**OUTER HOUSE, COURT OF SESSION**

**[2023] CSOH 81**

**CA68/22**

OPINION OF LORD HARROWER

in the cause

LEGAL AND GENERAL ASSURANCE (PENSIONS MANAGEMENT) LIMITED

Pursuer

against

HALLIDAY FRASER MUNRO

First Defender

and

FAIRHURST (formerly W A FAIRHURST & PARTNERS)

Second Defender

and

STEWART MILNE GROUP LIMITED

Third Defender

and

HALLIDAY FRASER MUNRO LIMITED

Fourth Defender

**Pursuer: MacColl KC, A McKinlay; Eversheds Sutherland (International) LLP**
**First and Fourth Defenders: Borland KC, Manson; DAC Beachcroft (Scotland) LLP**
**Second Defender: Dunlop; Stronachs LLP**
**Third Defender: Lord Keen of Elie KC, McKenzie KC; Brodies LLP**

17 November 2023

**Introduction**

[1] This is one of two actions concerning the Union Plaza building in Aberdeen, a multi-storey, office building at Union Wynd. The building has seven levels from the ground floor to the sixth floor. There are also basement and sub-basement levels providing car parking space. This action, CA68/22, relates to the basements. CA69/22 relates to the superstructure. The Union Plaza building was built in 2008, and the pursuer is its second purchaser, having bought it in 2013. In both actions, the pursuer sues in respect of defects in the design and application of what it calls the "paint protection systems", protecting the steelwork against the risk of both fire and corrosion. So far as inadequate corrosion protection is concerned, this complaint is made only in the basement action, where the pursuer also complains of water ingress. By contrast, the complaint that the paint protection systems inadequately protect the steel against the risk of fire is made in respect of the whole building. The pursuer also makes complaints in both actions of various other defects in fire protection.

[2] As the second purchaser of the building, the pursuer's title to sue is derived from various collateral warranties it received, or had assigned to it, from each of the main contractor, the architect and the engineer, although, as I explain in the next two sections, they are not all held responsible for each of the defects. Both actions came before me for debate on the defenders' preliminary pleas-in-law regarding prescription, specification and relevancy. The issues raised concern the relationship between collateral warranties and the underlying construction contract, particularly in the context of the law of prescription. Since the issues are largely common to both actions, I address them together in this opinion. However, a separate opinion will be issued in the superstructure action indicating how I propose to dispose of the parties' pleas in that matter.

**Parties**

[3] On 1 December 2006, Stewart Milne Central Limited ("the Employer") entered into a construction contract with Stewart Milne Group Limited ("SMG"), in which SMG was appointed main contractor for the construction of the building. The contract was in the form of the Scottish Building Contract With Quantities May 1999 Edition (January 2004 Revision), as amended by a letter dated 27 April 2007 from SMG to the Employer. The Employer and SMG are part of the same group of companies. SMG is the third defender in the basement action and the first defender in the superstructure action.

[4] The Employer appointed Halliday Fraser Munro, a partnership, as architects in terms of a contract dated 27 February and 2 April 2007. Following their appointment, the partnership's liabilities were assumed by Halliday Fraser Munro Limited. The pursuer has chosen to sue both parties, with the partnership being the first defender in the basement action and the second defender in the superstructure action, while the company is the fourth defender in the basement action and the third defender in the superstructure action. One of the issues that has arisen for debate is whether the pursuer's actions should be directed at the company rather than the partnership. In order to simplify matters, and unless the context otherwise requires, I shall simply refer to both the partnership and the company as "HFM". The Employer also appointed Fairhurst, as civil and structural engineers in terms of a contract dated 12 December 2006 and 17 January 2007. Fairhurst is sued only in the basement action, where it is the second defender.

[5] The building was certified as being practically complete on 8 July 2008. The Employer then sold the building to Union Plaza Limited Partnership ("UPLP"), which is in the same group of companies as the Employer and SMG. Although the date of that sale was left unspecified by the pursuer in its pleadings, senior counsel for the pursuer accepted at

debate that it occurred on or around 22 August 2008. The certificate of making good defects was issued on 13 December 2013. UPLP then sold the building to the pursuer on 20 December 2013, at which point the pursuer obtained the collateral warranties upon which these actions are based. HFM's collateral warranty is dated 6 January 2014; SMG's is dated 8 January 2014. Fairhurst's collateral warranty, dated 2 July 2008 and 28 November 2013, was originally granted in favour of UPLP, and then assigned to the pursuer on 18 December 2013.

**The pursuer's averments**

[6] While the pleadings in each action are detailed and rather lengthy, at debate the parties discussed the nature of the defects only in the most general terms. It is however necessary to give at least the gist of the pursuer's complaints in both actions.

