SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT KIRKCALDY

[2020] SCKIR9

A96/18

JUDGMENT OF SHERIFF ALASTAIR G D THORNTON

in the cause

IAN FORD

Pursuer

against

THE FIRM OF W & A S BRUCE, a firm formed under the Law of Scotland and Keith R Kordula, Charles B Campbell, James G Smith and Ronald E Cobham, as partners and trustees thereof

Defenders

Pursuer: A Sutherland, Advocate; Macnabs Solicitors, Perth
Defenders: A MacKinlay, Advocate; BTO Solicitors LLP, Glasgow

Kirkcaldy, 24 January 2020

The sheriff, having resumed consideration of the cause, Repels the pursuer's third and fourth pleas-in-law; Sustains the defenders' preliminary plea number 1; Assoilzies the defenders from the craves of the writ; thereafter Assigns Monday 16 March 2020 at 10.00am within the Sheriff Court House, Whytescauseway, Kirkcaldy as a hearing in relation to the expenses of process.

NOTE

[1] This case called before me for a diet of debate on 12 November 2019 in relation to the defenders' preliminary pleas. The defenders had previously lodged a Rule 22 Note, and essentially the defenders' submissions at debate adhered to the matters raised by them in

that Note. In essence the defenders argue that the pursuer's claim has prescribed (their first plea-in-law). In addition they contend that the pursuer's averments in Article 5 of condescendence regarding his awareness of negligence are irrelevant and lacking in specification, and that the averments in the same article of condescendence regarding any loss sustained by him are lacking in specification. At the outset of the debate, counsel for the defenders indicated that his submissions in relation to prescription, and the general plea to the relevancy (the defenders' second plea-in-law), were effectively on the same point. Counsel for the pursuer submitted that the claim had not prescribed and that the averments in support of it were relevant. At the end of the diet of debate, I made *avizandum*.

[2] This is an action for damages for professional negligence brought by a former client of the defender firm of solicitors. It relates to legal work undertaken by the defenders in September and October 2000 relative to the transfer of title of a house owned by the pursuer into the joint names of himself and his then fiancée who subsequently became his wife, together with associated mortgage security work. The pursuer avers that the instructions to carry out the legal work were given by himself and his then fiancée. He states that he made the defenders aware that he was transferring a one-half *pro indiviso* share of the property to his soon-to-be spouse for love, favour and affection on the basis that he anticipated that in the event of her pre-deceasing him, her share of the property would revert to him (Cond 2, lines 73 – 78 of the Options Record). It is averred that the defenders' work was carried out in 2000 (Cond 4, lines 176 – 177 and Cond 5, lines 234 – 235). The defenders aver that the transfer of the one-half share of the title to the property was duly completed by the defenders when the Disposition was registered with the Registers of Scotland on or around 26 October 2000 (Ans 2, lines 144 – 147). It is not disputed by the pursuer that that is when the Disposition was registered.

[3] The pursuer claims that the defenders negligently failed to advise him as to the possibility of a survivorship destination being inserted into the title to the property. He avers that the defenders did not advise him of the advantages and disadvantages of incorporating a survivorship destination into the Disposition putting the title into joint names which he claims was standard practice at the time (Cond 2, lines 89 – 94). *Esto* it was not standard practice, he claims that, if he had been given advice about the possibility of such a survivorship destination, he would have instructed that it be incorporated into the Disposition (Cond 2, lines 94 – 96). He claims that the defenders' failure to so advise him was negligent *et separatim* in breach of their contract with him (Cond 2, lines 98 – 99).

[4] A number of years after the defenders completed the legal work, the pursuer's wife sadly died on 16 July 2013. The pursuer avers that, contrary to what he had anticipated, his wife had not made provision for her one-half share of the property to revert to him from her estate. Rather she left him a life rent of the property, with the consequence that her share of the house would ultimately (on his death) become the property of beneficiaries under her Will who are children of hers from a previous relationship. Those children have no familial connection to the pursuer. He claims that as a consequence of the defenders' negligence *et separatim* breach of contract, he has suffered the loss of regaining ownership of the one-half *pro indiviso* share of the property immediately upon his wife's death on 16 July 2013 (Cond 4, lines 176 – 179).

