pleadings, in reliance upon the individual plot sale plans, it granted dispositions (with the benefit of absolute warrandice) to the purchasers of the four affected plots *ex adverso* Kirkhill Road (known initially as plot 7, 6, 11 & 12) on or about 19 September 2013, October 2013, 18 April 2014 and 5 February 2014, respectively. Accordingly, *damnum* (caused by the second *injuria*) had certainly occurred prior to 21 November 2013, upon the sales and dispositions of plot 7 & 6 in September and October 2013, respectively.

[94] A nice point of distinction arises as to whether the provision of each individual plot sale plan is itself a separate *injuria* which, when each plan is then subsequently relied upon, gives rise to separate *damnum* upon each conveyance; or whether there is a single (second) *injuria* (the provision of the erroneous plot sale plans) with merely successive individual heads of loss arising from reliance thereon. I am inclined to the latter view, but the pursuer's pleadings are not entirely clear on the issue nor was it addressed in submission. It may be a matter best left for proof, to ascertain the precise circumstances in which the plans were provided. I reserve my opinion on that issue meantime. In any event, for present purposes, it is sufficient to observe that *damnum* (caused by the second *injuria*) had certainly occurred prior to 21 November 2013 (upon the sale and conveyance of plots 7 & 6 in September 2013 and October 2013, respectively).

Is the damnum contingent or "uncertain"?

[95] It may be convenient at this juncture to address the pursuer's submission that *damnum* did not occur prior to November 2013. The pursuer's argument was that no

damnum had occurred by that date, firstly, because there was no "certainty" that the neighbouring landowner would ever insist upon the removal of the encroaching walls/garden ground; and, secondly, because all four affected plots had been sold for full market value anyway (pursuer's note of argument, paragraphs 11 & 8). The pursuer submitted that certainty of loss only emerged in April 2014 when, after "protracted negotiation", it became clear that the neighbouring proprietor was insisting upon the removal of the encroachment from his land.

[96] In my judgment, the pursuer's submission is not correct. In the first place, it is important to bear in mind that *damnum*, when it occurs, does not require to be "precisely calculable" at that date and that "it may increase over time" (*Kennedy, supra,* para [20]). All that is required is that the *damnum* when it occurs, must be "beyond what can be regarded as negligible" or "purely minimal damage" (*Cartledge* v *Jopling* [1963] AC 758).

[97] In the second place, the pursuer is, in effect seeking to postpone the date of occurrence of *damnum* by characterising any loss as contingent in nature (that is, contingent upon the outcome of negotiations with the neighbour). Of course, if, on a proper analysis, *damnum* is truly contingent in nature, then in law the *damnum* will be treated as not having occurred (for prescription purposes) until the contingency is purified (*Law Society* v *Sephton & Co* [2006] 2 AC 543). However, if, on a proper analysis, the *damnum* is real, actual and immediate (albeit perhaps not precisely calculable), then it is not truly contingent at all; and such *damnum* does not become contingent merely because of the speculation or possibility (or even probability) that, by some hypothetical voluntary act or omission of a third party (or the debtor himself), or happy turn of fate, or other "intervening factor" (*Midlothian Council, supra,* paragraph 17), the *damnum* might subsequently be mitigated, circumvented or eliminated entirely. Such hypotheticals are relevant only to the quantification of the

damnum that has occurred; they do not establish its non-occurrence, or any true contingency.

[98] In the present case, *damnum* had occurred by (at latest) 21 November 2013. It was real, actual and immediate. The mere possibility that, following "protracted negotiations", the disgruntled neighbour might mitigate, circumvent or eliminate that *damnum* (by, for example, not insisting upon the removal of the encroachment) is nothing to the point. Numerous authorities dismiss that proposition (*Jackson, supra,* page 280; *Beard*, supra, page 611F-G; *Khosrowpour, supra,* para [30], *Forster*, *supra)*. In each of these cases the fact that, by the voluntary act of a third party, steps might have been taken to reduce, eliminate or avoid the loss altogether did not mean that the *damnum* was contingent or had not occurred. In the present case, as a matter of objective fact, viewed with the benefit of hindsight, there was no uncertainty that *damnum* had occurred by 21 November 2013 (at the latest). The only "uncertainty" was whether that *damnum* could be mitigated, circumvented or eliminated by the supervening voluntary act or omission of the neighbouring landowner following "protracted negotiations".

[99] Therefore, for the purposes of section 11(1) of the 1973 Act, on the face of the pursuer's own averments, *damnum* "occurred" prior to 21 November 2013 in relation to each *injuria* founded upon. That is because, as a matter of objective fact viewed with the benefit of hindsight, prior to 21 November 2013 (i) in relation to the first *injuria*, the pursuer had incurred wasted expenditure to contractors in building the encroaching boundary walls and garden ground on land it did not own, and had incurred an unwanted liability to its neighbour to remove that encroachment; and (ii) in relation to the second *injuria*, the pursuer had incurred an unwanted liability in damages to third party purchasers for breach of contract *et separatim* breach of warrandice, by purportedly selling and conveying to those

third parties land it did not own (at least in respect of plots 7 & 6, conveyed in September and October 2013, respectively).

[100] The battle-ground now shifts to the special rule under section 11(3) of the 1973 Act.

When did the creditor become aware of the occurrence of damnum?

[101] The third step is to identify when the creditor became aware that *damnum* had occurred.

[102] This is the so-called "special rule" under section 11(3). It is concerned with cases involving "latent damage" (*David T Morrison & Co Ltd, supra*, paras [13], [14] & [25] per Lord Reed). It applies where, on the date when *damnum* occurred, the creditor was not *aware,* and could not with reasonable diligence have been *aware,* that it had occurred. In that special situation, section 11(3) provides that section 11(1) is to have effect as if for the reference to the date when *damnum* occurred, there was substituted a reference to the date when the creditor "first became, or could with reasonable diligence have become, so aware". In other words, by a statutory fiction, where the *damnum* is latent, it is deemed to have occurred on a later date than in fact it actually did.

[103] The defender's position is straightforward. It submits (incorrectly, in my view) that, for the purposes of section 11(3) of the 1973 Act, the pursuer was *aware*, prior to 21 November 2013, of the occurrence of the foregoing *damnum* because the pursuer knew, prior to 21 November 2013, that it was incurring expenditure to its contractors (which expenditure, with the benefit of hindsight, can be seen to have been wasted); and because the pursuer knew, prior to November 2013, that it had granted absolute warrandice to third party purchasers (which, with the benefit of hindsight, can be seen to have "bound [the pursuer] into further detriment" (defender's note of arguments, paragraph 20).