[7] The basements extend beyond the footprint of the superstructure, creating an external deck or podium. Although the pursuer had been aware, when it purchased Union Plaza, that there had been water ingress in the basements caused by defects in the tanking of the podium and retaining walls, it was advised that these had been remedied. However water ingress in the basements continued. Following investigations, the pursuer entered into an agreement with SMG in or around May 2018, in which SMG undertook to carry out certain remedial works to the podium defects at its own cost. Notwithstanding these remedial works, water ingress into the basements has continued. The problem of continuing water ingress will require repair, which the pursuer estimates will cost £50,000. This is the subject of the second conclusion in the basement action and is directed only at SMG.

[8] In the course of carrying out the remedial works to the podium defects, certain consequential defects in the basements were discovered, which included damage to some

areas of protective paintwork covering the steel. The need for remedial works to address the podium defects was identified in a survey report by CBRE dated November 2013, prepared on behalf of UPLP, and in a peer review carried out by GIA Building Consultancy, dated December 2013, instructed by the pursuer. Subsequently, however, the pursuer discovered that the paintwork in the basements was subject to degradation, observable as surface delineation and blistering of the paint coating, and rust and corrosion of the steel beams. The degradation to the paintwork in the basements was not caused solely by water ingress resulting from the podium defects. Rather, it was a consequence of inherent defects in the design and application of the so-called "paint protection system".

[9] The pursuer only became aware of the paint protection system defects in November 2018, after it had appointed Jones Lang LaSalle to investigate the design, specification and application of the protective paintwork in the basements. Prior to November 2018, there had been no reason for the pursuer or either of the building's previous owners to believe that there was a problem with the paint protection system in the basements, beyond the damage caused by water ingress as a result of the podium defects. The pursuer holds all three defenders responsible for the defects in the paint protection system in the basements. The summons in the basement action was served on each of them on 17 December 2018.

[10] On 2 February 2021, the pursuer introduced averments in the basement action relating to defects in the design and installation of the soffit insulation between the steel beams and the steel metal decking. Missing or poorly installed insulation had resulted in the risk of exposure of the beams in the event of fire. Moreover, insulation materials had been installed tight up against the steel beams, which would prevent the expansion of the coat of intumescent paint in the event of fire. These soffit insulation defects had been

identified in a draft report dated August 2020 prepared for the pursuer by Mr John Aitken of Firespec Ltd. Prior to August 2020, there had been no reason for the pursuer or either of the building's previous owners to believe that there was a problem with the soffit insulation in the basements. This complaint is not directed at Fairhurst. In its first conclusion in the basement action, the pursuer seeks £350,000 from all three defenders joint and severally, or severally, in respect of the cost of investigations and remedial works to address both the paint protection system defects in the basements and the soffit insulation defects.

[11] Following Mr Aitken's investigations in the basements, the pursuer instructed him to carry out investigations into fire protection in the rest of the building. As a result, in October 2020, the pursuer became aware of the existence of defects in the design and installation of the paint protection system in the superstructure, together with other fire protection defects (referred to compendiously by the pursuer in the superstructure action as the "fire protection defects"). Prior to October 2020, there had been no reason for the pursuer or either of the building's previous owners to believe that there was a problem with fire protection in the superstructure, including its paint protection system. The summons in the superstructure action was served on SMG on 28 May 2021 and on HFM on 1 June 2021. It seeks to recover from them, jointly and severally, or severally, the sum of £20 million in respect of the estimated cost of investigations and remedial works to address the fire protection defects in the superstructure.

[12] The pursuer avers that the words and conduct of each of the defenders induced it and the building's two previous owners erroneously to believe that the defenders had complied with their duties under their contracts or appointments with the Employer. The words and conduct said to have induced that erroneous belief included the defenders' performance of their obligations under their respective contracts or appointments, and their

requests for payment for work done. They included the words and conduct of each of the defenders in connection with the certification process, whether it related to the certification of works for payment, the certification of practical completion or the certification of making good defects. It included words or conduct relating to the presentation of the works for certification (SMG), advice given in relation to certification (Fairhurst) and the issuing of the certificates themselves (HFM). The pursuer also relied on the issuing of a certificate from SMG's subcontractor, Specialist Firecoat Systems, dated 19 June 2008, that all steel throughout the building had been shown to achieve in excess of the relevant 120 minute standard for fire resistance. Finally, the pursuer relied on the granting by each defender of a collateral warranty either to the pursuer itself or to UPLP. In summary, the pursuer avers that the erroneous belief that the defenders had complied with their obligations, induced by the words and conduct of the defenders, induced the pursuer and the building's two previous owners to refrain from raising proceedings.

