

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 19
CA207/14 and CA208/14

Lady Paton
Lady Clark of Calton
Lord Glennie

OPINION OF LADY PATON

in the cause

HEATHER CAPITAL LIMITED (in liquidation)
and PAUL DUFFY (as liquidator)

Pursuer and Reclaimer

against

LEVY & McRAE and others

Defenders and Respondents

and

HEATHER CAPITAL LIMITED (in liquidation)
and PAUL DUFFY (as liquidator)

Pursuer and Reclaimer

against

BURNESS PAULL LLP

Defender and respondent

Pursuer and reclaimer: Lord Davidson of Glen Clova QC, Tariq;
Shepherd & Wedderburn LLP
Defenders and respondents (Levy & McRae): Duncan QC, Brown;
Clyde & Co (Scotland) LLP
Defender and respondent (Burness Paull LLP): Dunlop QC, C Paterson;
Messrs CMS Cameron McKenna LLP

28 February 2017

Prescription and the extinction of obligations

[1] In these two actions raised in 2014, the liquidator of Heather Capital Limited (HC) sues two firms of solicitors, Levy & McRae (LM) and Burness Paull (BP). The grounds of action include implement of trust obligations, and damages for alleged breach of contract, negligence, breach of fiduciary duty and dishonest assistance.

[2] The solicitors contend that, on a proper construction of the liquidator's own pleadings and without the need for evidence, it can be seen that certain obligations have been extinguished by the passage of time in terms of the Prescription and Limitation (Scotland) Act 1973. Those submissions were successful in the BP action (a debate before Lord Tyre), and partially successful in the LM action (a debate before Lord Doherty).

[3] The liquidator reclaimed. LM and BP cross-appealed. The cases came before the Inner House on 15 and 16 November 2016.

[4] This opinion focuses upon obligations which are subject to the 5-year prescriptive period and the effect on the running of that period of sections 11(3) and 6(4) of the 1973 Act. In a separate opinion (with which I agree) Lady Clark rejects an argument that there are insufficient relevant averments of any loss suffered by the pursuer (HC).

Summary of conclusions reached

5-year prescription: awareness of loss, sections 11(3) and 6(4)

[5] While it is possible that losses which were easily identifiable by HC may have occurred in 2007, leading to the triggering of the 5-year prescription in 2007 (i.e. more than five years before the actions were raised in 2014: see paragraphs [58] to [61] below), this is a matter of dispute which cannot be resolved on the pleadings alone. In any event, HC's averments of reasonable diligence (ie section 11(3) of the 1973 Act) and of error induced by the solicitors (ie section 6(4), with the proviso of "reasonable diligence") are, in my opinion, sufficient to entitle HC to a proof before answer in each case, all pleas standing: see paragraph [62] *et seq* below.

20-year long negative prescription: section 7

[6] As I have reached the view in each case that there should be a proof before answer at large, all pleas standing, I consider it unnecessary and premature for this court to give an opinion relating to the 20-year prescription: see paragraph [80] below.

Ultimate decision

[7] As set out in the final paragraphs of this opinion, I propose that the court should recall the interlocutor of Lord Tyre dated 6 November 2015 and the interlocutor of Lord Doherty dated 31 August 2016; in each case allow a proof before answer at large, all pleas standing; remit to the Outer House to proceed as accords; and continue meantime the question of the expenses of the reclaiming motions.

Background: investment company affected by fraud

[8] HC is an investment company incorporated in the Isle of Man in 2005. On 7 July 2010, as a result of difficult economic conditions and cash flow problems, a liquidator was appointed. In February 2011, the liquidator received electronic documentation, and began a detailed review of the company's affairs. At a later stage, he was assisted by staff from the Fraud Investigations and Dispute Service in Ernst & Young LLP. In 2012, the liquidator and his team were able to confirm that millions of HC's funds were missing in circumstances suggestive of a deliberate fraud perpetrated by HC's two executive directors, Mr King and Mr Volpe. Details of the mechanism of the alleged fraud can be found in the Opinions of Lord Tyre, [2015] CSOH 150, and Lord Doherty, [2016] CSOH 107. As summarised in an Isle of Man judgment, the scheme resembled a "Ponzi" scheme in that apparent repayments to HC were in fact funded in a circular way by HC itself: see paragraph 30 of the judgment of His Honour Deemster Corlett, *Heather Capital Limited* v *KPMG Audit LLC*, 17 November 2015.

[9] A third party, Nicholas Levene, was a participant in the scheme. He is currently serving a 13-year sentence for fraud, false accounting, and obtaining money by deception. To date, no proceedings have been taken against Mr King or Mr Volpe. Both actions are at the stage of debate. No evidence has been led. Accordingly allegations against particular individuals (for example, Mr King and Mr Volpe) have not been established.

The court actions

[10] The liquidator seeks to recover and ingather funds. He has raised various court actions. The present actions in the Court of Session were raised on 23 October 2014 (with amendments to the instance in March/April 2015).

[11] The action against BP ("the BP case") contains the following conclusions, read short:

> 1. Count and reckoning of BP's intromissions from 1 March 2006 to 31 July 2006 with HC's funds received into its client account, and payment of any balance due.
>
> 2. Failing count and reckoning, for payment of £7.3 million.
>
> 3. Alternatively for payment of £7.3 million.
>
> 4. Alternatively for declarator that BP, through Mr Scott Wilson (then a partner), dishonestly assisted Mr King in committing breach of his fiduciary duties owed to HC and in diverting from HC £7.3 million.
>
> 5. Expenses.

[12] The action against LM ("the LM case") contains the following conclusions, read short:

> 1. Count and reckoning of LM's intromissions from 1 January 2007 to 30 June 2007 with HC's funds received into their client account, and payment of any balance due.
>
> 2. Failing count and reckoning, for payment of £28.412 million.
>
> 3. Alternatively for payment by way of recompense of £28.412 million.
>
> 4. Alternatively for payment by way of reparation of £28.412 million.
>
> 5. Alternatively for declarator that LM dishonestly assisted Mr King in committing breach of his fiduciary duties owed to HC and in diverting from HC £28.412 million.

6. Expenses.

[13] The summons in each case was served on the defenders on 23 October 2014. Each summons was subsequently amended (in LM's action on 27 March 2015, in BP's action on 28 April 2015) such that the instance reads "HC and Paul Duffy" (rather than "Paul Duffy as liquidator of HC").

[14] The averments in Condescendence 5 in each action refer to the date of "actual knowledge of loss" as follows:

> (i) The BP case: 17 April 2012, when the true destination of funds was confirmed by an e-mail from Scott Wilson, then a partner of BP.
>
> (ii) The LM case: 31 August 2012, when the true destination of funds was confirmed by the production of the client ledger under an order in terms of section 236 of the Insolvency Act 1986 (although senior counsel for HC also accepted that the earliest possible starting point for the five-year prescription was arguably February 2011, when the liquidator received the electronic documentation: see too Condescendence 39; and (paragraph [19] of Lord Doherty's Opinion).

[15] Each summons was met with *inter alia* a plea of prescription.

[16] In the BP case, the defender's third plea is as follows:

> "3. Any obligation incumbent upon the defender to make payment having prescribed in terms of section 6 of the Prescription and Limitation (Scotland) Act 1973, the defender should be assoilzied from the second to fourth conclusions of the summons."

HC's response is a plea as follows:

> "3. The pursuer's claim not having prescribed, decree should be granted as concluded for."

[17] In the LM case, the defenders' sixth plea is as follows:

> "6. Any obligation on the part of the defenders to make reparation to the pursuer for breach of contract, fault or negligence or assistance or fraud having been extinguished by the short negative prescription, the defenders should be assoilzied."

HC's response is a plea as follows:

> "3. The defenders' averments being unfounded in fact, or alternatively sections 6(4), 7 or 11(3) of the Prescription and Limitation (Scotland) Act 1973 being engaged, their plea of prescription should be repelled."

[18] Debates took place: first, a debate before Lord Tyre in the BP case; and secondly, a debate before Lord Doherty in the LM case. By interlocutor dated 6 November 2015, Lord Tyre sustained BP's third plea and assoilzied BP from the second to fourth conclusions of the summons (leaving the first and fifth conclusions extant, with no further orders to date). In the LM case, Lord Doherty pronounced an interlocutor dated 31 August 2016 in the following terms:

> " … sustains the defenders 1st plea in law to relevancy to the extent of refusing to admit to probation the pursuer's averment in article 39 of condescendence 'Reference is made to section 11(3) of the Prescription and Limitation (Scotland) Act 1973' together with the corresponding words and figures 'or 11(3)' in the pursuer's 3rd plea-in-law; *quoad ultra*

leaves all pleas standing and allows to parties a preliminary proof before answer on prescription…"

Lord Doherty granted leave to reclaim.

Timeline

[19] The following abbreviated timeline is taken from HC's averments, productions, and some undisputed parts of the Opinions of the Lords Ordinary. There were no joint minutes agreeing productions: counsel referred to and relied upon some productions without objection, and the court was invited to do likewise. Counsel chose to present the LM case before the BP case. However as the events concerning LM occurred after the events concerning BP, that chronological order is reflected in the timeline below.