[5] The defenders for their part deny that it was their standard practice in September and October 2000 to insert survivorship destinations into title deeds without specific instructions. They aver that they received no instructions to include such a destination in the Disposition, and deny that they were under any duty to provide advice to the pursuer in relation to the possibility of having a survivorship destination (Ans 2, lines 149 – 153).

[6] The defenders also aver that, *esto* the pursuer has suffered any loss due to the fault or breach of contract on the part of the defenders, any obligation to make reparation for that loss has prescribed, and that they should accordingly be assoilzied (Ans 5, lines 257 – 259 and their first plea-in-law). They argue that on the hypothesis of fact on which the pursuer proceeds the alleged negligence occurred in 2000. *Esto* he incurred the loss he claims (which they deny), they say that the loss was incurred on 26 October 2000 when the Disposition transferring title from his sole name into the joint names of himself and his fiancée was registered with the Registers of Scotland (Ans 5, lines 257 – 265). The present action was not served on the defenders until 6 July 2018, and they contend that any claim by the pursuer has prescribed.

[7] The pursuer argues in response that his loss arising from the alleged negligence by the defenders only crystallized at the point of his late wife's death on 16 July 2013 when her Will became operative (Cond, 5, lines 210 – 212). They contend that up to the date of her death she could have made provision (either by testamentary writing or by Disposition) for her share of the property to revert to the pursuer. Alternatively she could have disponed her share to a third party thereby defeating any survivorship destination that might have been inserted into the Disposition which the defenders prepared. They submit that, if she had taken any such steps, the pursuer would not have suffered any loss arising from the defenders' negligence (cond. 5, lines 212 – 221). They argue that if the survivorship destination had been incorporated into the Disposition, it is at the date of her death on 16 July 2013 that he would have acquired sole title to the property (Cond 5, lines 221 – 224). Further they aver that until he learned of the terms of his wife's Will immediately following her death, he was not aware of the negligence he alleges on the part of the defenders, nor could he have become aware of that by exercising reasonable diligence – because his wife

had not elected to make him aware of the terms of her Will (Cond 5, lines 224 – 229). He argues that, because he was not aware of the possibility of inclusion of a survivorship destination in the Disposition, he did not know that the defenders had been negligent in not so advising him, and that until his wife's death he had no reason to make inquiry regarding the manner in which the defenders had carried out work for him in 2000 (Cond 5, lines 230 – 235). The pursuer accordingly contends that the obligation to make reparation to him for his claimed loss arose as at the date of his wife's death, and so the claim which is the basis of the present action has not prescribed, having been raised within 5 years of that date.

The relevant statutory provisions

[8] At the diet of debate on 12 November 2019 I was referred by counsel for each party to a number of authorities in support of their respective positions. I have considered the relevant provisions of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"), and I have also had regard to the various authorities to which I was referred.

[9] Section 6 of the 1973 Act, when read with sections 9 and 10 of the 1973 Act, creates the short negative prescription by providing that if an obligation has subsisted for a continuous period of 5 years after "the appropriate date" without the creditor or someone on his behalf having made a relevant claim or the debtor or someone on his behalf having relevantly acknowledged the subsistence of the obligation, the obligation is extinguished at the expiration of that period. Section 6(3) provides that the appropriate date in relation to an obligation arising from liability to make reparation or from a breach of contract is a reference to the date when the obligation became enforceable.

[10] The defenders' preliminary plea is concerned with section 11 of the 1973 Act, which defines when an obligation to make reparation becomes enforceable. It provides:

> "11. (1) Subject to subsections (2) and (3) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.
>
> (2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased.
>
> (3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware."