**The issues**

[13] The issues raised by the defenders were summarised by the pursuer as follows: (I) Is SMG entitled to the benefit of the same prescription arguments which would have been open to it had the claims been brought by the Employer?; (II) Has the pursuer plead a relevant case based upon section 11(3) of the 1973 Act?; (III) Has the pursuer plead a relevant case based upon section 6(4) of the 1973 Act?; (IV) Is the pursuer entitled to recover damages in relation to collateral warranties which were granted after it purchased the building on 20 December 2013?; and (V) Is Halliday Fraser Munro entitled to be released on the basis that all liabilities have been assumed by Halliday Fraser Munro Limited?

[14] For convenience I have adopted the same general structure in this opinion, subject to two preliminary remarks. Firstly, the pursuer no longer insisted on its case based upon section 11(3) insofar as it was directed against HFM and Fairhurst. Secondly, I acknowledge that the defenders would not necessarily adopt exactly the same formulation of the relevant issues: the pursuer's averments in terms of section 6(4), in particular, are challenged as a matter of specification as well as relevancy.

**(I) Is SMG entitled to the benefit of the same prescription arguments which would have been open to it had the claims been brought by the Employer?**

[15] Section 6(1) of the Prescription and Limitation (Scotland) Act 1973 provides that obligations of the sort described in Schedule 1 are subject to a five-year prescriptive period. The obligations listed in Schedule 1 include any obligation arising from liability to make reparation, and any obligation arising from, or by reason of, any breach of contract or promise. Time starts to run on any such obligation when it becomes enforceable (s 6(3), 1973 Act). In *British Overseas Bank Nominees Limited* v *Stewart Milne Group Limited* 2020 SC 24, the Inner House decided that the statutory prescriptive period is essentially a maximum period that applies by default, it being always open to parties to agree a shorter period (para 25). Further, because of the importance of time-bar provisions to contractors and designers, a collateral warranty "should normally be subject to the same time-bar as applied to the original building contract" (para 16). They explained that by the "same" time bar, they meant "a time-bar that has effect on the same date" (*ibid*).

[16] The pursuer submitted that the court's use of the word "normally" was an acknowledgement that there was no universal rule, and that each case would turn upon its own facts and circumstances. The key clauses in the SMG collateral warranty were the

following, where SMG is referred to as the "Contractor", and the pursuer, being the beneficiary, is referred to as the "Company":

"WHEREAS

(A) In terms of the Construction Contract the Employer has appointed the Contractor to carry out the construction of the Works on the Site as part of the Project.

(B) The Company has entered into an agreement to purchase the Site.

**[…]**

WARRANTIES

The Contractor warrants to the Company that:-

2.1 the Contractor has carried out and will complete the Works in conformity with the Construction Contract;

2.2 the Contractor has [sic] and will observe, perform and comply with all the provisions and obligations on the part of the Contractor all as contained in the Construction Contract."

DUTY OF CARE

3.1 Duty of care in relation to the carrying out of the Works

Without prejudice to Clause 2 (Warranties), the Contractor warrants that in carrying out the works the Contractor has exercised and will continue to exercise the reasonable skill and care to be expected of an experienced, properly qualified and competent contractor with experience of carrying out works similar to the Works in connection with projects of a similar standard, size, scope, nature and complexity and value to the Project.

3.2 Duty of care in relation to the design of the Works

Without prejudice to the [sic] Clause 2 (Warranties), the Contractor warrants that such of the design of the Works for which it is responsible under the Construction Contract (including any design not carried out by the Contractor but for which the Contractor is responsible in terms of the Construction Contract) has been and will be carried out using the reasonable skill and care to be expected of an, [sic] experienced, properly qualified and competent architect, engineer or other appropriate professional designer, as the case may be, with experience of carrying out design in connection with projects of a similar standard, size, scope, nature, complexity and value to the Project.

> 3.3 Company's reliance
>
> The Contractor acknowledges that the Company shall be deemed to have relied upon and will continue to rely on the Contractor's reasonable skill and care as set out above.
>
> 3.4 No loss
>
> The Contractor agrees that it will not be entitled to argue in defence or mitigation of any claim against it arising from this Agreement that any loss suffered or cost incurred by the Company or any permitted assignee of the Company is not recoverable from the Contractor pursuant to this agreement because that loss or cost has not been suffered or incurred by the Employer.
>
> […]"

[17] The pursuer contrasted the SMG collateral warranty with the "no greater duties" clause (Clause 3.2) in the collateral warranties provided by the other defenders, in which HFM and Fairhurst are each, respectively, referred to as the "Consultant", and where the Employer under the construction contract is referred to as the "Client". The "Company" is the beneficiary under the warranty, which in the case of the Fairhurst warranty was of course UPLP until the benefit of the warranty was assigned to the pursuer:

> "The Consultant shall owe no greater duties or obligations to the Company under the terms of this Agreement than it would have owed to the Company had the Company been named as the Client under the Appointment…".