Accordingly, so the defender says, "with the benefit of hindsight, and as a matter of objective fact, the pursuer had the requisite degree of knowledge [of the occurrence of *damnum*] prior to 21 November 2013" (defender's note of arguments, paragraph 23).

[104] The defender seeks to justify this analysis on the basis that the words "loss, injury and damage" in section 11 refer to the concept of *damnum*; that those words have the same meaning in all three subsections of section 11; and that, in each case, *damnum* is a matter of objective fact to be determined with the benefit of hindsight. This is said to be the effect of the Supreme Court decisions in *David T Morrison & Co Ltd* and *Gordon's Trustees, supra*.

[105] In my respectful judgment, the defender's analysis is not the correct interpretation of section 11(3) nor is it a correct application of the *ratio decidendi* of *Gordon's Trustee* or *David T Morrison & Co Ltd, supra*.

[106] The key fallacies in the defender's approach are (i) that, erroneously, the defender purports to apply hindsight to ascertain the pursuer's actual (and constructive) awareness of the occurrence of *damnum;* (ii) that, erroneously, the defender equiparates awareness of the mere *incurring* of expenditure with awareness of the *occurrence* of *damnum;* and (iii) that the defender's analysis fails to recognise that wasted expenditure can itself be latent, for the purpose of section 11(3) of the 1973 Act. I have reached these conclusions for the following reasons.

Textual analysis

[107] First, the defender's analysis is not consistent with the plain, ordinary meaning of the statutory text. Section 11(1) of the 1973 Act is concerned with the date of *occurrence* of *damnum;* section 11(3) is concerned with the date of *awareness* of the occurrence of *damnum*. But section 11(3) refers to only two forms of knowledge: actual knowledge and constructive

knowledge. Actual knowledge is (rather obviously) the real, subjective knowledge actually possessed by the creditor *at the time*. Constructive knowledge is the knowledge which the creditor could have possessed *at the time* if reasonable diligence had been exercised by it *at the time*. Hindsight is not the same as actual or constructive knowledge. Hindsight is knowledge that is acquired *later in time*, after the event. On a plain reading of the statutory text, the special rule in section 11(3) is not concerned with knowledge only obtained or obtainable by the creditor *after* the event, *at a later time*, with the benefit of hindsight.

Illogicality

[108] Second, the defender's analysis is illogical. Section 11(1) states the "general rule" (*David T Morrison & Co Ltd, supra*): it is concerned with the *occurrence* of *damnum* as a matter of objective fact. Section 11(3) states a "special rule": it is concerned with the creditor's (actual or constructive) *knowledge* of the occurrence of that *damnum.* The *occurrence* of an event, and *knowledge* (actual or constructive) of the occurrence of an event, are different concepts. If the creditor's *knowledge* is also to be determined with the benefit of hindsight, these two distinct concepts become merged. Hindsight is a "know-it-all". Logically, with the benefit of hindsight, a creditor would always be regarded as having *knowledge* of the occurrence of *damnum*, even when it patently had no such actual or constructive knowledge at the time.

[109] "I have no desire to suffer twice" wrote Sophocles, "in reality and then in retrospect" (*Oedipus Rex*). By applying hindsight to ascertain both the date of occurrence of the *damnum* (for the purposes of section 11(1)) and the date of the creditor's *awareness* of the occurrence of that *damnum* (under section 11(3)), there is a sense that the creditor does indeed suffer twice. Under section 11(1), the prescriptive clock starts to run against him without his actual

or constructive knowledge of the occurrence of loss; and, still in ignorance of the occurrence of loss, he is then precluded from relying upon section 11(3) because knowledge of the occurrence of loss is attributed to him with the benefit of hindsight. The solution to this invidious predicament is simple: hindsight has no role to play in the latter exercise, namely in determining the creditor's actual or constructive knowledge under section 11(3) of the 1973 Act.

Conflation of the general rule and the special rule

[110] Third, by extension, the defender's analysis conflates the general rule (in section 11(1)) and the special rule (in section 11(3)). If hindsight is to be applied to ascertain the state of a creditor's awareness, then the date of occurrence of *damnum* (per section 11(1)) and the date of knowledge of its occurrence (per section 11(3)), will always coincide. In *Midlothian Council, supra* (at para [23]), the learned Lord Ordinary suggests that section 11(3) would still operate though within a narrower compass, but, with respect, I cannot envisage in what circumstances section 11(3) could ever operate, if hindsight is to be applied to ascertain the state of the creditor's actual or constructive knowledge from time to time.

Defeating the purpose of the special rule

[111] Fourth, by extension, the defender's analysis defeats the purpose of the special rule in section 11(3) by rendering that subsection redundant. The legislative intent of section 11(3) is clear. It deals with cases of "latent damage" (*David T Morrison & Co Ltd, supra*, paras [13], [14] & [25], per Lord Reed). It is intended to postpone the date of commencement of the short (five year) negative prescriptive period to the date when the creditor has actual (or constructive) knowledge that *damnum* has occurred. This is the date

when damage, previously concealed, is discovered or discoverable. In that way, the palpable injustice is avoided of a creditor losing its right to pursue a claim, after the expiry of just five short years, before the creditor has any inkling that it has suffered loss, injury or damage. If the creditor's actual (or constructive) knowledge at any particular point in time is always to be supplemented with hindsight (being knowledge acquired only at a later point in time, but imputed retrospectively), then the protective purpose of the special rule in section 11(3) is defeated. That is because, viewed with the benefit of hindsight, no damage could ever be said to be latent, concealed or unknown. Accordingly, on the defender's analysis, section 11(3) is rendered redundant.

Differential treatment of physical damage and financial loss

[112] Fifth, if the defender's analysis is intended to apply only to "wasted expenditure" or "expenditure incurred", then that approach risks creating an irrational distinction between, on the one hand, physical damage and, on the other, financial loss (in the form of wasted expenditure or expenditure incurred) in the context of section 11(3) of the 1973 Act.

[113] There is no compelling jurisprudential reason why "expenditure incurred" or "wasted expenditure" should fall into a special category of its own. Certainly, no such difference is warranted on the express language of section 11. Section 11(3) applies equally to all types of loss, injury or damage, without distinction.