The parties' submissions

[11] In their Rule 22 Note the defenders make reference to payment of legal fees by the pursuer to them as being relevant to identifying when the pursuer's loss arose. However at debate their counsel did not insist on that factor as indicating the commencement of the prescriptive period. Rather he submitted that, on the hypothesis of fact claimed by the pursuer, the actual loss sustained by him arose in the following way. Before the granting of the Disposition by the pursuer, he owned the entirety of the property. After the conveyance was completed, he should have owned his one-half *pro indiviso* share plus a right to have his wife's share vest in him again in the event of her pre-deceasing him. Counsel for the defenders submitted that, on the pursuer's own averments, the only right the pursuer was in fact left with was to his own one-half *pro indiviso* share. Counsel contended that the absence of the right to his wife's half share in the event of her pre-deceasing is itself, in law, the loss which he has suffered, and that it arose on the completion of the transaction in October 2000.

[12] On behalf of the pursuer it was argued that, before any claim could arise, a number of events had to occur after the alleged negligent failure to advise on incorporation of a survivorship destination. These were (i) the pursuer being pre-deceased by his wife, (ii) his wife making a Will and (iii) his wife omitting to leave her share of the house to him in her Will. Accordingly counsel for the pursuer contended that the legal consequence of the failure to advise could not be seen or felt until the death of the pursuer's wife. He submitted that the approach advanced by the defenders would require the prescriptive period to start without there being any "real world" consequence or loss at all. In his submission the critical question for the court was whether the registration of the Disposition altered the pursuer's legal position to his immediate, measureable, economic disadvantage. He suggested that the answer to that question must be in the negative, arguing that it was only after the wife's death in 2013 that the pursuer could have raised court proceedings with any hope of success, because until then the absence of a survivorship destination could not have been the subject of rational quantification. This is the crux of the controversy between the parties in relation to the operation of prescription, because the defenders contend that at the point in time at which the Disposition was registered there was actual loss to the pursuer, namely the difference between what he received following the conveyance to his then fiancée of a one-half *pro indiviso* share of the property, and what he ought to have obtained if the defenders had duly fulfilled the duties which the pursuer claims they should have performed.

Decision and reasons

[13] In *Dunlop* v *McGowans,* 1980 SC (HL 73), Lord Keith of Kinkel explained (at page 81) that:

> "An obligation to make reparation for … loss, injury and damage is a single and indivisible obligation, and one action only may be prosecuted for enforcing it. The right to raise such an action accrues when *injuria* concurs with *damnum*. Some interval of time may elapse between the two, and it appears to me that section 11(1) does no more than to recognize this possibility and make it clear that in such circumstances time is to run from the date when *damnum* results, not from the earlier date of *injuria*. The words 'loss, injury or damage' in the last line of the subsection refer back to the same words in the earlier part and indicate nothing more than the subject matter of the single and indivisible obligation to make reparation."

[14] In determining the time at which *injuria* concurs with *damnum*, the issue for the court to decide in this case, as in all cases, is when did the pursuer first suffer loss as a result of the defenders' alleged negligence or breach of contract; in this case as a consequence of the alleged failure to advise the pursuer about the possibility of incorporating a survivorship destination in the Disposition?

[15] As recognised by the Inner House in the case of *Kennedy* v *Royal Bank of Scotland Plc* 2018 SLT 1261 (per the Lord President (Carloway) at para [18] on page 1266), in some cases (as in this one) the pursuer may not have appreciated that a wrong has occurred until a time which is far removed from that when loss was suffered. In the Outer House decision in *Beard* v *Beveridge Herd and Sandilands*, 1990 SLT 609, the loss to the creditor (landlords) occurred at the point when their solicitors had failed to incorporate a legally effective rent review clause into the lease. It was not when the rent review would have operated or when the landlords realised that their solicitors had failed to do what they should have done. In that case the absence of the valid clause had the consequence of rendering the lease less valuable than one with an effective rent review provision. Accordingly the loss had been sustained at the time the lease was executed.