No equivalent wording was provided in the SMG warranty. Nor, according to the pursuer, could any such proviso be implied. It would make no commercial or practical sense given that the Employer, SMG and UPLP were all part of the same group of companies. The existence of a "no greater duties" clause was considered important by the Inner House in *British Overseas Bank Nominees Ltd* in its interpretation of the collateral warranty in that case. In the absence of any contractual limitation, the statutory prescription period applied,

commencing on the date of the SMG collateral warranty unless postponed in terms of the provisions of the 1973 Act.

[18] I am not persuaded by this argument. SMG warranted that it had carried out and that it would carry out and complete the Union Plaza building works "in conformity with the Construction Contract", and that it had and would comply with "all the provisions and obligations on the part of [SMG] all as contained in the Construction Contract". In my view that wording is sufficient to allow SMG, in any question with the pursuer, the benefit of any prescription defence it would have had against the Employer. There is a peculiarity in that the drafting – "has carried out and will carry out", "has [observed] and will observe" – implies that the SMG collateral warranty was intended to be provided at a point in time at which at least some of the contract works were still to be carried out. In its choice of wording SMG followed, as it was obliged to do, the standard form (including the grammatical errors) annexed to the side letter dated 27 April 2007 to the construction contract. However, in the event, the warranty was not signed until 8 January 2014, after the certificate of making good defects was issued. The fact that the date of execution cannot readily be reconciled with the manner in which the warranties are drafted suggests that it was not intended to be the date from which the warranties were to take effect.

[19] The pursuer relied heavily on the absence of a "no greater duties" clause in the SMG collateral warranty, contrasting it with the collateral warranty under consideration in *British Oversees Bank Nominees Ltd*. However, the importance of the "no greater duties" clause in that case was only that it "[put] matters beyond doubt" (para 27). Its presence was not critical to the court's interpretation of the collateral warranty under consideration. Rather, the court attached greater importance to the "fundamental purpose" of collateral warranties

in cases where the underlying contract was a building contract. That purpose was described as being,

> "to place the beneficiary and the contractor in an equivalent position to the original developer and contractor, not to extend the obligations of the contractor to the beneficiary of the warranty beyond those undertaken in favour of the original developer. Details of the wording used should not obscure that basic objective" (para 7).

The context against which the collateral warranty must be construed would include, in the case of building contracts, the roles of the various persons involved and the totality of contracts governing the project" (para 8). The general legal context would also be relevant, including the fact that collateral warranties were developed in the construction industry in order to ensure that the claims of subsequent purchasers, tenants, and the like against the contractor and the design team would not fall into a so-called legal "black hole" (paras 10-12). That legal and commercial context demonstrated an important feature of their purpose, namely, to provide the subsequent purchaser with rights against the contractor that are equivalent to the rights that were enjoyed by the original employer under the building contract.

> "The notion of equivalence is central. The purpose of the warranty is not to provide purchasers … with rights greater than those held by the original employer, to do so would make no commercial sense. Equivalence accordingly requires not merely that the beneficiary of the warranty should have the same affirmative rights of action as the original employer; it also requires that those rights of action should be subject to the same qualifications, limitations and defences as were available to the contractor in respect of the original building contract" (para 12).

[20] It is clear that the purpose of the SMG collateral warranty was to ensure that the pursuer's claims against SMG would not fall into a legal black hole. This is apparent from the terms of the preamble, as well as the "deemed reliance" and "no loss" provisions in Clauses 3.3 and 3.4. For these reasons alone, I would hold that the principle of equivalence is central to the SMG collateral warranty as much as it is to collateral warranties in the

construction sector generally. However, it is also significant that Clause 5.1 of the SMG collateral warranty placed an obligation on SMG to effect and maintain professional indemnity insurance for twelve years after the date of practical completion. In my view that requirement only makes commercial sense if liability under the SMG contractual warranty is linked to the date of practical completion under the construction contract.

[21] For all those reasons, SMG is entitled to the benefit of the same prescription arguments which would have been open to it had the claims been brought instead by the Employer, albeit that they take effect as a contractual limitation rather than a statutory prescription. The pursuer accepted that the Employer suffered loss, injury and damage under the construction contract at the date of practical completion on 8 July 2008. It follows that time would run against the pursuer under the SMG collateral warranty from that date, unless the period can be said to have been postponed on the basis of any argument that would have been available to the Employer against SMG.