Failure to recognise wasted expenditure as latent damnum

[114] Sixth, according to the defender's analysis, a creditor's mere awareness that expenditure has been incurred (which expenditure turns out, with hindsight, to have been wasted) is sufficient awareness of the occurrence of loss to trigger the start of the five year

prescriptive clock. In my judgment, this analysis is flawed because it assumes that all expenditure by a creditor is manifest detriment. It is not.

[115] It will be recalled that *damnum* (or "loss injury or damage", to use the legislature's words in section 11) describes "the detriment suffered by the creditor" (*Gordon's Trustee's, supra,* para [14], per Lord Hodge). *Damnum* means "being worse off, physically or economically" (*Rothwell, supra,* para [7]). Therefore, *awareness* of the occurrence of *damnum* means awareness of the occurrence of "detriment" or awareness of "being worse off, physically or economically".

[116] Some expenditure by a creditor may well constitute a manifest "detriment", of which the creditor is aware. This may include professional fees incurred following the discovery of a loss, injury or damage, perhaps incurred in an effort to mitigate or remedy that *damnum*. (An example may be the legal fees incurred by the pursuers in *Gordon's Trustees* in their litigation to evict the sitting tenant. This was consequential expenditure, incurred after the occurrence of a manifest *damnum* (ie the patent failure to obtain possession of their fields upon expiry of the notices to quit.) But other expenditure may not constitute a manifest detriment at all. Instead, it may be loss (a "detriment") that is latent in nature, being a detriment of which the creditor is unaware. Absent a pre-existing manifest *damnum* (such as in *Gordon's Trustees*, above), this may include expenditure which, at the time it was incurred, was apparently to the benefit of the creditor, not to its detriment, and which is only subsequently revealed as wasted, lost or futile. An obvious example would be the cost of constructing a house unwittingly upon inadequate foundations, in reliance upon the negligent advice of a structural engineer.

[117] In summary, awareness of the *incurring* of expenditure is not necessarily the same as awareness of the *occurrence* of *damnum*, for the purpose of section 11(3). *Damnum* (the

"detriment suffered by the creditor" or the state of "being worse off") may have occurred, but the creditor may be entirely unaware of the occurrence of any such detriment or of being worse off. It is in this sense that *damnum* is latent. Why? Because the detriment (the wasted expenditure) is concealed or disguised as expenditure to the benefit of the creditor, not to its detriment; it is masquerading as due and proper payment for a valuable consideration; it has the appearance of being a *quid pro quo* for a sought-after return. The creditor is obviously aware of the incurring of expenditure but is wholly unaware of the occurrence of *damnum*, because the detriment suffered by the creditor (the wasted expenditure) is latent, being concealed, disguised or masquerading as something other than "detriment".

[118] Property damage may be latent. This is perhaps the simplest to illustrate. A builder accidentally punctures the damp proof membrane in the cellar of a house. He completes his work, re-plasters the affected area, and leaves. Unknown to the householder, over several years, water seeps through the membrane and causes decay to the walls. Damage *occurred* as soon as the membrane was punctured. But the householder is not *aware* of the occurrence of damage. Why? Because the damage is concealed (behind the plasterboard in the cellar); it is undiscovered and undiscoverable; it is latent.

[119] Personal injury may be latent. An employee inhales noxious particles which damage his lungs. Injury has occurred. But the employee is not aware of the occurrence of injury. Why? Because the injury is concealed (within the employee's body); it is undiscovered and undiscoverable; it is latent.

[120] Let us take a trickier illustration of latent personal injury. A negligent surgeon misdiagnoses, as carcinogenic, a lump in a woman's breast. On the surgeon's advice, she undergoes an operation to remove the breast. In fact, the surgery was unnecessary. The lump was benign. The woman is fully aware that part of her body has been removed. In

that sense she is obviously aware of an injury to her body, but she is not aware that the removal of part of her body constitutes *damnum* - in other words, that it is a "detriment" suffered by her: *Gordon's Trustees, supra,* para [14]). On the contrary, her state of knowledge (reasonably so) is that the removal of part of her body is to her positive benefit, not to her injury; to her advantage, not to her disadvantage; to her betterment, not to her detriment. She has no awareness of the occurrence of *damnum* ("detriment"), still less of its cause or actionability. The *damnum* (the removal of a healthy breast) is latent, for as long as it is concealed, disguised or masquerading as being to her benefit, not to her detriment.

[121] Take a slightly different scenario. The surgeon correctly diagnoses a cancerous growth in the woman's breast, but negligently recommends removal of the entire breast, rather than excision. The mastectomy proceeds. Again, the woman is fully aware that part of her body has been removed. In that sense she is aware of an injury to her body but, again, she is not aware that it constitutes *damnum* (in other words, that it is a "detriment" suffered by her: *Gordon's Trustees, supra*). On the contrary, her state of knowledge (reasonably so) is that the removal of part of her body is to her positive benefit - that it has saved her life. She has no awareness of the occurrence of *damnum*. The *damnum* (the unnecessary removal of the breast) is latent, for as long as it is concealed, disguised or masquerading as being to her benefit, not to her detriment.

[122] In a similar way, financial loss (specifically, wasted expenditure) can be latent. It can be latent when it is concealed, disguised or masquerading as expenditure to the benefit (not to the detriment) of the creditor. By way of illustration, in reliance upon a report from a negligent structural engineer, a man engages contractors to build a house, but on inadequate foundations. The man is oblivious to the fatal deficiency nor could it reasonably have been discovered by him. The contractors are paid in full. Five years elapse. The house is

condemned. *Damnum* occurred as soon as expense was incurred to the contractors in reliance upon the negligent advice. That was the date when the man suffered detriment because, with the benefit of hindsight, his expenditure can be seen to have been wasted. Of course, he is fully aware that the expenditure has been incurred, that his money has been spent. But he is not aware that the expenditure constitutes *damnum* (in other words, that the expenditure is a "detriment" suffered by him). On the contrary, his state of knowledge (reasonably so) is that the expenditure is not wasted but, rather, that it is expenditure to his positive benefit. The *damnum* (the wasted expenditure) is latent, for as long as it is concealed or disguised as expenditure to the benefit of the creditor, not to his detriment; for as long as it is masquerading as due and proper payment for a valuable consideration; for as long as it has the façade of a *quid pro quo* for a sought-after return.