[20] In the BP case:

- On 21 April 2006, HC transferred funds to its client account with BP. Loans to four first level SPVs, namely Bayhill, Brookhill, Hampsey and Bellwood, were anticipated and were recorded in HC's books (Lord Tyre paragraphs [3], [4] and [7]; Condescendence 5).
- On 24 April 2006, after an email bearing to be from Mr King but forwarded to Mr Scott Wilson of BP by John Caulfield, Mr Wilson transferred £3.3 million from the client account directly into Mr Levene's personal account, not to any first level SPV (Condescendence 16-17; Lord Tyre paragraph [6]). In the email chain, Mr Levene indicated that he would use the funds for "our IPOs".
- On 3 May 2006, Mr Wilson sent documentation for Bayhill, Brookhill and Hampsey to Mr Ashworth, managing director of Abacus (HC's management and administrative services). Mr Wilson did not mention payment of the funds into Mr Levene's personal bank account. Abacus recorded the loans in HC's books of account as having been made to Bayhill, Brookhill, and Hampsey (Lord Tyre paragraph [7] and [17]).
- On 12 July 2006, Mr Wilson of BP transferred £4 million from the client account to a company Mathon plc. The Bellwood documentation was sent to Abacus. Mr Wilson did not mention payment of the funds into Mathon's account. Abacus recorded the loan in HC's books of account as made to Bellwood (Lord Tyre paragraphs [8], [9] and [17]; Condescendence 24 *et seq*).
- In early 2007, HC's auditors KPMG raised questions about what appeared in HC's books of account as loans to first level SPVs (Bayhill, Brookhill, Hampsey, and Bellwood). KPMG identified concerns including (i) inability to reconcile second level SPVs' heritable securities with the Land Registry; (ii) missing documentation; and (iii) concerns about the enforceability of securities given by second level SPVs (Lord Tyre, paragraph [10]).
- By a memorandum dated 17 March 2007, KPMG recorded these concerns and indicated that further work and information was required (Condescendence 5, page 8 of BP reclaiming print).
- In May and June 2007, amounts equivalent to loans thought to have been made to the four SPVs were apparently "repaid" to HC via Cannons, solicitors, Glasgow (Lord Tyre paragraph [10] *et seq*; Condescendence 27A and 27B).
- KPMG carried out additional work, including a "full scope audit to 30 September 2007 to gain greater assurance over receipt of monies in relation to the SPV loans and their subsequent reinvestment" and "an audit of the nine month figures to 30 September 2007" (Lord Tyre paragraph [14]).
- By letter dated 26 November 2007, Mr King advised the board of HC that "some sort of fraud had been deliberately introduced with invalid land registry details on a number of the loans". He stated that he had applied pressure to Mr Volpe and Mr Cannon, whereupon there had been "full

repayment of the loans with relevant interest" which meant that "investors were secure" (Lord Tyre paragraph [12]).

- On 4 December 2007, HC obtained legal advice from Bird Semple regarding the apparent repayment of the SPV loans (Condescendence 5, page 9 of BP reclaiming print).
- By email dated 12 December 2007, Mr King supplied apparently fabricated correspondence supporting his account of the repayment of the first level SPV loans to HC (Condescendence 5, page 9 of BP reclaiming print).
- In December 2007, having examined HC's books, the auditors KPMG expressed concerns, using language such as "the risk of fraud increased to high", "some form of fraud appeared to have been attempted", "increase[ed] audit procedures" and a statement that "We have been unable to verify where funds advanced to the SPVs were invested. In addition, we were supplied with false documentation in relation to the SPVs, which appears to have been a deliberate attempt to mislead us" (Condescendence 5, pages 9-11 of BP reclaiming print; Lord Tyre paragraph [13]).
- On 6 June 2008, KPMG signed their audit report with qualifications concerning the SPV loans (Condescendence 5, page 12 of BP reclaiming print).
- On 5 September 2008 and 12 May 2009, KPMG signed the accounts reports without audit qualifications (Condescendence 5, page 12 of BP reclaiming print).
- On 7 July 2010, the liquidator was appointed to HC (Condescendence 1).

[21] In the LM case:

- On 4 January 2007, HC transferred £19 million to its client account with LM (Lord Doherty paragraph [5]).
- On 24 January 2007, HC transferred £9.412 million to its client account with LM (Lord Doherty paragraph [5]).
- The money was intended to be loaned to a first level SPV Westernbrook Properties Ltd (WBP) for onward lending to second level SPVs (Lord Doherty paragraph [5]).
- On 9 January 2007, LM transferred £19 million to a Panamanian company (Niblick) owned and controlled by Mr Levene: the money was not therefore transferred to WBP. The transfer was undocumented and without security (Lord Doherty paragraph [5], and Condescendence 6 and 17, pages 20 and 44 of LM reclaiming print).
- By a memorandum dated 17 March 2007, HC's auditors KPMG "identified a number of concerns relating to the documentation provided in respect of these loans". Further work and information was required (Condescendence 5, page 13 of LM reclaiming print).
- On 29 March 2007, LM transferred £9.142 million to Hassans, solicitors, Gibraltar, under the reference "Rosecliff Limited" (a company controlled by Mr King): the money was not therefore transferred to WBP. The transfer was undocumented and without security (Lord Doherty paragraph [5], and Condescendence 6 and 17, pages 20 and 44 of LM reclaiming print).
- In April to June 2007, amounts equivalent to the loans thought to have been made to WBP (including accrued interest) were "repaid" to HC via Cannons, solicitors, Glasgow. The directors were unable to ascertain the source of these repayments (Lord Doherty paragraph [7]).
- Approaches made by HC to Mr Volpe and Triay & Triay, a firm of solicitors in Gibraltar, were met with a total lack of co-operation (Lord Doherty paragraph [8]).
- At a board meeting on 6 September 2007, "KPMG could not approve HC's accounts … Santo Volpe had executed certain loans to SPV companies where non-standard procedures had been followed which meant that inadequate security had been given for some loans … Gregory King stated that the loans to the SPVs had been repaid in full in May 2007" (Condescendence 5, page 13 of LM reclaiming print).
- By email to a non-executive director of HC (Mr Bourbon) dated 7 September 2007, Mr McGarry of KPMG referred to the previous day's board meeting, and expressed concerns about the situation. He asked for further information, namely "all possible evidence regarding

the movement of monies out of Heather Capital into these SPVs and onwards to whatever purpose the funds were applied – ie, sight of bank statements, payment/remittance instructions, certified extracts from solicitors clients' money accounts etc". (It should be noted that, contrary to HC's averment in Condescendence 5 at page 13C-D of LM reclaiming print, the email did not restrict the inquiries requested to "explaining what information was required *from Santo Volpe*": the request was much broader.)

- In October 2007 the non-executive directors of HC met with the Isle of Man Financial Services Commission (FSC) to discuss "the issues" (Lord Doherty paragraph [8]). A director also disclosed the suspicious activity and Mr Volpe's obstruction to the Isle of Man Financial Crime Unit (FCU), who said they would investigate (Condescendence 5 page 14 of LM reclaiming print). The auditors KPMG carried out an additional full scope audit.
- By letter dated 18 October 2007, FSC wrote to the directors of HC setting out further information which they required.
- By letter dated 26 November 2007 Mr King advised the HC board that "some sort of fraud had been deliberately introduced with invalid land registry details on a number of the loans". He stated that he had applied pressure to Mr Volpe and Mr Cannon, whereupon there had been "full repayment of the loans with relevant interest" which meant that "investors were secure".
- On 17 December 2007, KPMG signed the accounts and added a completion note using language such as "The risk of fraud increased to high as a result of the documentation issues surrounding the SPVs, where some form of fraud appeared to have been attempted". In their audit report opinion, they stated "We have been unable to verify where funds advanced to the SPVs were invested. In addition, we were supplied with false documentation in relation to the SPVs which appears to have been a deliberate attempt to mislead us. Given these loans were repaid in the period, we consider that the effect of this is not so material and pervasive that we are unable to form an opinion on the financial statements [opting instead for express qualifications that loan and security documentation could not be validated] … There is uncertainty as to where the monies lent to the [SPVs] were then subsequently invested … Investigations continue to determine what party (or parties) were involved in and were accountable for these events, and whether any action should be taken against them …" (Lord Doherty paragraph [9]).
- By letter to HC dated 4 January 2008, KPMG gave serious warnings about their inability to validate loan and security documentation, and lack of evidence as to the purpose for which the money advanced to SPVs was applied. In their words:

> " … Our report is designed to … avoid weaknesses that *could lead to material loss or misstatement.* However, it is your obligation to take the actions needed to remedy those weaknesses and should you fail to do so we shall not be held responsible *if loss or misstatement occurs as a result …* [Having explained the disappearance of the funds and the apparent repayments, on which legal advice had been received, KPMG warned] … these matters are extremely serious … an attempted fraud appears to have been perpetrated … We would recommend that the Board continue their investigation into this matter and formally document their decision as to whether or not to inform the criminal justice authorities …"

- By email dated 28 March 2008 Mr Bourbon, a non-executive director, weighed up the pros and cons of proceeding with further investigations as follows:

> "In my opinion there would be a significant cost racked up by David McGarry (sorry David McG please do not take this the wrong way) in reopening certain files and every likelihood that given the nature of their own risk committee that even more detailed work would follow which would ultimately present the same dead end that

both David McGarry and the non executive directors have already discovered. David was the one who personally visited Glasgow and interviewed Frank Cannon for I believe 90 minutes …

More importantly I think that neither the Board nor the Administrator would be able to find a good justification for incurring further costs when we already know that KPMG have accepted the situation and are continuing to act as auditor, you have a copy of the Bird Semple opinion, that the FSC's in both IOM [Isle of Man] and Gibraltar are satisfied with the position, that as all loan notes were fully redeemed with interest no other Proper Authority has any appetite to conduct an investigation and finally every investor has received a full explanation and set of accounts and thus had the opportunity to vote with their feet! In actual fact we have if anything a waiting list of potential investors who wish to join …"

- On 6 June 2008, KPMG signed their audit report with qualifications concerning the SPV loans (Lord Doherty paragraph [9]).
- On 5 September 2008 and 12 May 2009, KPMG signed the accounts reports without audit qualifications (Lord Doherty paragraph [9]).
- In 2009, the Serious Fraud Office in England and Wales opened an inquiry into Mr Levene's business affairs. He was subsequently charged with fraud and pled guilty (Condescendence 4).
- On 7 July 2010, the liquidator was appointed to HC (Condescendence 1).
- On 5 November 2012, Mr Levene was sentenced to 13 years imprisonment (Condescendence 4).