**(II) Has the pursuer pled a relevant case against SMG based upon section 11(3) of the 1973 Act?**

[22] One such argument is that section 11(3) of the 1973 Act must be read as qualifying the contractual limitation which, in the previous section, I held to be available to SMG as part of its collateral warranty. Section 11(3) would have the effect of postponing the running of time on the basis that "the creditor was not aware, and could not with reasonable diligence have been aware" of the occurrence of loss, injury or damage. Of course, even if I had upheld the pursuer's arguments in the previous section, given the date of the SMG collateral warranty, prescription would *prima facie* have extinguished all of the pursuer's claims against SMG other than those it had made the subject of the original summons in the

basement action. Accordingly, the pursuer relies on section 11(3) of the 1973 Act, not just as providing a necessary qualification to the contractual limitation defence available to SMG. It also relies on section 11(3), in the event that I am wrong about my interpretation of the SMG collateral warranty, as a defence to statutory prescription operating against its claims regarding the soffit insulation defects and the superstructure action.

[23] Against that background, the pursuer argued that it was entitled to a proof before answer on its averments regarding the lack of actual or constructive awareness of loss on the part of the Employer, UPLP and the pursuer. SMG's position was that objectively, and with the benefit of hindsight, the Employer had suffered financial loss "when it paid for and took possession of the *ex hypothesi* defective building at practical completion". That being so, section 11(3) was not available to the pursuer with respect to its claims against SMG, just as the pursuer appeared belatedly to have recognised that it could no longer advance this argument against HFM and Fairhurst: *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287; *WPH Developments Ltd* v *Young & Gault LLP* 2022 SC 28.

[24] However, in my view, whatever may be the correct analysis of the pursuer's claims against HFM and Fairhurst, money paid by the Employer to SMG for the construction of the building was simply consideration for services supplied, rather than loss incurred by the Employer as a result of SMG's breach of contract. In that regard, and in agreement with the pursuer, I would accept what I understand to be the distinction between consideration and loss drawn by Lord Doherty, *obiter*, in *Midlothian Council* v *Raeburn Drilling and Geotechnical Ltd* 2019 SLT 1327 (para 25). Senior counsel for SMG referred me to *Scottish Widows Services Ltd* v *Harmon/CRM Facades Ltd* 2010 SLT 1102, and in particular to Lord Drummond Young's analysis of loss in the case of defective performance by the contractor or design team. The primary loss resulting from defective performance, the court said, is the physical

defect in the building (paras 17, 18 and 29). That may well be the case, but the issue here is not to do with when loss occurred but with when the Employer had actual or constructive awareness of loss. In that regard, SMG founded at debate not on the pursuer's actual or constructive awareness of defects in the building, which is something that might become relevant at proof, but on the Employer's payment of the price for the building. As I have said, the price paid is consideration for services supplied, rather than loss caused by breach.

[25] SMG further argued that, whatever may have been the position regarding the consideration paid by the Employer for the building, the pursuer (and indeed UPLP) incurred financial loss when they purchased the building. Here too, however, I agree with the pursuer, that the price paid for the building did not represent loss or damage recoverable under the collateral warranty. In particular, while Clause 3.4 of the SMG collateral warranty prevents SMG from arguing that the loss suffered by the pursuer "has not been suffered or incurred by the Employer", the principle of equivalence means that the pursuer effectively stands in the shoes of the Employer. As a result, it can only recover in respect of the type of loss for which the Employer itself would have been able to recover under the construction contract.

[26] I have already noted that the pursuer accepted that its averments relating to section 11(3), in the context of its claims against HFM and Fairhurst, should be excluded from probation. Insofar far as the actions are directed against SMG, I would accept that the pursuer makes relevant averments regarding the absence of actual or constructive awareness on the part of the Employer, UPLP and itself regarding the existence of defects in the paint protection system in the basements prior to November 2018, of defects in the soffit insulation in the basements prior to August 2020, and of the fire protection defects in the

superstructure prior to October 2020. The pursuer does not appear to rely on section 11(3) in respect of water ingress.

**(III) Has the pursuer pled a relevant and specific case based upon section 6(4) of the 1973 Act?**

[27] The pursuer submitted that, insofar as its case against each defender proceeded on the basis of a contractual limitation, mirroring the statutory prescription that would have been available against any claim by the Employer, then it was entitled to rely upon section 6(4) of the 1973 Act. In other words, the principle of equivalence required that the entire statutory regime applicable to the five-year prescription should be taken to have been incorporated into the contractual limitation. As regards SMG, of course, the pursuer's primary argument was that the statutory prescription period applied and would have commenced *prima facie* from the date of the collateral warranty. In that context, insofar as it was necessary to do so, the pursuer also relied on section 6(4). Before summarising the arguments of parties on this issue, it is convenient to set out the relevant terms of section 6(4). They provide as follows:

> "In the computation of a prescriptive period in relation to any obligation for the purposes of this section-
> (a) any period during which by reason of-
> (i) fraud on the part of the debtor or any person acting on his behalf, or
> (ii) error induced by words or conduct of the debtor or any person acting on his behalf,
>
> the creditor was induced to refrain from making a relevant claim in relation to the obligation, and
>
> (b) any period during which the original creditor (while he is the creditor) was under legal disability,
> shall not be reckoned as, or as part of, the prescriptive period:

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

[28] HFM argued that, for the purposes of section 6(4), the pursuer could only rely on words or conduct of HFM directed specifically at it, rather than at the Employer or UPLP. Since the only words or conduct directed at the pursuer upon which it relies occurred after the action had already prescribed, its case under section 6(4) was irrelevant. In any event, the HFM collateral warranty contained no wording that would allow the pursuer to rely on words or conduct directed at other parties. Indeed, the HFM collateral warranty contained no wording importing anything equivalent to section 6(4). Further, the pursuer did not aver how any words or conduct on the part of HFM came to operate on the mind of the pursuer such as to have induced it into error. For the purposes of section 6(4) the relevant state of mind must exist in one or more individuals and, in a corporate context, must be capable of being attributed to the relevant company: *Dryburgh* v *Scotts Media Tax Limited* 2014 SC 651. The pursuer had not given sufficient notice of the period during which it or anyone else had been induced into error. The pursuer had averred separate end dates for separate defects. Each end date was predicated upon receipt by the pursuer of expert reports. However, there was no averment that the Employer received a copy of the pursuer's expert report.

[29] Fairhurst adopted HFM's arguments in their entirety. In addition, they complained that the pursuer's averments lacked specification, particularly its averment in article 8 of condescendence that "the period until (at least) 17 December 2013 should be discounted in calculating the prescriptive period in term of section 6(4) of the 1973 Act." The pursuer failed to aver a start date or an end date for the period during which it was induced to refrain from making a claim. It failed to aver what particular words or conduct of Fairhurst

induced an error. So far as Fairhurst's performance of its obligations under the appointment was concerned, the pursuer could not simply rely on the general duty to exercise care and skill. Otherwise any alleged breach of a duty of care in all professional negligence disputes would prevent commencement of the prescriptive period. Words or conduct occurring during the course of the works could not be relied upon since they predated practical completion and the commencement of prescription. Any advice given regarding the certification of interim payments or practical completion under the construction contract did not constitute a warranty in respect of the works. Fairhurst's entitlement to payment was not conditional on the absence of defects; therefore, when claiming payment under their appointment, they were not necessarily representing that the building was free from defects.

[30] SMG adopted HFM's submissions, other than its submission to the effect that express wording was required to incorporate the equivalent of section 6(4) in a collateral warranty. That was understandable enough, since otherwise SMG might have risked undermining its earlier submissions on the availability, without express wording, of a contractual limitation against the pursuer equivalent to any prescription defence it might have had against the Employer.

[31] I begin by underlining what is obvious, that we are here discussing the relevancy, and to some extent the specification, of the pursuer's pleadings. Insofar as the defenders sought dismissal of the actions based on the relevancy of the pursuer's averments regarding contractual limitation or prescription, then the sole question at this stage is whether the actions are bound to fail.

[32] Secondly, and just as obviously, this is not the sort of case where the creditor in the obligation had first been intent on pressing a claim but was then deflected from doing so by words or conduct of the debtor. The notion that section 6(4)(a) was confined to addressing

such a scenario was rejected in *Thorn EMI Ltd* v *Taylor Woodrow Industrial Estates Ltd* (29 October 1982, unreported, and cited with approval in *BP Exploration Operating Company Ltd* v *Chevron Transport (Scotland)* 2002 SC (HL) 19 (para 32)). It is perfectly possible in principle, therefore, for the pursuer to argue that the creditor of the defenders' respective obligations, whoever that may be from time to time, had been induced to refrain from making a claim, even while it may not have been aware that it had such a claim. Indeed, on the pursuer's averments, it is precisely because the relevant creditor at all material times had been induced erroneously to believe that the defenders had complied with their obligations that it failed to raise legal proceedings.