[123] Likewise, a solicitor gives negligent advice to a client. In reliance on the advice, the client settles, at an excessive sum, a claim made against it by a third party (and pays the solicitor's fee in full). The client is unaware that any loss has occurred and could not reasonably have become so aware. Five years elapse. The client discovers it has paid too much. Again, *damnum* occurred as soon as the excessive payment was disbursed to the third party in reliance upon the negligent advice. That was the date when, with the benefit of hindsight, the client can be seen to have suffered "detriment" (*Gordon's Trustees*) or was "worse off, financially" (*Rothwell*). Of course, the client is fully aware that the money has been disbursed. But the client is not aware that the expenditure constitutes *damnum* (in other words, that it is a "detriment" suffered by it). On the contrary, its state of knowledge (reasonably so) is that the expenditure is not excessive or wasted but, rather, that it is proper, due and necessary to obtain a positive benefit (namely, a valid discharge of the third party claims). The *damnum* is latent for as long as it is concealed or disguised as expenditure

to the benefit of the creditor, not to its detriment; for as long as it is masquerading as due and proper payment for a valuable consideration; for as long as it has the façade of a *quid pro quo* for a sought-after return. Likewise, to the extent that the payment of the negligent solicitor's fee may itself constitute *damnum*, in the form of wasted expenditure, it too is properly characterised as latent in nature. Plainly, the client is aware of the disbursement but it is unaware that it has suffered *damnum,* or is worse off financially, because the detriment (the wasted legal expenditure) is concealed, disguised or masquerading as expenditure to the benefit of the creditor; it is masquerading as due and proper payment for a valuable consideration (ie correct legal advice); it has the façade of a *quid pro quo* for a sought-after return.

[124] It is important to reiterate that we are concerned here solely with the concept of awareness of the occurrence of *damnum*. Difficult cases can arise where awareness of the occurrence of *damnum* coincides with awareness of its cause, its wrongfulness and/or the identity of the wrongdoer. In cases requiring specialist or technical input (such as the scenarios described above), the creditor's lack of awareness of the occurrence of *damnum* may well continue until a date when, it so happens, the relevant awareness is attained coincidentally with awareness of attributability and actionability. That may be so. Nevertheless, such coincidence of discovery does not alter the fact that the creditor was indeed unaware of the occurrence of *damnum* until that later date.

[125] In conclusion, in my judgment, the defender's analysis is flawed because it assumes that all expenditure by a creditor is manifest detriment. It fails to recognise that some wasted expenditure may constitute latent *damnum*.

Miscellaneous considerations

[126] Seventh, a number of miscellaneous considerations suggest that the approach of the defender is incorrect.

[127] In the first place, in the specific context of construction contracts, if employers are to be shackled with knowledge of the occurrence of *damnum*, merely by having incurred contractual expenditure to their contractors (if the expenditure subsequently turns out to have been wasted), then employers may be well-advised to sue their contractors immediately upon practical completion (or upon payment) simply to interrupt the running of any potential five year prescriptive period.

[128] Indeed, arguably, the same position would apply to any party receiving goods or services in a contractual relationship. The party paying for goods or services would require to sue the provider of those goods and services immediately upon making payment in order to preserve the right to recover damages (including reimbursement of the price) caused by any undetected mis-performance of the contract. A client should perhaps sue his solicitor, immediately upon paying the fee note, for damages in respect of every deed or document executed, or litigation settled, or legal opinion tendered and acted upon, just in case it transpires that the advice was defective and that the legal expenditure subsequently proves to have been wasted. A house purchaser would arguably require to sue the author of a home valuation report immediately upon purchasing a house, to preserve any right of action against the surveyor, just in case the home report is later shown to have disclosed a negligent over-value. These rather absurd unintended consequences follow if hindsight is applied to ascertain the state of the creditor's actual or constructive awareness of the occurrence of *damnum*.

[129] In the second place, the defender's approach allows no scope for any exercise of "reasonable diligence" (per section 11(3) of the 1973 Act) in arriving at the necessary state of awareness. If the mere incurring of expenditure amounts to knowledge of the occurrence of *damnum* (because, unbeknown to the paying party, the expenditure was worthless or wasted), in many cases the only conceivable way in which the creditor could pursue a claim timeously would be to seek a second opinion on the quality and adequacy of all professional advice rendered, or contractual service provided, or goods delivered. Again, this seems a rather extreme course of action.

[130] In the third place, stepping back, there is a certain skewed and unpalatable logic in the proposition that if a person spends money in reliance upon advice without knowing, or having any reason to think, that the expenditure is wasted (because the advice was wrong), the creditor is nonetheless deemed to know immediately, at the time of incurring the expenditure, that this is indeed what is happening. Yet this is precisely the analysis urged upon me by the defender.

[131] In the fourth place, if the defender's analysis is correct, and the creditor's knowledge that it has incurred expenditure is sufficient knowledge to preclude the application of section 11(3), then we are at risk of indulging in the kind of awkward legal acrobatics that are illustrated in *Loretto Housing Association* v *Cruden Building & Renewals Ltd & Others* [2019] CSOH 78. In that case, the creditor was aware that it had incurred expenditure, but it had no actual or constructive awareness that it was wasted expenditure. In order to avail itself of section 11(3), the pursuer required to present an elaborate argument that the expenditure was not properly due at all because the defender's advice had been negligent; and that the payment of the expenditure was therefore attributable to an error on the part of the creditor

induced by the act of the negligent defender in issuing an invoice to the creditor in the first place. Lord Doherty allowed parties a proof before answer of their averments.

[132] The creditor's argument in *Loretto Housing Association* has a certain commendable logic to it but, with respect, it is unduly elaborate and strained. In my judgment, the simpler and more attractive analysis is that the creditor did not have actual or constructive knowledge of the occurrence of the relevant *damnum* (ie it was not aware it had suffered "detriment" at all). That is because the *damnum* (the wasted expenditure) was latent. Hindsight is properly applied to ascertain the date of occurrence of the *damnum* under section 11(1), but hindsight has no part to play in ascertaining the state of the creditor's actual (or constructive) awareness of the occurrence of the *damnum* under section 11(3).

The Supreme Court decisions

[133] Of course, all of the foregoing discussion is academic if Supreme Court precedent supports the defender's analysis. However, in my judgment, the defender's analysis is not supported by the true *ratio decidendi* of the leading Supreme Court decisions in *Gordon's Trustees* and *David T Morrison & Co Ltd* (or other binding authority).