[16] In *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287, the Supreme Court (per Lord Hodge at para [18] on page 1291) drew a distinction between the circumstances of that case and those which applied in *David T Morrison and Co Limited*

(t/a Gael Home Interiors) v *ICL Plastics Limited*, 2014 SC (UKSC) 222. In the earlier case there was clear, observable physical damage to the pursuer's shop caused by an explosion in the neighbouring business premises operated by the defenders. The Supreme Court in *Morrison* v *ICL* held that, for the prescriptive period to begin under section 11(3) of the 1973 Act, the creditor needed to be aware (actually or constructively, if the creditor could with reasonable diligence have been aware) only of the occurrence of the loss or damage and not of its cause. In other words, in the case of latent damage, section 11(3) applies by postponing the start of the prescriptive period until the creditor is aware of the physical damage to his property (see Lord Hodge's opinion at para [17] on page 1291).

[17] But as Lord Hodge goes on to explain in para [18] of his opinion in *Gordon's Trustees*, the situation is different where a client of a professional adviser suffers financial loss by incurring expenditure in reliance on negligent professional advice. In such a case the client will often be unaware that that expenditure amounts to loss or damage because of circumstances, existing at the date he spends the money, of which the client has no knowledge, for instance that the professional adviser has given negligent advice.

[18] In addressing the question of whether section 11(3) starts the prescriptive clock when the creditor (in this case, the client) is aware that he has spent money, but does not know that the expenditure will be ineffective, Lord Hodge continues at paras [19] to [21] by focusing on the proper interpretation of the words "loss, injury or damage" in subsection (3) in the context of section 11 as a whole. In para [19] he gives some examples of when the prescriptive period will start. He states:

> "Thus if, as a result of a breach of contract, a person purchases defective goods, incurs expenditure or fails to regain possession of his property when he or she wished to do so, the section 11(1) clock starts when the person acquires the goods, the expenditure is incurred or when the person fails to obtain vacant possession of the property."

[19] I respectfully agree with the learned opinion of Lord Doherty in the more recent Outer House case of *Khosrowpour* v *Taylor* [2018] CSOH 64 (at para [26]) that it is clear that Lord Hodge in the passage from para [19] of *Gordon's Trustees* cited above was not making an exhaustive statement of the circumstances in which loss, injury or damage might occur. Rather, he was providing examples to illustrate the principles he was elucidating. As Lord Doherty goes on to state:

> "It is not difficult to think of other instances which could have been used, eg where as a result of a breach of contract or duty by a professional a client ends up with less in the way of rights than he would have had but for the breach."

His Lordship cites the case of *Beard* v *Beveridge Herd & Sandilands* (see para [15] above) as an example of such a situation.

[20] The circumstances of *Khosrowpour* are that the pursuer entered into an informal agreement with his mother-in-law that he would provide her with a sum of money to enable her to purchase her council house which she was entitled to buy at a discounted price. He contended that they had agreed that on her death the house would be left to him, that he consulted a solicitor (the defender) with a view to documentation being prepared to give effect to the informal agreement, but that the solicitor failed to advise him to conclude a binding written agreement incorporating what had been agreed informally. The mother-in-law made a Will including a bequest of the house to the pursuer and granted a standard security over the property "in security of all sums due or which may become due" to the pursuer. A number of years later the mother-in-law executed a new Will revoking the earlier bequest of the house to the pursuer, and making no alternative provision in his favour. Several years after that the mother-in-law died and her estate fell to be distributed in accordance with the later Will. The only right with which the pursuer was left was for

redemption of the standard security in his favour by repayment of the sum he had advanced to her at the outset together with interest thereon. He sued the solicitor in relation to the loss he claimed to have suffered as a consequence of the lawyer's professional negligence by failing to embody the informal agreement with the mother-in-law in legally binding documentation. The defender argued that any obligation he may have had to make reparation had been extinguished by the operation of prescription. The pursuer contended that loss did not occur until the second Will was executed by the mother-in-law.