[33] Thirdly, the creditor is not restricted by section 6(4) to relying on words or conduct that post-dated the coming into existence of the obligation upon which the action is founded. At least in principle, the creditor is entitled to found upon words or conduct of the debtor that not only preceded the coming into existence of the claim itself, but which gave rise to that claim. This follows from *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Ltd* [2011] CSIH 26, where the pursuer claimed for repetition of sums mistakenly paid, over a ten-year period, to Scottish Water in respect of water drainage charges. The pursuer was held to have made relevant averments that the very issuing by Scottish Water of charge notices induced the error which, in turn, induced the pursuer to refrain from making a claim. The same conclusion follows from *Caledonian Railway Co* v *Chisholm* (1886) 13 R 773, where the railway company sought to recover what it would have charged the defender for carrying the defender's grain sacks, over a seven-year period, had the defender not falsely represented that the sacks had been used, or intended to be used, for the carriage of grain on the pursuer's line. While in *Caledonian Railway Co*, the defender had by its words or conduct implicitly represented that no obligation to pay had arisen, in *Rowan*

*Timber Supplies,* the defender's charge notices had implicitly represented that the sums sought were truly due (*Rowan Timber Supplies*, para 11). In each case, at least on averment, the pursuer had been induced to refrain from making a claim.

[34] *Caledonian Railway Co* and *Rowan Timber Supplies* were both payment actions (or in the case of *Rowan Timber Supplies*, an action for repayment). However, there is no reason in principle why the argument should not be available in what amounts to a claim for damages. In such a case, the creditor may rely on words or conduct of the contractor or consultant pre-dating practical completion, on the basis that it induced the creditor erroneously to believe that the contractor or consultant had complied with its obligations. Imagine that the contractor claimed payment for applying layers of paint that it knew it had omitted, or that the architect or engineer had certified that sums were due to the contractor in respect of a specification that it knew to be defective. Should the creditor be prevented from relying on the debtor's fraud, in the sense required to satisfy section 6(4)(a)(i), even though he may thereby have been induced to refrain from making a claim until these defects appeared or were discovered? I can see no reason why he should, nor why the answer should be any different where the creditor founds on error rather than fraud. Fairhurst argued that no reliance could be placed on words or conduct predating the date when prescription *prima facie* would have commenced, which in this case was the date of practical completion. However, while clearly there would have been no right of action prior to practical completion, it does not follow that an erroneous belief that the defenders had complied with their respective duties had not already been induced, or at least begun to be induced, on the basis of words or conduct preceding practical completion.

[35] Fourthly, must the words or conduct be directed specifically at the pursuer, as it is submitted they must by the defenders? Again, I can see no reason in principle why they

should. I would reject HFM's and Fairhurst's argument that express wording was required in order to incorporate the equivalent of section 6(4) into their collateral warranties. Their argument involved treating the "no greater duties" clause in Clause 3.2 as a "lesser duties" clause. There is no basis for such an interpretation. The principle of equivalence discussed earlier requires that pleas that would have been available to the employer, whether they be in the context of the underlying construction contract or the contracts of appointment with the design team, should also be available to those standing in the shoes of the employer such as the beneficiaries of collateral warranties. Otherwise their claims might fall into a black hole, something which it is the very purpose of the collateral warranty to prevent. In my view, therefore, the pursuer offers relevantly to prove that the building's two previous owners, as well as the pursuer itself, were induced to refrain from bringing proceedings by reason of a common erroneous belief that the defenders had complied with their contractual obligations.

[36] Fifthly, I would of course accept, following *Dryburgh*, that it is necessary, in order for section 6(4) to apply to the facts of any case, that error on the part of the company should be accompanied by a specific mental state in one or more individuals that is capable of being attributed to the company (para 21). But *Dryburgh* was decided on appeal following a proof before answer. It does not follow, and the case is not authority for the proposition, that the specific mental state of any particular individuals must be plead either as a matter of relevancy or specification. It is also necessary to bear in mind the speech of Lord Hope in *BP Exploration Operating Company Ltd* (*op cit*), in which he said that there need not be some conscious act of self-restraint on the part of the creditor before section 6(4) could apply (para 30). Certainly, a creditor's reason for not making a claim might in some cases result from a conscious and deliberate decision on his part, but not where he was unaware of the

obligation because of error (para 31). That is what is averred here, since, as I have indicated, in both actions, the pursuer claims that the relevant creditor at all material times was unaware of the existence of a right of action as a result of words or conduct of the defenders inducing it erroneously to believe that they had complied with their duties under the contract.

[37] Sixthly, it follows also from *BP Exploration,* that the period of time covered by the word "refrain" in section 6(4) includes time when the creditor does nothing to enforce the obligation, "whether or not this is the result of a conscious decision on his part not to press the claim" (*ibid,* para 33). It is not necessary for the creditor to identify the date when he would have made the claim but for the error (*ibid*). Contrary to the defenders' submissions, therefore, I would not hold that the pursuer's case is fatally undermined by any vagueness in its pleadings in this regard. On any fair reading, the pursuer should be understood as saying that time should not run until the error was discovered, in relation to which it has made relevant and sufficiently specific averments, namely, in November 2018, for the paint protection system defects in the basements; in August 2020 for the soffit insulation defects in the basements; and in October 2020 for the fire protection defects in the superstructure.