Relevant legislation

[22] The Prescription and Limitation (Scotland) Act 1973 provides *inter alia:*

"**6 Extinction of obligations by prescriptive periods of five years**

(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years –

(a) without any relevant claim having been made in relation to the obligation, and

(b) without the subsistence of the obligation having been relevantly acknowledged,

then as from the expiration of that period the obligation shall be extinguished …

(2) Schedule 1 to this Act shall have effect for defining the obligations to which this section applies …

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

(a) any period during which by reason of –

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

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

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

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

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

11 Obligations to make reparation

(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 …

(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 …

Schedule 1

Obligations affected by prescriptive periods of five years under section 6

1 Subject to paragraph 2 below, section 6 of this Act applies – …

(b) to any obligation based on redress of unjustified enrichment, including without prejudice to that generality any obligation of restitution, repetition or recompense …

(d) to any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation …

(g) to any obligation arising from, or by reason of any breach of, a contract or promise, not being an obligation falling within any other provision of this paragraph."

Submissions

[23] Senior counsel's submissions relating to the 5-year prescription and sections 11(3) and 6(4) are noted below, in an abbreviated and paraphrased form.

Submissions for the liquidator (in both BP and LM cases)

[24] Lord Davidson QC submitted that HC's averments were sufficient to engage section 11(3); Lord Doherty's approach to section 6(4) should be preferred to Lord Tyre's; BP and LM erred in their cross-appeals in contending that HC's averments disclosed (i) actual knowledge on the part of HC; and (ii) in the BP case, imputed knowledge on the part of HC *via* one of its directors (Volpe). They also erred in their assertion that, on HC's averments, there had been no conduct on the part of BP and LM qualifying within section 6(4). In the result, each action should go to a proof before answer, all pleas standing (*Jamieson* v *Jamieson* 1952 SC (HL) 44).

[25] It was neither necessary nor appropriate to plead evidence (*John Doyle Construction Ltd* v *Laing Management (Scotland) Ltd* 2004 SC 713 at pages 722-723; Court of Session Practice Note No 6 of 2004 (Commercial Actions) paragraph 3(1); *Watson* v *Greater Glasgow Health Board* [2016] CSOH 93 at paragraphs 22-23).

Section 11(3) and reasonable diligence

[26] HC averred sufficient reasonable diligence, including examining all avenues; involving accountants; complaining to criminal authorities and regulators; and investigations by non-executive directors. Evidence likely to be led was set out in an appendix to HC's Note of Argument. Mr King had concealed the true fraudulent scheme by his diversionary "cover story" involving Mr Volpe and possible fraud at the second level SPVs. But the level of reasonable diligence required was no higher because HC had been warned of an element of fraud.

[27] The liquidator was appointed in 2010. He received the documents electronically in February 2011, and began to examine them. It took expert accountants and regulatory authorities such as the FCU considerable time to work out what had happened. Standing the complexity of matters, the difficulties being experienced by accountants and regulators, and the fictional fraud actively propagated by Mr King, it could not be suggested that the non-executive directors of HC should have uncovered matters more promptly. The auditors' letter of 4 January 2008 had been taken out of context and given too much weight.

[28] Both Lords Ordinary had gone too far too fast. The BP pleadings had been amended following upon the debate before Lord Tyre, in particular enhancing the averments relating to reasonable diligence, which were now in effect common to both actions. Both BP and LM were entitled to proof, standing authorities such as *Peco Arts Inc* v *Hazlitt Gallery* [1983] 1 WLR 1315 at page 1323, and *Glasper* v *Rodger* 1996 SLT 44 at page 48. Nothing in HC's pleadings or the productions demonstrated that HC was aware that it had suffered loss. Senior counsel referred *inter alia* to the auditors' qualifications and caveats in HC's accounts; Mr Bourbon's email of 28 March 2008; Mr McGarry of KPMG's interview with the FSA; and KPMG's sign-off letter dated 28 May 2008. The averments relating to awareness and reasonable diligence were sufficient for a proof before answer.

Section 6(4) and error induced

[29] Lord Doherty's reasoning was to be preferred. "Conduct" included an omission or silence. In addition, in the BP case, Mr Wilson of BP had sent Abacus (HC's administrator) the formal

documentation relating to Bayhill, Brookhill, Hampsey and Bellwood, as if the transactions had been successfully completed. That was a positive action, in addition to silence.

[30] As for *onus*, once HC established error induced, the onus shifted to the defender to prove the proviso in section 6(4): paragraph [10] of *Graham* v *E A Bell & Co* (Lord Hardie, unreported, 24 March 2000). The averments relating to section 6(4) were sufficient for a proof before answer.

Awareness of loss

[31] Awareness of Mr King's cover story did not amount to awareness of the real loss. Neither the letter of 4 January 2008, nor the settlement of the liquidator's action against the non-executive directors, demonstrated an awareness of loss.

[32] HC's response to any argument based on *Gordon's Trs* v *Campbell Riddell Breeze Paterson LLP* 2016 SLT 580 was as follows: (i) HC had not paid for the auditors' additional investigative work (a feeder company, Sargon, paid); (ii) no causal link between the defenders' conduct and the alleged losses existed: HC had not sued the defenders in respect of any investigative expenditure, and that expenditure was unconnected to any breaches of duty on the part of the defenders: it was part of Mr King's cover story.

[33] In the result, HC had been unaware of any loss until after the appointment of the liquidator.

Imputed knowledge

[34] BP had knowledge of the Bayhill, Brookhill, Hampsey and Bellwood transactions, but not of the WBP transaction. BP's knowledge was therefore irrelevant in the LM case. In any event, BP's knowledge should not be imputed to HC (Lord Hoffmann at pages 703e to 704a of *El Ajou* v *Dollar Land Holdings plc* [1994] 2 All ER 685).

[35] Mr Volpe was a co-conspirator (Condescendence 5). The knowledge of a criminal director should not be imputed to the company (*Bilta (UK) Ltd* v *Nazir (No 2)* [2016] AC 1, Lord Neuberger paragraph [7]).

Result

[36] In conclusion, senior counsel submitted that both actions should be sent to a proof before answer, all pleas standing.

Submissions for LM

[37] Mr Duncan QC for LM submitted that the liquidator's reclaiming motion should be refused, and LM's cross-appeal allowed. Lord Doherty's interlocutor of 31 August 2016 should be recalled, LM's pleas-in-law 1, 2 and 6 sustained, and *absolvitor* granted (or alternatively if the "no loss" submission succeeded, dismissal).

Awareness of loss: section 11(3)

[38] The 5-year period began to run when HC was aware that it had suffered a loss (*Morrison & Co Ltd* v *ICL Plastics Ltd* 2014 SC (UKSC) 222). A loss was suffered when a loan was made and inadequate (or no) security was given in return. It was irrelevant whether or not the loss might

subsequently be reversed (*Jackson* v *Clydesdale Bank plc* 2003 SLT 273 paragraphs [23] to [24]; *Heather Capital Limited* v *Burness Paull LLP* [2015] CSOH 15 paragraph [26]).

Actual knowledge

[39] When Mr King referred to "some sort of fraud" on 26 November 2007, HC was inevitably aware that it had suffered a loss in that it had advanced funds to an unknown and/or unsuitable borrower in circumstances suggestive of fraud, for an unknown purpose, without adequate security, and with an unverifiable destination for the funds (cf the earlier email dated 7 September 2007 from Mr McGarry of KPMG). Further, the auditors' letter dated 4 January 2008 unequivocally advised HC that it had suffered a loss. The extent of the non-executive directors' knowledge by that time was as detailed in the defence to the liquidator's Isle of Man action against them.
Lord Doherty erred in accepting that there was a distinction between fraud at first level SPVs and fraud at second level SPVs, as the first level SPVs were shell companies with no assets, and security for the loans came from the heritable securities granted by the second level SPVs.

[40] In any event, HC had been obliged to incur additional cost and expense as a result of learning about the disappearance of the funds. HC had to instruct its auditors to do extra work; pay for a non-executive director's trip to Gibraltar to try to obtain information from Triay & Triay; instruct a legal opinion from Bird Semple, solicitors, about the apparent repayments. Those additional costs or liabilities were clearly known to HC, and they triggered the 5-year prescription even if they might not have appeared to be a loss at the time (*Gordon's Trs* v *Campbell Riddell Breeze Paterson LLP* 2016 SLT 580).

Reasonable diligence: section 11(3)

[41] Lord Doherty was correct to exclude any reference to section 11(3). The auditors had urged HC to make investigations (for example, Mr McGarry's email of 7 September 2007). The FSC had given similar advice (FSC's letter dated 18 October 2007). The non-executive directors were told to find out "where the money went when it left HC". In those circumstances, clear and specific averments of steps taken by HC were required before section 11(3) could be invoked (*Beveridge & Kellas WS* v *Abercromby* 1997 SC 88; *Heather Capital Limited* v *Burness Paull LLP* [2015] CSOH 150, paragraph [30]). The lack of averment as to why inquiries had been made of Triay & Triay, solicitors, and Cannons, solicitors, but not of Burness Paull, solicitors (who acted in 4 out of the 12 transactions) whose partner Mr Scott Wilson would readily have disclosed the necessary information – in particular the destination of the funds – was fatal to HC's case. BP was not questioned until 2012. HC's averments in Condescendence 39 disclosed that £28.412 million had been "paid out to third parties, about whom no, or no proper, enquiries had been made, undocumented, and without security". Why had HC not asked LM and BP where the money had gone? Bank records would have disclosed this. The auditors told the non-executive directors that they must find out where the money went. But the solicitors were not asked. HC had been put on major alert (Answer 39), and yet had not made basic inquiries.