[21] Lord Doherty held (at para [28]) that on a proper analysis the pursuer suffered *damnum* immediately he parted with the funds he advanced to his mother-in-law. He determined that it was self-evident that what the pursuer got in return for that payment was less than he ought to have got had the defender performed his duties. The mother-in-law should have been bound to leave the house to him when she died, but instead all that he had was a "precarious expectancy" which could be defeated at any time. Lord Doherty went on to hold (at para [30]) that the pursuer sustained an immediate actual loss when the solicitor failed to fulfil his contractual and delictual duties when consulted by the pursuer about the oral agreement he had reached with his mother-in-law. His Lordship explained that the rights which the pursuer obtained were not as valuable as they would have been had the defender duly performed his duties.

[22] The pursuer in this case has argued, both in his pleadings (Cond 5, lines 212 – 220) and at debate, that there were a number of possible things which his wife could have done prior to her death which would have defeated any survivorship destination, had such a provision been included in the conveyance. The pursuer contends that the existence of these possibilities had the effect of postponing the time when loss was suffered by him until the date of her death. In this connection it must be noted that the law infers that a survivorship

destination in a Disposition is a contract to the effect that, on the first death, the property will devolve upon the survivor (Currie on the *Confirmation of Executors in Scotland*, Ninth Edition, para 13-19). If such a destination had been incorporated in the Disposition by the pursuer in favour of himself and his fiancée, it would have been a "clause of return" whereby the substitute would have been the granter of the conveyance, i.e. the pursuer (Gretton & Reid, *Conveyancing*, Fifth Edition, para 27-08). Presumptively his wife would have had no power to evacuate that survivorship destination without express provision in the Disposition (Gretton & Reid, *op cit*, para 27-16). However she could have evacuated the destination by conveying the property to a third party (Gretton & Reid, para 27-20).

[23] Another aspect of Lord Doherty's decision in *Khosrowpour* was his determination (again at para [30]) that the possibility that the mother-in-law in that case might subsequently have agreed to enter into a binding contract, or might have maintained the first Will as her testamentary provision until her death, ought not to lead to a conclusion that the time when loss was suffered should be postponed from the date when the solicitor's negligence occurred. Lord Doherty held that it was known with the benefit of hindsight that, *ex hypothesi* of the pursuer's averments in that case, the defender's breach was in fact causative of the pursuer's loss. He determined that possibilities of that nature were extraneous factors which did not suspend the running of the prescriptive period.

[24] On that point, a similar view was taken by Lord Eassie in *Jackson* v *Clydesdale Bank Plc*, 2003 SLT 273 (at para [25] on page 280), when he held that:

> "When a transaction is concluded (or its conclusion is omitted) in circumstances involving negligence or *injuria* and productive of immediate loss, the possibility of voluntary steps being taken by a third party to remedy, cancel or mitigate the amount of the loss will not on that account delay the starting point for the running of time for the purposes of prescription."

While I appreciate that the circumstances of *Jackson* are somewhat different to those of the present case (as the pursuer's counsel contends), I am respectfully of the view that Lord Eassie's conclusion that the possibility of extraneous factors intervening does not postpone the commencement of the prescriptive period is correct and must apply in cases such as the present one.

[25] For the sake of completeness it should be mentioned that Lord Doherty also reached the same conclusion as regards the irrelevance of the possibility of an extraneous factor intervening in *Midlothian Council* v *Keith and others* [2019] CSOH 29 (at para [17]).

[26] It appears to me that the issues which arose in *Khosrowpour* are not so very far removed from those which apply in the present case.

[27] Counsel for the pursuer placed reliance on passages in Johnston, *Prescription and Limitation* (2nd edition), in particular from paragraph 4.40 to paragraph 4.45, which distinguished instances where the appropriate date for the loss was the date of realisation (i.e. when the creditor can clearly identify what his loss is) from other situations where the appropriate date is the date of the transaction (namely where the focus is the value of the right acquired or lost at the time of contracting). As Professor Johnston states at paragraph 4.40, "everything turns on the facts of the case".