[134] In both *Gordon's Trustees* and *David T Morrison & Co Ltd,* the relevant *damnum* was manifest and patent from the very moment that it occurred. Section 11(3) had no application because the *damnum* was never latent. In each case, the occurrence of *damnum* coincided with the creditor's awareness of its occurrence.

[135] In *David T Morrison & Co Ltd*, a shop suffered extensive physical damage in an explosion. The physical damage constituted *damnum*. That *damnum* was, in no sense, latent. It was patent from the outset. The owner was fully aware that damage had occurred from the moment it occurred. ("There was no doubt that [the creditor] knew that damage had

occurred on the date of the explosion": Lord Reed, para [3]). The real issue in dispute in *David T Morrison & Co Ltd* was whether section 11(3) was to be interpreted as importing additional requirements into the creditor's awareness, namely awareness of the attributability and actionability of that damage. This dispute arose from the use of the words "caused as aforesaid" in section 11(3). The answer was clear: no such additional requirements are imported into the creditor's awareness under section 11(3). The present case deals with a different issue, namely whether, for the purpose of section 11(3), the creditor's awareness (of the occurrence of *damnum*) is to be determined with the benefit of hindsight. That issue was neither argued nor decided in *David T Morrison & Co Ltd*.

[136] In *Gordon's Trustees*, landlords wanted to recover vacant possession of their fields in order to realise its development value; they served notices to quit on a tenant; but, on expiry of the notices (on 10 November 2005), the landlords were unable to recover vacant possession from the tenant. For the purpose of section 11(1), the landlords' failure to recover possession of their fields was *damnum*. It was "a detriment" to the landlords. They had not obtained something (repossession of their asset) that they had sought. Further, for the purpose of section 11(3), that *damnum* was, in no sense, latent. It was patent from the moment it occurred. The landlords were fully aware that they had not recovered possession of their fields on 10 November 2005. Lord Hodge stated (at para [24]):

> "…. there was no postponement under [section 11(3)]: the [landlords] were aware on 10 November 2005 that they had not obtained vacant possession of those fields. That was a detriment."

So the landlords had actual awareness that they had suffered detriment (*damnum*) when the tenant failed to vacate the fields upon expiry of the notices to quit. They knew, on 10 November 2005, that they had not obtained something that they had sought, namely recovery of possession of their fields.

[137] The material issue in dispute in *Gordon's Trustees* was whether the landlords could postpone the date of commencement of the five year prescriptive period to a later date (24 July 2008), when the landlords' subsequent litigation against the tenant in the Scottish Land Court (to remove the tenant from the fields) failed. The landlords argued that it was only on this later date, when the Scottish Land Court had issued its decision, that the landlords "first knew that they had suffered loss" (para [11] H-J).

[138] Plainly the landlords knew they had suffered "detriment" long before their litigation failed in the Scottish Land Court in 2008. That litigation was pursued precisely because they *had* suffered detriment (back in 2005, when they failed to recover possession of their fields). It was obviously pursued to remedy and remove that detriment.

[139] More generously perhaps, the essence of the landlords' argument in *Gordon's Trustees* may have been that, until the Scottish Land Court had issued its decision in July 2008, the landlords considered that there was a chance (perhaps even a very good chance) that the landlords' *damnum* (the failure to recover possession of their fields) might be reversed if the Scottish Land Court had decided in its favour, upheld the enforceability of the notices to quit, and ordered the tenant to remove - and that, in that sense, their loss was not certain until the litigation failed. Alternatively, the landlords appear to have argued that, until the Land Court issued its decision, they were not certain as to the cause of the tenants' failure to vacate the fields, specifically whether it was due to the tenants' intransigence or to a failure by their solicitor.

[140] However, for the reasons previously discussed (in paras [95] to [98], above), these arguments were forlorn. First, the mere speculation or belief, possibility or even probability, that *damnum,* once it has occurred, might be mitigated or cancelled does not render that *damnum* contingent, or otherwise postpone its occurrence. Second, *damnum* does not require

to be precisely or immediately calculable at the date it occurs, provided the detriment that is suffered is more than merely negligible. Third, section 11(3) does not require that the creditor has any awareness of the cause of the detriment or its actionability. Aided perhaps by the wisdom of hindsight, it might even be said that *Gordon's Trustees* is not a hard case at all: the landlords had suffered obvious detriment, and they were obviously fully aware that they had suffered detriment, on 10 November 2005, when their tenants refused to vacate.

[141] As an aside, it may also be worth observing that, in *Gordon's Trustees*, the landlords were also well aware, from 10 November 2005 onwards, of at least the potential cause of their failure to recover vacant possession. To be clear, this is not to suggest that section 11(3) requires any awareness of the cause or actionability of *damnum*. It does not. But I mention this merely to underline that it would be a misunderstanding of *Gordon's Trustees* to assume that the landlords were blissfully unaware of the cause of the tenant's refusal to cede possession until the Scottish Land Court's judgment suddenly revealed it to them. The landlords' solicitors had withdrawn from acting for the landlords on the very same day (10 November 2005) that the notices to quit had failed to have the desired effect, "citing the difficulties which they foresaw would arise from their earlier failure to prevent tacit relocation" (para [6]; and it was "an agreed fact" that the landlords had incurred "material expense" (para [7]) in instructing new solicitors to pursue litigation in the Scottish Land Court to recover possession of the fields.

[142] Further, importantly, the issue in *Gordon's Trustees* was not whether, for the purpose of section 11(3), the landlords' awareness of the occurrence of *damnum* (the manifest failure to recover possession of the fields) was to be determined with the benefit of hindsight. On the material facts of *Gordon's Trustees*, there was no need to apply hindsight to determine the landlords' awareness of the occurrence of that *damnum* because the landlords had *actual*

awareness of the occurrence of the *damnum.* They knew they had suffered a detriment on the day it occurred.