Imputed knowledge

[42] LM did not rely on Mr Volpe's knowledge, but on BP's (as HC's agents). That knowledge was to be imputed to HC, regardless of whether or not BP in fact communicated it (*Chapelcroft*

Limited v *Invergordon Egg Producers Limited* 1973 SLT (Notes) 37; *Adams* v *Thorntons WS (No 3)* 2005 1 SC 30; *Blackburn Low & Co* v *Vigors* (1887) 12 App Cas 531; *Muir's Exrs* v *Craig's Trs* 1913 SC 349; *Johnston, Prescription and Limitation* (2nd ed) at paragraph 6.89). On HC's own averments in the action against BP, that knowledge would have led to their detecting and preventing the alleged fraud months before LM were instructed.

Conclusion: In conclusion, Lord Doherty had been right to conclude that section 11(3) of the 1970 Act could not assist HC.

Error induced: section 6(4)

[43] Mr Duncan QC submitted that the onus of establishing reasonable diligence in terms of the proviso to section 6(4) lay on HC: cf Lord Penrose in paragraph 36 of *Adams* v *Thorntons WS* 2005 1 SC 30; Lord Hope in *BP Exploration Operating Co Ltd* v *Chevron Transport (Scotland)* 2002 SC (HL) 19. Lord Doherty's contrary opinion (that the onus lay on LM) placed too much weight on an *obiter* observation of Lord Millett in the *BP Exploration* case (an observation not taken up by either Lord Hope or Lord Clyde) and relied on too narrow a reading of the *dicta* of Lord Penrose in *Adams* v *Thorntons WS* 2005 1 SC 30. The onus lay squarely on HC.

[44] In their pleadings, HC focused on two alleged errors induced, namely (i) error as to the destination of the funds and (ii) error in being kept in ignorance of a possible claim against LM. However in relation to (i) while HC might have been under the erroneous misapprehension that the funds in question were destined for a particular first level SPV Westernbrook Properties Ltd (WBP) (Lord Doherty's Opinion paragraph [5]), HC was disabused of that misapprehension by the letter of 4 January 2008 from its auditors KPMG, giving clear written advice to the effect that nothing could be verified about where the funds had gone; the source of the purported repayments was unknown; and further investigations were required. (ii) As for the second alleged error, that presupposed the existence of a duty to confess or a duty to tell on the part of LM: but there was no authority for such an alleged duty (*Maharaj* v *Johnson* [2015] PNLR 27; *Bell* v *Peter Browne & Co* [1990] 2 QB 495). If such a duty existed, the underlying cause of action would never prescribe. In any event, the directors had the necessary knowledge by January 2008.

[45] Thus the attempt to invoke section 6(4) failed. Also the attempt to invoke the proviso to section 6(4) failed as HC could not demonstrate reasonable diligence (cf paragraph [41] above).

Conclusion

[46] Lord Doherty was correct to exclude the averments relating to section 11(3), but had otherwise erred in the context of the short negative prescription. The interlocutor of 31 August 2016 should be recalled; LM's sixth plea-in-law should be sustained to the effect that the defenders should be assoilzied from any claim for breach of contract, fault or negligence or assistance or fraud.

Submissions for BP

[47] Mr Dunlop QC for BP adopted Mr Duncan's submissions. Further, he submitted that there was a concurrence of *injuria* and *damnum* in 2006, as the payments were made in 2006 (*Dunlop* v *McGowans* 1980 SC(HL)73). Yet the action against BP was not raised until October 2014 (with an amendment to the instance in the spring of 2015). Thus HC's claims so far as directed to breach of

contract, reparation, negligence, and dishonest assistance were extinguished by prescription in terms of section 6 and Schedule 1 of the 1973 Act, unless sections 11(3) and 6(4) applied.

Imputed knowledge

[48] Mr Volpe was aware of everything. As the averments concerning his complicity were inadequate, HC could not rely upon the *dicta* of Lord Neuberger in *Bilta (UK) Ltd* v *Nazir (No 2)* 2016 AC 1. HC was accordingly fixed with the relevant knowledge *via* Mr Volpe (Condescendence 5 at page 8B of BP reclaiming print; Condescendence 16 at page 26; Condescendence 20 at page 29).

[49] *Esto* the court took a different view, Mr Dunlop submitted that everyone at HC knew that BP had actioned the payments. It would have been an easy matter to ask BP where the money had gone. In early December 2007 the auditors told HC that there was a problem. It was irrelevant that repayments were apparently made in May-June 2007, or that Mr King told the board a cover story in November 2007. *Injuria* met *damnum* in 2006, and the 5-year period began to run.

Reasonable diligence: section 11(3)

[50] For section 11(3) to assist HC, HC had to demonstrate an excusable state of ignorance in 2009-2010: but they could not do so. HC knew that BP had actioned the payments. When Scott Wilson, the banking partner of BP, was eventually asked in 2012 "to whom did you send the money", he immediately and truthfully advised that he had sent the money to the destination he was told to send it, and gave full information. Had the question been asked earlier, the information would have been forthcoming. Against that background HC had not averred sufficient reason for the application of section 11(3).

Section 6(4) and error induced

[51] Mr Dunlop submitted that it was for HC to establish an error *induced by BP*. HC could not rely upon Mr King's cover-up. On the averments, HC were advised by KPMG in 2007 that there was a problem. It was irrelevant that documentation had been sent to Abacus in 2006; or that in May-June 2007 apparent repayments had been made; or that in November 2007 Mr King told HC's board a misleading cover story. HC could not claim that any error on their part had been induced by BP: to do so would require a principle in law that the 5-year prescription would not start to run until the solicitor *ex proprio motu* volunteered information about where the money had been sent. But there was no authority for such a proposition. Lord Doherty was correct in his statement of the law in *Trustees of Rex Proctor & Partners Retirement Benefits Scheme* [2015] CSOH 83 at paragraph [207] and Lord Tyre was correct to agree with him on that matter; see too *Maharaj* v *Johnson* [2015] PNLR 27.

[52] As for the proviso to section 6(4), i.e. demonstrating reasonable diligence in discovering where the money went, HC could not satisfy that test for the same reasons as those relating to section 11(3).

[53] On the averments, therefore, HC was unable to pray in aid section 6(4).

Conclusion

[54] Lord Tyre had not erred. The court should adhere to his interlocutor of 6 November 2015.

Reply for the liquidator

[55] *Inter alia*, senior counsel pointed out that HC had not averred that it had suffered loss by incurring extra investigative costs as a result of any breach of duty on the part of the defenders (contrast with the circumstances in *Gordon's Trs* v *Campbell Riddell Breeze Paterson LLP* 2016 SLT 580). The *ratio* in *Gordon's Trs* could not therefore assist the defenders.

Discussion

Awareness of loss and section 11(3)

[56] The actions were raised in 2014. As noted in paragraph [14] above, HC avers that the date of "actual knowledge of loss" was 17 April 2012 (in the BP case) and 31 August 2012 (in the LM case). Nevertheless, it is not disputed that, as a matter of law, *damnum* met *injuria* when large amounts of HC's investment funds were diverted away from their proper destinations into unknown hands for unknown purposes for a period of time. As senior counsel for LM submitted, in the context of a claim by a lender, loss is suffered when the lender advances funds and receives in exchange a bundle of rights less valuable than that which was anticipated, typically by reason of a defective or inadequate security. The prospect that the borrower might nevertheless repay notwithstanding the lack of security does not prevent the loss being suffered. Thus, on a proper application of the 5-year prescription to the undisputed facts, and subject to section 11(3), the *terminus a quo* was agreed by counsel to be 2006 in the BP case (Lord Tyre, paragraph 21) and 2007 in the LM case (Lord Doherty, paragraphs 14 and 32).

[57] In those circumstances, senior counsel for HC accepted that the burden lay upon HC to aver, and in due course establish, that HC had brought itself within the terms of section 11(3). LM and BP contended that HC was given "unequivocal advice that it had suffered loss" more than 5 years before the raising of the actions. HC in its pleadings denies having been given such advice. Even if we take into account the terms of the email of 7 September 2007 and/or the letter of 4 January 2008, and indeed any other production to which we were referred (as distinct from the averments or any documents agreed by parties), whether individually or taken together, we are not persuaded that we can be satisfied that HC was unequivocally advised more than five years before raising the actions that it had suffered loss. We accept that HC's averments are to the effect that HC was given repeated warnings that a very serious situation had arisen; that there had been questionable activities and unknown uses of the company's investment funds during a period when the monies could not be traced, which "could lead to material loss"; and that further investigation by the company should be carried out. But it could equally be argued that HC was not in fact, and could not with reasonable diligence have been, aware of any loss to the company until the liquidator and his team managed to disentangle matters and to identify a loss of millions of pounds that HC had indeed suffered. Much may depend upon the evidence adduced in relation to these matters.