[28] The difficulty for the pursuer is that the learned professor's textbook was published before and without the benefit of the two leading Supreme Court decisions on this aspect of the law of prescription, namely *Morrison* v *ICL Plastics* and *Gordon's Trustees*. Accordingly any guidance to be derived from the textbook must be viewed in that light, and it appears to me that the learned author's analysis set out in the passages referred to cannot be relied upon to the extent that it is inconsistent with, or does not take account of, those Supreme Court decisions. In particular it seems to me that the two authorities specifically cited by the

author (and relied upon by counsel for the pursuer in the present case) as examples of the application of the "date of realisation" approach (namely *Riddick* v *Shaughnessy, Quigley and McColl*, 1981 SLT (Note) 89, and *MacDonald-Haig* v *MacNeill and Critchley*, 2004 SLT (Sheriff Court) 75) may not have been decided as they were if they had been considered with the benefit of the subsequent Supreme Court judgments.

[29] The case of *Kusz* v *Buchanan Burton* 2010 SCLR 27 was also referred to. It related to an alleged failure by solicitors to raise proceedings and put in place an inhibition on the dependence of that action. It was held that, although the defender's admission to take steps to put an inhibition in place constituted an act, neglect or default by them, any loss to the pursuer was only contingent and did not occur until the perfection of the contingency by the obtaining of decree for a substantial sum in favour of the pursuer. That case too was decided without the benefit of the subsequent Supreme Court authorities of *Morrison* v *ICL* and *Gordon's Trustees*, and it appears to me to be difficult to reconcile the approach taken by the court in *Kusz* with that later taken by the Supreme Court in those two cases.

[30] The essence of the pursuer's case here is that the defenders ought to have advised him to incorporate a survivorship destination in the Disposition in favour of himself and his then fiancée. Had the defenders done so, the pursuer claims that he would have instructed the incorporation of such a provision into the Disposition, and he would have regained his wife's one-half *pro indiviso* share of the property immediately upon her death. In my opinion, on a proper analysis, the pursuer suffered loss immediately he conveyed a one-half *pro indiviso* share of his property to his fiancée. To adopt Lord Doherty's formulation in *Khosrowpour*, it is self-evident that what the pursuer obtained in consequence of that conveyance was less than he ought to have got had the defenders duly performed the duties he claims were incumbent upon them. On the hypothesis that the defenders were indeed in

breach of their contractual and delictual responsibilities when the Disposition was registered in October 2000 without a survivorship destination, the pursuer sustained an immediate actual loss. The rights which he obtained were not as extensive as they would have been had the defenders duly performed their professional duties. That loss was actual, not merely contingent or potential. He was deprived of a right or entitlement which on his averments he ought to have obtained. Although it was only upon the death of his wife that he became actually aware that he had suffered a detriment by virtue of there being no survivorship destination, his loss as a matter of law occurred in October 2000 when the entitlement which he says he should have obtained by incorporation of the destination in the Disposition was omitted. It was at that point in time that an actual loss occurred, albeit an uncertain one because it could not have been known that his wife would in fact pre-decease him.

[31] The possibility that his wife might subsequently during her lifetime have (a) altered her testamentary writing to provide for her one-half *pro indiviso* share of the property to revert to the pursuer through her estate, or (b) disponed her one-half *pro indiviso* share of the property back to the pursuer, or (c) disponed her *pro indiviso* share of the property to a third party does not in my view lead to any different conclusion. As a matter of fact none of these possibilities came to pass. *Ex hypothesi* of the pursuer's averments, the defenders' alleged breach of duty by failing to advise on incorporation of a survivorship destination can be seen with the benefit of hindsight as having caused loss to the pursuer (see *Gordon's Trustees* per Lord Hodge at para [24], page 1293). Such possibilities as advanced by the pursuer are indeed extraneous factors, and while the views expressed by Lord Eassie in *Jackson* v *Clydesdale Bank Plc* and Lord Doherty in *Khosrowpour* are both decisions of single judges in the Outer House and are not binding on me, I respectfully share their opinions that the

existence of potentially intervening extraneous factors does not suspend the running of the prescriptive period.