[143] In my judgment, the *ratio decidendi* of *Gordon's Trustees* can be found in para [24] of Lord Hodge's judgment. This is where the Supreme Court applies the law to the material facts of the case. The Supreme Court decided that, for the purposes of section 11(1), *damnum* occurred on 10 November 2005 when the landlords failed to get what they had sought (that is, when they suffered "detriment" by failing to recover vacant possession of their fields) (para [24]C); and, for the purposes of section 11(3), the landlords could not postpone the commencement of the five year prescriptive period because they had *actual* knowledge, on that same date (10 November 2005), of the occurrence of that *damnum* (ie they knew full well that they had indeed failed to recover vacant possession of their fields)(para [24]E). The critical aspect of the judgment reads as follows:

> "On an objective assessment, the trustees suffered loss on 10 November 2005 when they did not obtain vacant possession of those fields and therefore could not realise their development value. It does not matter whether the loss resulted from the tenant's intransigence, as the trustees may have believed, or from someone else's acts or omissions. It was also possible that the defects in the notices to quit would not have caused loss if the tenant had later waived his right to challenge them or had otherwise surrendered possession of the fields. But he did neither, and with the benefit of hindsight the failure to obtain vacant possession on 10 November 2005 can be seen as having caused loss to the trustees. At that moment, as in *Dunlop* v *McGowans*, the prescriptive period began to run under s. 11(1), unless it was postponed by subs. (3). But there was no postponement under the latter subsection: the trustees were aware on 10 November 2005 that they had not obtained vacant possession of those fields. That was a detriment. They were in any event actually or constructively aware by 17 February 2006 that they had incurred expense in legal proceedings to obtain such possession. As the trustees did not commence legal proceedings against the [negligent solicitors] until 17 May 2012, it follows that the [solicitors'] obligation to make reparation to them has prescribed."

Importantly it can be seen that the Supreme Court did not apply hindsight to ascertain the landlords' awareness of the occurrence of *damnum* for the purposes of section 11(3). In other

words, the Supreme Court did not attribute to the landlords, with the benefit of hindsight, any knowledge that the landlords did not *actually* possess on 10 November 2005.

[144] So, contrary to the defender's submission, in my respectful judgment, on a proper analysis of its *ratio decidendi*, *Gordon's Trustees* is not a binding authority for the propositions that (a) for the purpose of section 11(3), a creditor's awareness of the occurrence of *damnum* is to be assessed with the benefit of hindsight or (b) a creditor's mere awareness of expenditure incurred by it (which only in hindsight is known to have been wasted), in reliance upon negligent advice, precludes the operation of section 11(3).

Obiter dicta in Gordon's Trustees

[145] That said, I am bound to acknowledge that there are certain dicta in *Gordon's Trustees* which provide *prima facie* support to the defender's analysis.

[146] However, in my respectful judgment, those dicta are properly regarded as obiter, they do not form part of the binding *ratio* of the decision, and for the reasons explained below they ought not to be applied in the present case. Obviously, given the eminence of the source of those dicta, I have reached that conclusion only after careful deliberation and with the utmost deference to the Supreme Court Justices.

[147] The dicta in question appear in paras [18] to [22] of the judgment. I categorise them as obiter because, from para [18] onwards, Lord Hodge is addressing what is, strictly speaking, a hypothetical factual scenario that is not ultimately a material factual component of the decision. He states:

> "But where a client of a professional adviser suffers financial loss *by incurring expenditure in reliance on negligent professional advice,* the client, *when spending the money*, will often be unaware that that *expenditure* amounts to loss or damage because of circumstances, existing at the date he or she *spends the money*, of which the client has no knowledge. A question which the current appeal raises is whether s. 11(3)

> starts the prescriptive clock when the creditor of the obligation is aware that he or she has *spent money* but does not know that that *expenditure* will be ineffective" *(my emphasis)*

Lord Hodge then carries on to discuss the particular difficulties that emerge in cases where a creditor has "incurred expenditure" (para [21]), or "incurred expenditure which turns out to be wasted" (para [22]), or has "suffered a detriment in the form of wasted expenditure" (para [22]). These passages disclose that Lord Hodge is opining upon a hypothetical issue that does not strictly form part of the factual context of the case, nor which ultimately forms part of the rationale of the decision.

[148] To explain, *Gordon's Trustees* was decided, not on the basis that the landlords had "incurred expenditure", or had "spent money", "in reliance on negligent professional advice". Instead, the case was decided on a materially different factual basis, namely that the landlords had simply failed to recover possession of their physical property due to the solicitor's negligence. True, Lord Hodge does record that some expenditure (namely, legal expense) was subsequently incurred to the landlords' new solicitors in pursuing litigation against the tenant in the Scottish Land Court (para [24]E-F). However, that expenditure was not incurred "in reliance" on the defender's negligent advice. Rather, it was incurred as a consequence of the manifest *damnum* (the failure to recover possession of the assets) that had already occurred, and in an effort to mitigate or eliminate that pre-existing manifest *damnum*. In other words, the legal expense was not the *damnum* itself, but a specific head of loss flowing from the *damnum*.

[149] It is in the context of this hypothetical discussion that Lord Hodge states (at para [21]):

> "It follows that section 11(3) does not postpone the start of this prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry

> rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has *incurred expenditure*." (*my emphasis*)

Lord Hodge goes on to acknowledge that this approach may appear harsh on the creditor but that "it allows certainty, at least with the benefit of hindsight" (para [22]). This, then, appears to be a key source of the defender's contention in the present case that hindsight should be to applied to ascertain the pursuer's awareness of the occurrence of *damnum* under section 11(3) (at least in the context of "wasted" or "incurred" expenditure).

[150] In my respectful judgment, notwithstanding the eminence of their source, for the reasons set out below, these obiter dicta provide an unsatisfactory basis upon which to draw conclusions of any wider application.

[151] Firstly, as explained above, the dicta appear in the context of a discussion of a hypothetical scenario (the incurring of wasted expenditure in reliance upon negligent advice) which does not actually form part of the material facts in issue in *Gordon's Trustees* and which, ultimately, does not form the crux of the decision.