[58] However even if HC can establish that it was not aware, and could not with reasonable diligence have been aware, of any loss represented by the diversion of the company's funds, such an argument might be fatally undermined by HC's averments appearing to acknowledge that, in 2006 and 2007, HC incurred liability for costs which would not otherwise have been incurred but for the questionable events of those years. In particular, on HC's averments as they stand, it can be seen that HC appears to have incurred liability for (i) fees charged by the auditors KPMG in respect of additional work (including, for example, a special full scope audit; a special nine month audit; and

Mr McGarry of KPMG conducting a long interview with the solicitor Mr Cannon); (ii) the costs of a non-executive director's (Mr Bourbon's) investigative trip to Gibraltar to interview Triay & Triay about the suspicious events; and (iii) the liability incurred in respect of the legal opinion obtained from Bird Semple on the question whether the apparent "repayments" could be treated as such, without the risk of being claimed by a third party on the basis of a constructive trust. Applying the recent guidance given by the Supreme Court in *Morrison & Co Ltd* v *ICL Plastics Ltd* 2014 SC (UKSC) 222 (as was done in *Gordon's Trs* v *Campbell Riddell Breeze Paterson LLP* 2016 SLT 580), it is the defenders' contention that HC's pleadings in both the LM case and the BP case disclose HC's awareness in 2007 of those costs (or one or other of them). The defenders submit that, as the law currently stands, it is irrelevant that such expenditure might not have been seen by HC's non-executive directors as a "loss" at the time. It is also irrelevant that HC has not claimed damages for such losses in the present actions: the averments relating to these apparent additional costs are on record, and in the context of prescription, they *prima facie* disclose liability for those losses being incurred by HC.

[59] Nevertheless senior counsel for HC disputed the correctness of such an approach: see paragraphs [32] and [33] above. It was said that another party had paid the cost of additional investigative audit work. It was contended that the costs were not being sued for, and were not considered to be costs or expenses arising from any breach of duty on the part of the current defenders. Thus it was submitted that HC had not suffered any such loss in 2007.

[60] In my opinion, this disputed issue calls for a proof before answer on the question of any loss suffered by HC as a result of any additional costs and outlays incurred in 2007. If, after evidence and submissions, it is established that HC did indeed incur costs or outlays in 2007 which would qualify as "loss" caused by any breach on the part of the defenders, and if it is established that HC was aware of those costs, the averments in Condescendence 5 to the effect that HC "could not with reasonable diligence have been aware that loss … had occurred" would appear to be of little assistance to HC. An element of HC's loss would be the otherwise unnecessary expenditure referred to above, of which HC was presumably fully aware in 2007. Applying *Morrison* and *Gordon's Trs,* it would arguably be irrelevant that the main bulk of HC's loss was only discovered some years later (in 2012, or at the earliest, February 2011).

[61] The fairness or unfairness of such an approach might be a matter for debate (cf *dicta* of Lord Malcolm in *Gordon's Trs,* paragraphs [21] to [24]; Scottish Law Commission Discussion Paper on Prescription No 160, February 2016, Chapters 3 to 5, and in particular paragraphs 3.17 and 4.21; *Johnston, Prescription and Limitation* (2nd ed) paragraph 6.94, final paragraph). But it is a matter requiring exploration of both facts and law before any final view can be formed.

Error induced and section 6(4)

[62] On the basis of HC's pleadings, properly construed, HC's error was a compound one, including in my opinion the following components:

- An erroneous assumption that solicitors would act in accordance with their normal professional standards and practices, and would not, for example, send a client's funds to a third party who was not the intended recipient in the transaction, about whom little was known, without any clear commercial rationale, without adequate documentation and security, and

without intimating to the client that the funds had in fact been paid to someone other than the expected recipient (with whom all the formal documentation and security had been completed).

- An erroneous assumption that the relevant funds had indeed been paid to the appropriate first level SPVs (an assumption not necessarily contradicted by the auditors' reports of problems in 2007, as the auditors were focusing upon the discrepancies and lack of documentation at the second level SPVs).
- An erroneous conclusion that HC appeared to have suffered no significant loss as a result of the funds being untraceable for a period, followed by the apparent repayment of the funds or their equivalent, with interest.
- HC's conclusion (based to some extent upon the errors outlined above) that all relevant avenues of investigation appropriate to an investment company such as HC had been pursued, and that it was neither necessary nor profitable for HC to investigate further, or to try to ascertain exactly what had happened.
- HC's lack of awareness that it might have a claim against its own solicitors BP and LM (cf *Johnston, Prescription and Limitation* (2nd ed) paragraph 6.108, second paragraph).

[63] "Conduct" is not defined in the 1973 Act. The approach to section 6(4) adopted by the courts suggests that the word should not be construed in a narrow or restrictive way: see for example Lord Hope (paragraphs [29] to [33]), Lord Clyde (paragraphs [66] to [67]), and Lord Millett (paragraph [100]) in *BP Exploration Operating Co Ltd* v *Chevron Transport (Scotland)* 2002 SC (HL) 19; Lord Drummond Young at paragraph [20] of *Dryburgh* v *Scotts Media Tax Ltd* 2014 SC 651; Lord Penrose at paragraph [68] *seriatim* in *Adams* v *Thorntons WS* 2005 SC 30; Lord Emslie at paragraphs [75] to [78] of *ANM Group Ltd* v *Gilcomston North Ltd* 2008 SLT 835; Lord Doherty at paragraphs [44] to [46] of *Heather Capital Limited* v *Levy & McRae* [2016] CSOH 107; and *Johnston, Prescription and Limitation* (2nd ed) paragraph 6.108. Adopting that approach, it is my opinion that relevant conduct in the context of prescription may be active or passive. It may involve positive action, but equally, in certain circumstances, it may involve a silence or a lack of action. The conduct need not be deliberate, or blameworthy, or careless, or be carried out with any particular motive such as deception or concealment: Lord Emslie in *ANM Group Ltd cit sup,* paragraph [75]; *Johnston,* paragraph 6.124. The conduct does not have to constitute a crime or a breach of duty (whether contractual or delictual or fiduciary): *Johnston,* paragraph 6.108, fourth paragraph. The conduct does not require to be the sole cause of the error: Lord Emslie in *ANM Group Ltd,* paragraph [75]; *Johnston,* paragraph 6.107, second bullet point.

[64] It follows from the above that the relevant question, in my opinion, is simply whether any conduct on the part of the solicitors concerned, viewed objectively, induced or contributed to inducing some or all of the error as defined above, with the result that HC refrained (in the broad sense explained in *BP Exploration*) from making any claim against the solicitors.

[65] On a proper construction of HC's pleadings, and for the reasons set out in paragraphs [66] to [69] below, I consider that there are sufficient relevant averments of error induced by the conduct of BP, entitling HC to a proof before answer on the question of the suspension of the 5-year period in terms of section 6(4). I also consider that there are sufficient relevant averments of error induced by the conduct of LM, entitling HC to a proof before answer on the question of the suspension of the 5-year period in terms of section 6(4).

[66] In the BP case, the averments are to the effect that HC erroneously assumed that the funds had been properly and regularly transferred to the intended recipients namely Bayhill, Brookhill, Hampsey and Bellwood, with all the necessary formal documentation such as debentures duly

completed and delivered. HC's position is that BP's conduct contributed to that erroneous assumption, as on the averments BP gave HC no indication that the funds had, unexpectedly, been transferred to other destinations, unaccompanied by the necessary documentation or security. Even if BP themselves were tricked or misled into such actions by Mr King or Mr Volpe or anyone on their behalf, and even if BP thought that they were properly carrying out clear instructions from an appropriate source, it is in my opinion arguable, depending on what facts are proved, that BP's own conduct induced, or contributed to inducing, the error on the part of HC.

[67] It will be seen that it is my opinion that silence on the part of BP, or their lack of intimation to or communication with HC (ie not telling HC that the funds had in fact been transferred to destinations other than the intended recipients) could qualify as "conduct" inducing error on the part of HC, as defined in paragraph [62] above.

[68] Furthermore in the BP case, there was an additional factor: it is averred that Mr Wilson of BP sent the completed formal documentation relating to Bayhill, Brookhill, Hampsey and Bellwood to Abacus, HC's administrator, as if all had gone well and the transactions with the four first level SPVs (Bayhill, Brookhill, Hampsey and Bellwood), had been successfully and properly carried out, leaving HC in possession of appropriate documentation and security. If established as a fact, that would amount to a positive act, and if that act contributed to HC's error, it would be a relevant factor in terms of section 6(4).

[69] In the LM case, the observations and conclusions in paragraphs [66] to [67] above apply, *mutatis mutandis,* but without the additional positive act of sending the completed formal documentation to Abacus. I also agree with and adopt the reasoning of Lord Doherty in paragraphs [42] *et seq* of *Heather Capital Limited* v *Levy & McRae* [2016] CSOH 107.

[70] In the result, it is my opinion that it cannot be said in either case, on the basis of HC's averments, that HC is bound to fail when seeking to rely upon section 6(4) (the test set out in *Jamieson* v *Jamieson* 1952 SC (HL) 44).

Reasonable diligence

[71] The question of reasonable diligence on the part of HC remains a live issue, certainly in the context of the proviso to section 6(4), but possibly also in the context of section 11(3), depending upon the answer to the question whether HC suffered any loss as a result of additional costs and outlays incurred in 2007 (see paragraph [60] above).