[32] I fully understand that the effect of my determination in this case may appear to be harsh from the pursuer's perspective. The harshness of the Supreme Court's decision in *Gordon's Trustees* was also recognised by Lord Hodge at para [22],p 1292. His Lordship acknowledged that the circumstances when the prescriptive period begins may not prompt an enquiry into the existence or likelihood of such loss. However he explained that the approach which the Supreme Court took in that case provides certainty, at least with the benefit of hindsight, and that the pursuers' proposition in that case would create uncertainty, which might be prolonged. He pointed out that a requirement that there be awareness of a head of loss would involve knowledge of the factual cause of the loss, which is an interpretation that the Supreme Court rejected in *Morrison v ICL*. He referred to the Scottish Law Commission's proposals for reform of the 1973 Act, which address the apparent harshness of the law, and which have now resulted in the Prescription (Scotland) Act 2018 which amends the law in relation to the 5-year negative prescriptive period. However at the time of this judgment regulations to bring the relevant provisions of that legislation into force have not yet been enacted by the Scottish Parliament.

[33] The issue which I have determined in this case is one of law relating to the correct application of a statutory provision. There is no place here for consideration of issues of equity or reasonableness.

[34] In all the circumstances it seems to me that there is no point in reserving determination of the prescription plea and allowing a proof before answer into the facts. On the hypothesis upon which the pursuer proceeds, I am satisfied that there was a concurrence of *injuria* and *damnum* in October 2000, more than 17 years before this action was raised, and

that the obligation to make reparation upon which the pursuer founds was extinguished by the operation of Section 6 of the 1973 Act.

The defenders' general plea to relevancy

[35] In view of my decision on the concurrence of the alleged negligence or breach of contract and the suffering of loss in this case, it is not necessary for me to determine separately the issue of the relevance or otherwise of the pursuer's averments regarding his awareness of the defenders' negligence. As submitted by the defenders' counsel, the two matters are essentially the same. However, as I have held above, the commencement of the prescriptive period is not dependent upon the pursuer being aware that the defenders had been negligent or in breach of their contract with him. Accordingly the state of his knowledge about that is nothing to the point, and in my view the pursuer's case would be bound to fail even if he proved all that he has averred. Therefore his averments in Article 5 (lines 209 – 237) of Condescendence relative to his awareness of the negligence are irrelevant in law, and would fall in any event to be excluded from probation.

[36] There were general, but no specific, submissions on behalf of the defenders at the debate in relation to the pursuer's quantification of loss in the latter part of Article 5 of Condescendence (lines 238 – 255), but these averments by the pursuer are predicated on the loss having occurred at the date of death of the pursuer's wife, and not when the defenders' alleged negligence occurred. Accordingly those averments too are irrelevant in law, and, were it not for my upholding of the defenders' plea of prescription, would fall in any event to be excluded from probation.

Disposal

[37] Since I am satisfied that the obligation upon which the pursuer founds has been extinguished by the operation of prescription, I shall repel the pursuer's third and fourth pleas-in-law, sustain the defenders' first plea-in-law and pronounce decree of absolvitor.

Expenses

[38] I was asked at the end of the debate by both parties to certify the case as suitable for the instruction of junior counsel. Having regard to (i) the difficulty or complexity of the legal issues in this case, there being no previous authority relating to a failure to advise on a survivorship destination, (ii) the importance of the matter to both parties, and (iii) the fact that both parties had chosen to instruct counsel, I granted their joint motion for certification.

[39] I was not addressed fully in relation to any award of expenses as between the parties, and so I shall arrange for the sheriff clerk to assign a diet for that issue to be determined in light of my decision following debate.