[152] Secondly, that apart, the dicta are difficult to square with the *ratio*. To explain, Lord Hodge acknowledges that references to "loss, injury or damage" (ie *damnum*) throughout section 11 (including section 11(3)) are intended by Parliament "to describe the detriment suffered by the creditor" (para [14]); he uses the same word ("detriment") to describe the *damnum* that actually occurred (namely, the failure to regain possession of the fields on 10 November 2005), for the purposes of section 11(1) (para [24]E-F); and, unsurprisingly, he concludes (for the purposes of section 11(3)) that the landlords "were aware" of the occurrence of that very same detriment or *damnum* on the date that detriment occurred. Therefore, Lord Hodge's apparent suggestion (in para [21]) that section 11(3) does

not postpone the start of the prescriptive period until a creditor is actually or constructively aware that he has suffered a "detriment" is rather confusing. It also does not sit easily with the final sentence of para [21] where the learned Supreme Court Justice states that it is "… sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought…". One would have thought that a "failure to obtain something" that was "sought" would invariably be recognised (or recognisable) to a creditor as "a detriment" (and would, therefore, be something of which the creditor was aware). In other words, in my respectful judgment, what is required for the purpose of section 11(3) is awareness by the creditor of the occurrence of detriment. That explains why the landlords in *Gordon's Trustees* were unable to avail themselves of section 11(3) - because they were actually aware that they had suffered detriment, when they failed to obtain something that was sought by them.

[153] Thirdly, in submissions for the defender, much weight was attached to the final sentence in para [21] of Lord Hodge's judgment. It reads:

> "It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has *incurred expenditure"* (my emphasis).

It was submitted for the defender that the effect of this passage is to place "incurred expenditure" in a special category of its own, namely as a form of manifest *damnum*, the occurrence of which will always be known to the creditor. However, in my judgment, this reading of the passage fails to recognise that expenditure may constitute *damnum* in at least two different senses: (i) it may comprise expenditure that turns out to be wasted (for example, because it does not achieve its expected purpose) or (ii) it may comprise expenditure that was never sought, expected or wanted in the first place. By its nature, a creditor might readily be aware of the occurrence of *damnum* in the second category, but

may not be so readily aware of the occurrence of *damnum* in the first category. The first category of expenditure is likely to be latent; the second category is likely to be patent.

[154] The striking feature of *Gordon's Trustees* is that it did not involve wasted expenditure in the first category at all. It only involved expenditure falling into the second category, namely legal fees incurred in an attempt to evict the tenants. As a head of loss, that expenditure would indeed have been patent as "a detriment" - as something that was never "sought", wanted or expected by the landlords. In any event, the landlords' legal expenditure was merely an ancillary specific head of loss following, and consequential upon, the occurrence of a pre-existing manifest *damnum* (the patent failure to recover vacant possession of the fields upon expiry of the notices to quit.) It was not the relevant *damnum* for prescription purposes.

[155] It seems to me that when Lord Hodge was referring to "expenditure incurred" (at the end of para [21]), he had in mind expenditure falling within the second category. After all, that is the only expenditure that featured in the case (and even then, only in a subordinate role); and it is the only category of expenditure that can generally be said to be patent to a creditor from the moment it is incurred.

[156] Overall, I am left with the nagging feeling that something may be awry in this final sentence of para [21] and that it may perhaps have been intended to read:

> "It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure *that was not sought*" (my words in italics)

That interpretation would at least provide a certain linguistic balance to the sentence; it would link the discussion more clearly to the relevant type of expenditure that was in issue; and it would prevent all "incurred expenditure" being placed in some curious special category of *damnum* all on its own.

[157] Fourthly, while Lord Hodge ends his discussion by suggesting that, for the purposes of section 11(3), different considerations may apply to financial loss (including presumably wasted expenditure) and to physical damage, the notion that all "expenditure incurred" comprises a discrete form of *damnum* does not appear to have been fully discussed in the case. That may be unsurprising. The *damnum* in *Gordon's Trustees*, while it was financial in nature, did not actually comprise wasted expenditure at all. It comprised the owners' failure to recover possession of their land for redevelopment. Such expenditure as did feature in the case formed merely a subordinate specific head of loss, consequential in nature, post-dating the occurrence of the manifest *damnum*.

[158] For the foregoing reasons, in my respectful judgment, these eminent dicta do not form part of the *ratio* of *Gordon's Trustees* and provide an insecure basis upon which to found any wider conclusions of general application.

Other judicial decisions

[159] Aside from the two leading Supreme Court decisions in this field, it is necessary to consider whether any other authorities provide a reliable basis to vouch the defender's analysis. In my judgment, they do not.

[160] The cases of *Dunlop, Beard* and *Khosrowpour, supra,* are irrelevant. They all concerned the operation of the long (twenty year) negative prescriptive period under section 7 of the 1973 Act and, specifically, with identification of the date of occurrence of *damnum*. Section 11(3) does not apply to the long negative prescription, therefore, the issue of the creditor's awareness did not arise. In each case, the defender's obligation to make reparation was extinguished upon expiry of twenty years from the date of occurrence of the *damnum*, irrespective of the creditor's state of knowledge.

[161] While the decision in *Jackson, supra,* did involve the short (five year) negative prescription, it was concerned only with ascertaining the date of occurrence of *damnum* for the purpose of section 11(1), in particular whether the *damnum* was "conditional, potential or uncertain" (para [23]). It was not concerned with the separate issue of the creditor's awareness of the occurrence of *damnum* under section 11(3).

[162] The Inner House decision in *Kennedy, supra*, involved a bank's refusal to perform its contract with a customer by prematurely demanding early repayment of term loans. It was concerned with identifying both the date of occurrence of *damnum* (under section 11(1) and the date of the creditor's awareness of the occurrence of *damnum* (under section 11(3)). On the first issue, the *damnum* occurred immediately upon the bank notifying the customer (on 8 February 2010) of its withdrawal of the credit facilities and demanding repayment of the loans. The *damnum* was the premature loss of the contractual credit facilities. On the second issue, the creditor was held to be fully aware of the occurrence of that *damnum* on the same date that it had occurred. That is because the pursuer was plainly aware that it had suffered "a detriment" on that date (in the sense that he knew the Bank was refusing to perform its obligations under the loan contracts, and that he no longer had the benefit of his agreed credit facilities). So, in *Kennedy*, the *damnum* was never latent. It was patent, manifest and, again (as in *Gordon's Trustees*), actually known to the creditor on the date it occurred (whether or not it was immediately quantifiable at that stage). As the Inner House noted:

> "…so far as the creditor's knowledge is concerned, *all that is required is an awareness that he or she has not obtained something that ought to have been acquired*. That appears to point very directly to refusal to perform a contract. In such a case, the innocent party must, as I have indicated, be instantly aware that he or she will not obtain performance of the contract; in other words, the innocent party will lose the benefit of an existing right. That is self-evidently an awareness of the loss of property, in the form of a contractual right to performance…" (*my emphasis*)

The words in italics confirm that the creditor's awareness of the occurrence of detriment is an essential element of the creditor's knowledge for the purpose of section 11(3). Accordingly, *Kennedy* does not support the defender's contentions in the present case.