[72] I consider that HC's averments are sufficient to entitle it to a proof before answer on the question of reasonable diligence. Bearing in mind the guidance given by Webster J in *Peco Arts Inc* v *Hazlitt Gallery Ltd* [1983] 1 WLR 1315 at page 1323, and applying that guidance *mutatis mutandis* to the present case, the issue becomes whether HC did what "an ordinary prudent [company and its directors] would do having regard to all the circumstances". Although the word used in section 6(4) is "could", it is qualified by the phrase "with reasonable diligence". Thus, as was pointed out in *Peco Arts Inc:*

> " …reasonable diligence means not the doing of everything possible, not necessarily the using of any means at the plaintiff's disposal, not even necessarily the doing of anything at all, but it means the doing of that which an ordinary prudent [company and its directors] would do having regard to all the circumstances …"

That approach was adopted by Lord President Hope in *Glasper* v *Rodger* 1996 SLT 44 at page 48; see too *Johnston, Prescription and Limitation* (2nd ed) paragraph 6.100 *et seq.*

[73] Accordingly the relevant question is: what was reasonable for HC and its directors in the particular circumstances of the case?

[74] The averments in the BP case (Condescendence 48 and 5 *as amended*, and thus containing averments which were not before Lord Tyre) are as follows:

> "48 … neither the board of directors of HC nor the liquidator upon his appointment were aware, nor could they with reasonable diligence have been aware or discovered, at any point prior to the liquidator's appointment, that HC suffered loss, injury or damage as condescended on above …
>
> 5 … all avenues of enquiry were considered to have been pursued by HC's board of directors. These avenues included (i) John Bourbon meeting with KPMG to discuss how the matter could be investigated further in or around September 2007; (ii) John Bourbon attempting to arrange various meetings with Santo Volpe to discuss the SPV loans and obtain the information required by KPMG in or around September 2007. Santo Volpe declined to meet with John Bourbon; (iii) John Bourbon meeting Joseph 'Melo' Triay of Triay & Triay in Gibraltar to obtain further information about the loans in September 2007. Joseph 'Melo' Triay refused to provide access to the books or records of the first level SPVs on the basis that HC did not own or control the first level SPVs. He falsely stated that Santo Volpe was the beneficial owner of the first level SPVs and had not authorised the disclosure of documents. Gregory King e-mailed Santo Volpe on 27 September 2007 stating that Joseph 'Melo' Triay had 'played a blinder for us'; (iv) John Bourbon, Andrew Beeman and Andrew Ashworth attending a meeting with the Isle of Man Financial Services Commission to discuss the matter in or around October 2007; (v) seeking to obtain further information from Gregory King and Andrew Millar about the SPV loans, and (vi) sending a 'Disclosure' of [suspicious] activity to the Isle of Man Financial Crime Unit in respect of Mr Volpe in or around October 2007 … These enquiries amounted to reasonable diligence in the circumstances of this case. These enquiries did not disclose the existence of a loss …"

[75] The averments in the LM case (Condescendence 39 and 5) are as follows:

> "39 … the auditors had informed the relevant board of directors of HC that no loss had occurred and confirmed the position in subsequent years.
>
> 5 … all avenues of enquiry were considered to have been pursued by HC's board of directors, including discussing matters with the FSC and making disclosure to the FCU; meeting with KPMG to discuss how the issue could be further investigated; obtaining legal advice; and seeking to obtain further information from *inter alia* Gregory King, Santo Volpe and Triay & Triay. These enquiries amounted to reasonable diligence in the circumstances of this case. HC's board of directors, Abacus and KPMG believed that whilst there had been irregularities with the securities granted by the Second Level SPVs and as explained in the letter from Gregory King to the board of directors of HC dated 26 November 2007 that 'some form of fraud had been deliberately introduced with invalid land registry details', the funds

advanced had been repaid in full, with interest, and HC had not suffered a loss. HC's board of directors' understanding was supported by KPMG's investigations. KPMG verified HC's accounts as reflecting a true and fair view of HC's financial conditions. This remained KPMG's position in subsequent reports. In those circumstances, the board of directors of HC were not, and could not with reasonable diligence, have been aware that HC had suffered a loss until after the appointment of the Liquidator. The true destination of these funds was confirmed on 31 August 2012. From the date of his appointment the Liquidator (assisted by staff from the Fraud Investigations and Dispute Service at Ernst & Young LLP) sought to reconstruct HC's affairs and so account for the losses HC and its investors sustained. This process of identifying the destination of the funds commenced in February 2011. This included a detailed review of electronic documentation recovered from various sources. In around June 2012, the Liquidator's team identified documents which indicated that the payments to WBP had not been on lent to the Second Level SPVs but had instead been paid to Niblick [a Panamanian company owned by Mr Levene] and Hassans [Gibraltar, under reference "Rosecliff Limited", a company owned by Mr King]. This was only confirmed on 31 August 2012, when [LM] produced copies of its client ledger to the Liquidator as part of a response to a request for information made by the Liquidator under section 236 of the Insolvency Act 1986. The ledger produced showed that the funds paid to the defenders by HC had been paid to Niblick and to Hassans … "

[76] In my opinion, the averments in each action (which seek to record a complex factual situation) are, in the particular circumstances of each case, sufficient for a proof before answer on the question of reasonable diligence. The context is that of prudent company directors whose primary purpose was to operate a profitable commercial concern. It is at least arguable that their paramount goals and duties in the circumstances were to ascertain whether the company had suffered an actual identifiable loss; to attempt as best they could (with the assistance of their auditors) to understand what had happened, particularly with a view to preventing repetition; to reorganise staff and procedures as necessary to avoid repetition; to continue running the business of the company with a view to making profits; and to report any questionable or apparently criminal or fraudulent activities to the appropriate public authorities such as the Isle of Man Financial Services Commission (FSC) and the Isle of Man Financial Crime Unit (FCU). While some might adopt the position that the directors could and should have followed the advice given in Mr McGarry's email of 7 September 2007 (thus devoting staff and resources to obtaining "all possible evidence regarding the movement of monies out of Heather Capital into these SPVs and onwards to whatever purpose the funds were applied – ie sight of bank statements, payment/remittance instructions, certified extracts from solicitors clients' money accounts etc"), it is at least arguable that in circumstances where no significant loss to HC had apparently been identified, the advisability of devoting significant company time and resources to the company's own investigations with a view to ascertaining with greater certainty what had occurred had to be weighed against the company's primary purpose, namely the making of profits for its investors and shareholders. When weighing up these matters, it must be remembered that HC and its directors are averred to have been actively misled by their own executive director Mr King, whom on the averments they had no reason to distrust. Furthermore, as averred, the auditors' focus was upon

problems at the second level SPVs, and not upon any apparent diversion of funds at the first level SPVs. Against that background, HC had to assess whether and to what extent the resources of a commercial investment company should properly be devoted to what appeared to be an open-ended investigation of some complexity. In this context, I consider that it is instructive to note that the liquidator, assisted by a team from the Fraud Investigations and Dispute Service in Ernst & Young LLP, did not discover certain critical facts about what had happened to HC's funds until 2012.

[77] In the result, it is my opinion that sufficient has been averred to entitle HC to a proof before answer on the question of reasonable diligence. I therefore agree with the conclusion reached by Lord Doherty. Questions of onus in respect of the proviso to section 6(4) are best addressed once evidence has been led (cf *Johnston, Prescription and Limitation* (2nd ed) paragraphs 6.109 to 6.110; Lord Hardie at paragraph [10] of *Graham* v *Bell,* 24 March 2000 (unreported), referring to a shifting onus, depending on the evidence).

Imputed knowledge

[78] As a proof before answer at large is required, any question of imputed knowledge would also, in my opinion, be more appropriately addressed once evidence has been led.

Decision and further procedure

A proof before answer (not a preliminary proof before answer)

[79] In the light of the possible significance of any additional costs and expenses incurred by HC in 2007 (paragraphs [58] to [61] above), it might be thought that a preliminary proof before answer on that issue would be an expeditious way forward. However there remain live issues in relation to section 6(4) and the question of reasonable diligence: the wording of section 6(4) is such that it is unaffected by the *ratio* in *Morrison & Co Ltd* v *ICL Plastics Ltd* 2014 SC (UKSC) 222, in that for the purposes of assessing error induced in terms of that subsection it is relevant that the creditor has been left "entirely unaware that he might have a claim [against a particular person], and he had never so much as considered claiming" (cf *Thorn EMI Ltd* v *Taylor Woodrow Industrial Estates Ltd,* Lord Murray, 29 October 1982, unreported, approved in *BP Exploration,* 2002 SC (HL) 19 at paragraph [32], and referred to in *Johnston, Prescription and Limitation* (2nd ed) paragraph 6.108 second paragraph). Thus even if the defenders succeed in relation to section 11(3), it seems to me that the issues concerning section 6(4) and its proviso of reasonable diligence would require to be explored: and those issues cover much of the material in the case. Similarly it is my opinion that a proof on the issue of prescription alone, possibly (depending on the initial outcome) followed by a proof before answer on the merits, would result in an unwelcome duplication of evidence and expense.

Trust issues and the 20-year long negative prescription

[80] On the view which I have reached, I consider that it would be premature and inappropriate to explore any trust issues at this stage, prior to a proof before answer. If the 20-year prescription applies to a trust obligation, such a trust obligation has not yet been extinguished by prescription. If any trust obligation is affected by the 5-year prescription (a matter which may be in dispute), the conclusion reached in the present opinion means that the extinction or otherwise of such an

obligation will form part of the proof before answer at large. It is therefore unnecessary to consider trust matters at this stage.

Ultimate decision

[81] For the reasons given above, I propose that we allow the reclaiming motions; refuse the cross-appeals; recall the interlocutors of the Lords Ordinary; in each case allow a proof before answer at large, all pleas standing; remit the cases to the Outer House to proceed as accords; and meantime continue any question of the expenses of the reclaiming motions and cross-appeals.