[163] Before leaving *Kennedy*, it is of interest to note that it involved a defender refusing to perform its obligations under a contract. The Inner House observed that a refusal to perform a contract will generally be "apparent" (that is, manifest and patent) as a form of *damnum*, whereas a mis-performance (or defective performance) of a contract (while it may also produce loss, injury or damage that is apparent) is, perhaps, more likely to result in damage that is latent. In other words, the nature of the *injuria* may provide a clue as to whether the resulting *damnum* is latent or patent. I pause to observe that the present case involves *injuriae* that comprise alleged defective performance of a contract, rather than an outright blatant refusal to perform, with the result that the *damnum* is more likely to be latent in nature.

[164] That brings us to the decision in *Midlothian Council, supra*. The facts are well-known. In reliance upon negligent professional advice, the Council incurred expenditure to contractors in building a housing estate above former mine workings, without the protection of a ground gas defence system to prevent the escape of gas into the houses. The houses proved to be uninhabitable and were scheduled for demolition.

[165] For the purpose of section 11(1), Lord Doherty concluded (correctly in my view) that the expenditure incurred by the Council in building the estate was wasted; that that wasted expenditure represented the relevant *damnum;* and that *damnum* had occurred as soon as that expenditure was incurred. He stated:

> "Here, the pursuer did not know that it had not obtained what it sought from the fourth defender (i.e. a competent site investigation and assessment). However, it knew between December 2007 and June 2009 that it was

> incurring expenditure on construction of the development in reliance on the fourth defender's advice. It did not know at the time it was being 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 failed to achieve its purpose. As a matter of objective fact, it was 'loss, injury or damage'".

To this extent, the Lord Ordinary's reasoning cannot be criticised. As a matter of objective fact, viewed with the benefit of hindsight, the expenditure incurred in building the estate in reliance upon the negligent advice had failed to achieve its purpose and was wasted (paras [14] & [18]).

[166] However, for the purpose of section 11(3), Lord Doherty then goes on to conclude that, by virtue of knowing merely that it was incurring expenditure in building the estate in reliance on the advice (expenditure which, as a matter of objective fact, and with the benefit of hindsight, was wasted), the pursuer was to be treated as thereby being aware of having suffered loss, injury or damage (paras [22] & [24]).

[167] In my respectful judgment, the learned Lord Ordinary falls into error at this point. While the Council was indeed aware that it had incurred expenditure to its contractors, it was not aware (actually or constructively) "of having suffered loss, injury or damage" (para [24]) at that date. On the contrary, at the time of incurring expenditure to its contractors, the Council had no awareness (actual or constructive) that any expenditure had been wasted, or that any "detriment" had been suffered by it, or that it was "worse off, financially", or otherwise that any *damnum* had occurred. If I may say so, the error into which the Lord Ordinary has fallen is that hindsight has been applied by him to ascertain both the date of occurrence of the *damnum* (for the purpose of section 11(1)) and the state of the creditor's actual and constructive knowledge of the occurrence of that *damnum* (for the

purpose of section 11(3)). While it is correct to apply hindsight to determine the former, it is incorrect to apply hindsight to determine the latter, for the reasons previously explained.

[168] The true position is that *Midlothian Council* had no actual (or constructive) knowledge that *damnum* had occurred when it was incurring expenditure to its contractors in building the site in reliance upon the negligent advice. The *damnum* (the wasted expenditure) was latent. It was concealed as expenditure to the benefit of the Council, not to its detriment; it was masquerading as due and proper payment for a valuable consideration; it had, at all times, the façade of a *quid pro quo* for a sought-after return. In my respectful judgment, on this issue (anent the creditor's awareness of the occurrence of *damnum* under section 11(3) of the 1973 Act) the decision in *Midlothian Council* is wrong.

[169] Accordingly, for the foregoing reasons, I conclude that the defender's analysis is not vouched by any other reliable judicial precedent.

Conclusion

[170] For the foregoing reasons, I have rejected the defender's submission that, for the purposes of section 11(3), on the pursuer's own averments, the pursuer was aware that loss, injury or damage had occurred prior to 21 November 2013.

[171] While it is correct that *damnum* occurred prior to 21 November 2013, the pursuer has made relevant averments to avail itself of the benefit of section 11(3) by averring that it was not aware, and could not with reasonable diligence have become aware, of the occurrence of *damnum* until on or about 20 February 2014, when agents for the neighbouring proprietor first intimated to the pursuer's agents "issues as to the boundary" (Record, page 3, article 3, line 30), followed by related disclosures to the pursuer's agents in the succeeding few days up to 27 February 2014.

[172] Accordingly, I shall repel, in part, the defender's pleas-in-law numbers 2 & 3 so far as directed at the relevancy of the pursuer's averments anent prescription. *Quoad ultra* the defender's said preliminary pleas are reserved.

[173] I shall sustain, in part, the pursuer's plea-in-law number 5 so far as directed at the relevancy of the defender's averments anent prescription to the extent of excluding from probation the defender's averments in Answer 3 from (and including) the words "more particularly…" (on page 5, line 23 of the Record number 16 of process) to the end of that Answer. *Quoad ultra* the pursuer's said preliminary plea is also reserved.

[174] Thereafter, I shall allow parties a proof before answer of their respective remaining averments, reserving, so far as extant, the parties' preliminary pleas (namely, the defender's pleas-in-law numbers 2 & 3 and the pursuer's pleas-in-law numbers 4 & 5), on dates to be hereafter assigned.

[175] I have not yet formally repelled the defender's peremptory plea of prescription (plea-in-law 1) because the defender, in its Answers, does not formally admit the pursuer's averments anent its alleged awareness of the occurrence of *damnum* (that is, the circumstances from 20 February 2014 onwards regarding the pursuer's communications with agents acting for the neighbouring proprietor and the third party purchasers). Therefore, for the time being, the onus remains on the pursuer to prove these averments in order to avail itself of the benefit of section 11(3) of the 1973 Act.

[176] The issue of the expenses of the debate is reserved meantime. I shall assign a case management conference in due course, to discuss further procedure generally and to dispose of the issue of expenses, once the current restrictions to contain the spread of the coronavirus pandemic are eased.