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 19
CA207/14 and CA208/14

Lady Paton
Lady Clark of Calton
Lord Glennie

OPINION OF LADY CLARK OF CALTON

in the cause

HEATHER CAPITAL LIMITED (in liquidation)
and PAUL DUFFY (as liquidator)

Pursuer and Reclaimer

against

LEVY & McRAE and others

Defenders and Respondents

and

HEATHER CAPITAL LIMITED (in liquidation)
and PAUL DUFFY (as liquidator)

Pursuer and Reclaimer

against

BURNESS PAULL LLP

Defender and respondent

Pursuer and reclaimer: Lord Davidson of Glen Clova QC, Tariq;
Shepherd & Wedderburn LLP
Defenders and respondents (Levy & McRae): Duncan QC, Brown;
Clyde & Co (Scotland) LLP
Defender and respondent (Burness Paull LLP): Dunlop QC, C Paterson;
Messrs CMS Cameron McKenna LLP

28 February 2017

Summary

[82] In a separate Opinion, Lady Paton sets out the context of the two actions in which the liquidator of HC sues two firms of solicitors, LM and BP. Lady Paton considers in detail whether issues relating to prescription focused in the pleadings can be resolved without proof. I agree with her reasoning and decision which she sets out in her opinion.

The relevancy of the averments of loss by HC

[83] I have chosen to consider in some detail a different but connected issue which arises in the cross appeals on behalf of LM and BP as to whether there are sufficient relevant averments of any loss suffered by HC to go to proof.

[84] The factual averments in relation to loss made by HC in the actions against LM and BP are different but neither counsel for LM or BP submitted that any argument relied on by them depended on any factual averments, specific to one case, to distinguish the position of the respondents in relation to the averments of loss. In their submissions to this court, the challenge to the averments of loss was dealt with in oral submission only by counsel for BP. These submissions were also given prominence by counsel in the BP case when presenting the case to Lord Tyre. Counsel for LM adopted the oral submissions made by counsel for BP and the written submissions by counsel for LM were consistent with that. I consider, therefore, that this dispute can best be examined in the context of the submissions and pleadings in the BP case.

Submissions by Counsel for BP

[85] Counsel for BP directed attention to Articles 5, 27A and 27B of the averments by HC. He submitted that there are express averments by HC that the sums loaned to various companies namely Bayhill, Brookhill, Hampsey and Bellwood were repaid by companies Mathon and Bathon during April and June 2007. Said sums were treated as repayments of said loans in HC's financial statements. It is wrong to describe the repayments as "purported" as set out in the pleadings by HC. What is averred is not purported but actual payments. Relying on *National Commercial Bank* v *Millars Trustee* 1964 SLT (Notes) 57 and *Capital Homes Ltd* v *Countrywide Surveyors Ltd* [2011] 3 EGLR 153, counsel submitted that properly interpreted what is averred by HC is appropriation by HC and consequent extinction of the debt, that is, monies advanced in respect of the Bayhill,

Brookhill, Hampsey and Bellwood transactions. Counsel also referred to *Heather Capital Limited (in liquidation)* v *KPMG Audit LLC* (unreported). He submitted in that litigation against the auditors of HC, there is an acceptance on behalf of HC that there was repayment.

[86] Counsel was critical of the reasoning of Lord Tyre in his considerations of the criticisms of the relevancy of the pleadings about loss. Lord Tyre stated in paragraph 20:

> "I reject this contention. The authorities referred to are clearly distinguishable because they are not concerned with fraudulent conduct. According to the pursuer's averments in the present case, the loans to Mathon and Bathon were fictitious. Their effect was that money went round in a circle and left the pursuer no better off than it had been after the fund recorded as destined for Bayhill, Brookhill, Hampsey and Bellwood had been paid out. The apparent 'repayment' was accordingly nothing of the sort. It was no more than an attempt to conceal the frauds alleged by the pursuer to have occurred when instructions were issued and accepted by the defenders to make payment to persons other than Bayhill and the others. The defenders are not being sued for repayment but for damages for loss caused by the facilitation of fraud, and are not therefore, in my view entitled to be treated in the same way as one of the SPVs would have been, if sued after receipt of the funds from Cannons. The pursuer's case, which I regard as relevantly made, is that the loss sustained when the funds were originally diverted was not recovered by the subsequent attempt at concealment."

[87] Counsel submitted that Lord Tyre erred in distinguishing the authorities of *National Commercial Bank of Scotland* and *Capital Home Ltd* on the basis that they were not concerned with fraudulent conduct. There are no averments by HC in relation to Mathon or Bathon's involvement in any fraud. On the averments, any loss is the loss of Mathon or Bathon, not HC. Actual money in excess of 7 million was actually paid by Mathon and Bathon to HC and this equated to the sum released by BP from the client account. There are no averments that HC required to repay Mathon and Bathon and indeed any such requirement to repay would have prescribed. Counsel further submitted that the Lord Ordinary erred in drawing support for his conclusion from the fact that BP is being sued for damages and not repayment as this overlooks a major part of the case advanced by HC which is based on breach of trust for which HC are seeking repayment.

Submissions by Counsel for LM

[88] The written submissions by counsel for LM pray in aid *National Commercial Bank of Scotland Ltd* and *Capital Home Loans Ltd* in support of the contention that the averments made are predicated upon a false proposition that HC never received any repayment of the sums it advanced to the company Westernbrook. It is averred that Cannons, solicitors on behalf of Westernbrook, repaid the sums in full and this was recorded in the books of HC. It is averred that HC delivered an executed discharge and the directors of HC took legal advice as to the entitlement to treat the funds received in that manner. Cannons received the money from a company Bathon. On the averments of HC, any loss suffered is a loss to Bathon as it was Bathon who made repayment on behalf of the company Westernbrook. It is further submitted that if the loss averred is a loss attributable to HC, it arises from the decision by HC to lend to Bathon which is not the basis of the action pursued against LM.

Submissions by Counsel for HC

[89] Counsel for HC did not attempt in oral or written submissions to focus the issues in dispute about loss by reference to any detailed analysis of the pleadings. In relation to the criticisms about the averments of loss by HC in both cases, he submitted that Lord Tyre gave a correct and sound analysis at paragraph 20 of his opinion. He founded upon that. Lord Tyre correctly concluded that the cases relied on by counsel for LM and BP are distinguishable in that in both cases a complex fraud of a similar nature is averred by HC. Counsel submitted that both Lord Tyre and Lord Doherty were correct to reject the submissions that no loss had been relevantly averred by HC.

Decision and reasons in relation to the relevancy of the pleadings about loss

[90] Counsel for BP invited the court to focus on Articles 5, 27A and 27B but I consider that is too narrow a focus. The pleadings in said Articles require to be seen in the context of the full case pled and developed by HC in order to understand the nature of the fraud. It is averred in Article 4 of condescendence that:

> "During the period of its operation, HC and its investors were defrauded by the diversion of invested funds exceeding £90 million, under the guise of fictitious loans to various shelf companies incorporated in Gibraltar. This sum includes the sum sued for in the present action. The mechanism of the fraud was essentially the same in each case,. A number of companies, owned and/or controlled by Gregory King, were incorporated in Gibraltar. HC then entered into a number of credit facility agreements with these companies (the 'First Level Special Purpose Vehicles' (or the 'First Level SPVs')), each agreement secured by a debenture. On the information available to it, HC recorded these loans in its books of account as loans to the First Level SPVs in question. In fact, the money was never paid to them. It was instead paid out of the client accounts in which it had been deposited, undocumented and without security, to third parties (typically on the basis of instructions from persons with no authority to give them, for example John Caulfield). In most cases, the third party recipient was a man named Nicholas Levene or companies owned and controlled by him. None of it was consistent with the strategy and principles set out in the investment particulars. In 2009, the Serious Fraud Office opened an inquiry into Mr Levene's business affairs, as a result of which he was charged with, and pleaded guilty to, fourteen counts of fraud, false accounting and obtaining money by deception. On 5 November 2012, he was sentenced to thirteen years' imprisonment…"

Further specification of the allegations including alleged wrongful acts and omissions by BP, are set out in Articles 5-31 of condescendence. Article 5 sets out averments about loans, alleged to be fictitious, to Bayhill, Brookhill, Hampsey and Bellwood and the steps taken to create the false impression that the fictitious loans had been repaid between April and June 2007 by these companies. In Articles 27A and 27B there are specific averments about payments, using HC funds transferred from HC to Mathon and Bathon, to make "repayments due" from Bayhill, Brookhill, Hampsey and Bellwood.

[91] In relation to the averments of loss, in summary HC offer to prove *inter alia*; that HC money was paid into their client account at BP; a false impression was created that secured loans had been made to and repaid by four companies namely Bayhill, Brookhill, Hampsey and Bellwood; no money was paid out of the HC client account by BP to these companies; instead BP wrongfully paid in excess of £7 million without any security to a third party, Mr Levene; there are no averments by HC that any repayment was made by Mr Levene or on his behalf; there is a general denial of the respondents' averment in answer 5 that the monies paid out by HC and forming the basis of the claim were in fact repaid to HC.

[92] In support of his submission that the pleadings about loss were irrelevant, counsel relied mainly on *National Commercial Bank of Scotland* and *Capital Home Loans Limited.* I do not consider that these cases support the submission made. The pleadings in both actions raised by HC are grounded in averments based on the relationship between HC and their solicitors, LM and BP. I am not persuaded that relationship equates to the relationship of banker (lender) and customer (debtor) and the special rules which may apply in such a relationship.

[93] In any event, even if the special rules do apply, it is difficult to understand how the principles relating to appropriation of debt payments in a creditor/debtor relationship have relevance to the averments in this case. I note that according to the averments, the creditor is HC and the debtor, who received the money, is Mr Levene; the Bayhill, Brookhill, Hampsey and Bellwood companies owed no money to HC as BP did not pay money to them but to Mr Levene; HC make no averments that the debtor, Mr Levene, repaid any money to HC or that anyone else repaid money on his behalf. I do not consider that the averments to the effect that payments to HC were credited as repayments by said companies to HC in the accounts of HC assist BP in their submissions. The context of the case pled by HC is to the effect that HC offer to prove that the "repayment" was a fiction as no sums had been paid to said companies Bayhill, Brookhill, Hampsey and Bellwood; said companies were not liable for any repayment; HC were unaware that further money borrowed from them by other companies (Mathon and Bathon)had been used to pay sums to them purportedly on behalf of secure debts owed to them by Bayhill, Brookhill, Hempsey and Bellwood. Further I consider that in both actions, where complex averments are made in the context of multiple transfers through different companies, I am unable to conclude on the pleadings alone, without evidence, that there is no loss. Whatever the basis of the claim made by HC culminating in Article 47 of condescendence, I consider that HC has made relevant averments of loss.

[94] In reaching that conclusion, I have taken into account the submission made about the case of *Heather Capital Limited (in liquidation)* heard in the High Court of Justice of the Isle of Man. Counsel for BP referred to the judgment of His Honour Deemster Corlett delivered 17 November 2015 and invited the court to consider the position adopted by HC in that case. Paragraph 16 states:

> "It is common ground that the making of circular loans did not itself lead to any net loss for Heather because it received back what it lent out. Any loss was therefore avoided or Heather has to give credit for gains in the form of recoveries of the repayments of the earlier loans which completely offset its losses under the later circular loans. Accordingly, the liquidator accepts that KPMG is entitled to credit in respect of the repayments made…"

I do not consider that the apparent concession in that case is without qualification and an acceptance that HC suffered no loss at all. In any event, I consider that a decision requires to be made on the basis of the pleadings by HC in the actions before this court. If there is an inconsistency in the position of HC and the liquidator, I consider that this is a matter to be explored in evidence and cannot be resolved at this stage.

[95] In relation to the LM case, I note that the averments relate to different facts and circumstances and involve different companies and different personnel. I consider, however, that the same structure of averments in the pleadings which I identify in paragraph [91] is apparent. Counsel did not seek to persuade the court that there were any averments in the LM case which made any difference to the submissions about the relevancy of the pleadings about loss compared with the BP case. In the LM case, the main focus in the debate before Lord Doherty related to issues about prescription. Counsel for LM dealt very briefly with some additional issues relating to relevancy which included a submission that the averments made by HC that it had sustained a loss were irrelevant. Lord Doherty considered it possible to deal briefly with these submissions and in paragraph 61 concluded:

> "... I am not satisfied that if the pursuer proves its averments it will fail to prove that it has suffered a loss."

[96] For the reasons given, therefore, I am of the opinion that Lord Tyre in the BP case and Lord Doherty in the LM case were both correct to conclude that HC had made relevant averments of loss and that the cross appeals should be refused.



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 19
CA207/14 and CA208/14

Lady Paton
Lady Clark of Calton
Lord Glennie

OPINION OF LORD GLENNIE

in the cause

HEATHER CAPITAL LIMITED (in liquidation)
and PAUL DUFFY (as liquidator)

Pursuer and Reclaimer

against

LEVY & McRAE and others

Defenders and Respondents

and

HEATHER CAPITAL LIMITED (in liquidation)
and PAUL DUFFY (as liquidator)

Pursuer and Reclaimer

against

BURNESS PAULL LLP

Defender and respondent

Pursuer and reclaimer: Lord Davidson of Glen Clova QC, Tariq;
Shepherd & Wedderburn LLP
Defenders and respondents (Levy & McRae): Duncan QC, Brown;
Clyde & Co (Scotland) LLP
Defender and respondent (Burness Paull LLP): Dunlop QC, C Paterson;
Messrs CMS Cameron McKenna LLP

28 February 2017

[97] I have had the advantage of reading in draft the opinions to be given by Lady Paton and Lady Clark of Calton. I agree with them and, for the reasons they give, I too would allow parties a Proof Before Answer of all their averments on record preserving all pleas.

[98] I would wish to add two comments of my own.

[99] The main focus of the debate in each case was whether the pursuer, HC, had made sufficient and relevant averments of "reasonable diligence" for the purposes of section 11(3) and the proviso to section 6(4) of the 1973 Act. In both cases the Lord Ordinary held that HC had not said enough and in sufficient detail to justify sending the matter to a Proof Before Answer. The matter could be determined on the pleadings. Lady Paton has explained why we take a different view. But I have a more general concern about this approach.

[100] In his note of argument in the LM case, under reference to cases such as *John Doyle Construction Ltd* v *Laing Management (Scotland) Ltd* 2004 SC 713 at pages 722 - 723 and *Watson* v *Greater Glasgow Health Board* [2016] CSOH 93 at paragraphs 22-23, Lord Davidson QC was at pains to remind us that the purpose of pleading is to give fair notice of the assertions of fact sought to be established in the evidence as well as to identify the essential propositions of law on which a party founds. Elaborate pleading is unnecessary in any action, not just in a commercial action. The purpose of the pleadings is to give notice of the essential elements of the case. The pleadings

should set out the bare bones of the case. They are not the place to set out in full the evidence intended to be adduced. In the present cases that appears to have been overlooked. To that extent I have some sympathy with Lord Davidson's submission. The Closed Record in the BP action, as it appears in the Reclaiming Print, runs to some 59 pages, while that in the LM action extends to 93 pages. This has happened, so it seems to me, because in their pleadings parties have indulged in a process akin to trial by pleading. The defenders have made averments of fact intended to undermine the pursuer's case on reasonable diligence; the pursuer has responded by making further averments addressed to those points; this in turn has caused the defenders to make further averments or raise further questions; the pursuer has tried to answer by making yet further averments; and this is constantly repeated until parties are finally exhausted. The process resembles one of cross examination and response, a process for which pleadings are quite unfitted. I do not seek to apportion blame. In a case such as this, the temptation to pile pressure on to the pursuer by pleading a wealth of detail is difficult to resist; and a pursuer who does not respond in kind runs the risk of being thought to have no answer to the points which have been raised. Difficulty arises when the matter comes to debate on the question of whether, for example, the pursuer has made sufficiently relevant and specific averments that it "could not with reasonable diligence have been aware" that loss had occurred (section 11(3)) and that it could not "with reasonable diligence have discovered" the fraud or error induced by the debtor which induced it to refrain from making a relevant claim at an earlier stage (section 6(4), proviso). Points are made in argument about the failure to take certain steps or to follow up on the particular line of enquiry; and the Lord Ordinary is invited to form a view that what was done was insufficient or that the reasons given for not doing it are inadequate. Such an invitation should, in my view, be resisted save in the most obvious case. The judgments which the court is being asked to make are essentially value judgments, assessments of the reasonableness or otherwise of a party's conduct. Such judgments should seldom if ever be made on the basis of the pleadings without hearing evidence. It may seem obvious, on paper, that something ought to have been done or that a line of enquiry ought to have been pursued; but when evidence is led it might seem less obvious, or there might be good reasons for not taking that course. It is not the function of pleadings to set out every reason why each relevant individual took or did not take any particular step. In many cases issues of credibility and reliability might arise, the evidence may be far more nuanced than it is possible to convey on paper, explanations may be given more fully and persuasively than can come over in the pleadings, and some of the criticisms may, in light of all the evidence, be seen to be informed by hindsight. I should emphasise that I make these observations without reference to any of the particular points decided in the particular cases with which we are here concerned. But it does seem to me that the cases with which we are concerned illustrate the danger of the court being drawn into deciding cases on detailed averments of fact when it would be more appropriate that all the evidence be heard before any decision is made.

[101] The other comment I would wish to make concerns the question of whether the claims advanced in both actions on the basis of the existence of a trust are subject to the 5-year prescriptive period in section 6 of the 1973 Act or are subject to the 20-year long negative prescription in section 7. This matter was discussed by Lord Doherty in the LM action at paragraphs [25]-[31]. He concluded that the obligation of a trustee to produce trust accounts is an imprescriptible obligation; that the liability to make payment of the sum found due in an

accounting for trust funds is subject only to the long negative prescription; and that the obligation of a trustee to restore the value of trust property paid away in breach of trust is also subject only to the long negative prescription. The matter was not discussed by Lord Tyre in the BP case for reasons which are slightly unclear – matters appear to have proceeded in that debate on the basis that all obligations were subject to the 5-year prescriptive period and that the only issues in that respect concerned the pursuer's case on sections 6(4) and 11(3) – but it was not suggested before us that the point is not live in that action too. Detailed submissions on the point were made by Mr Duncan QC on behalf of LM and adopted by Mr Dunlop QC on behalf of BP. Lord Davidson QC responded on behalf of HC. I, for one, was grateful for their submissions. It emerged in the course of those submissions, as it had to some extent at the debate in the LM case, that not only was there a dispute as to the law to be applied in a case of accounting and/or breach of trust but there was also a dispute as to whether the circumstances of the present cases gave rise to a relationship of trust at all or, alternatively, a trust of a kind intended to be excluded from the 5-year short negative prescription. In light of this, it seems to me that it would be desirable that all of the relevant facts be determined before the issues are decided. For that reason, and for the reasons given by Lady Paton in paragraph [80] of her opinion, I am persuaded that it would be premature to attempt to decide these points at this stage.