[38] Finally, when it comes to the actual words and conduct relied upon by the pursuer, the question, from the point of view of relevancy, is as follows. Are they in principle capable of being understood as a false representation by the debtor, even if only implicitly, giving rise to an erroneous belief on the part of the creditor that the defenders had complied with their obligations? In my view, they are. Fairhurst objected to any reliance being placed on a letter dated 5 December 2013, in which it sought to give reassurances to the Stewart Milne Group relating to water ingress in the basements. This could have no relevance, they claimed, to any paint protection system defects in the basements, or the alleged soffit

insulation defects. However, the same letter concluded by saying that Fairhurst knew of "no reason why the making good [sic] defects certificate should not be issued". Whether or not that amounted to a representation regarding the condition of the basements generally is a question more appropriately resolved after proof.

[39] It was not disputed that the question of whether or not the creditor had exercised reasonable diligence could not be decided at debate. In my view, therefore, the pursuer has in both actions plead a relevant and specific case on the basis of section 6(4) of the 1973 Act. Such was the level of generality at which the debate was conducted, there was little or no reference made to the specific defects in respect of which the section 6(4) argument would apply. For the avoidance of doubt, I am persuaded that the pursuer has relevant averments in respect of the paint protection system defects in the basements, the soffit insulation defects in the basement, and the fire protection defects in the superstructure (including the paint protection system defects there). That is so whether, as I have held, the argument applies in the context of the contractual limitation argument plead by all the defenders, or whether, as the pursuer maintained in its primary argument against SMG, statutory prescription applies. I did not understand the pursuer to be invoking section 6(4) in respect of its complaint regarding water ingress, or if it was, what its arguments were in that regard.

**(IV) Is the pursuer entitled to recover damages in relation to collateral warranties which were granted after it purchased the Building on 20 December 2013?**

[40] HFM and SMG argued that, the building having been purchased by the pursuer on 20 December 2013, prior to the collateral warranties having been granted by them, respectively, on 6 and 8 January 2014, it follows that any breach by them of their collateral

warranties did not and could not have caused the pursuer to suffer loss. Any loss had already been sustained by the time the collateral warranties were granted and took effect.

[41] I reject this argument essentially for reasons given by the pursuer. It proceeds on the false premise that actual reliance is necessary in order to found a claim for breach of warranty. There is no reason why any person who becomes liable for the cost of repairing a defect in a building should not be entitled to sue for that cost provided he is the beneficiary of an appropriately worded collateral warranty granted by the person responsible for the defect (*Scottish Widows Services Ltd, op cit*, paras 17, 18). Senior counsel for the pursuer noted that the date of the latest signature on the collateral warranty in *British Overseas Bank Nominees Ltd* post-dated the relevant purchase (*op cit,* para 32). There was no suggestion in that case that the post-dating prevented the collateral warranty being enforced.

**(V) Is Halliday Fraser Munro entitled to be released on the basis that all liabilities have been assumed by Halliday Fraser Munro Limited?**

[42] HFM acknowledged that the transfer of liabilities from the partnership to the company might not in itself be sufficient to relieve the partnership of liability to the pursuer. However, it submitted that, in choosing to sue the company, the pursuer intimated its acceptance of that transfer of liability. Moreover, this was reflected in the pursuer's averment in both actions that the company had "assumed the liabilities" of the partnership. Reference was made to *MRS Distribution Ltd* v *DS Smith (UK) Ltd* 2004 SLT 631, in which it was noted that it was possible to infer from conduct that the relevant obligation had been subject to novation or delegation (para 9). HFM invited me to dismiss the action against the partnership in both actions.

[43] I would reject this attack on the relevancy of the pursuer's pleadings. The pursuer has explained its position as follows:

> "[T]he pursuer has not consented to any discharge of liability on the part of the [partnership]. It does not follow from the [company] having assumed responsibility for the liabilities of the [partnership], in an agreement between these parties, that the [partnership] has been divested of any liability vis-à-vis the pursuer".

In my view, the pursuer has relevant averments that it has not accepted or otherwise consented to the substitution of the company for the partnership. I will therefore allow both actions to proceed against the partnership as well as the company.

**Disposal**

[44] I would be minded to give effect to the foregoing discussion in this, the basement action: by sustaining SMG's first plea-in-law, by excluding from probation the pursuers' averments regarding statutory prescription (rather than contractual limitation) being applicable to SMG's obligations under its collateral warranty; by sustaining HFM's and Fairhurst's first pleas-in-law by excluding from probation the pursuer's averments regarding section 11(3) of the 1973 Act; by sustaining the pursuer's fifth plea-in-law by excluding from probation the defenders' averments regarding the pursuer not being able to sue on a collateral warranty that post-dated the pursuer's purchase of the building; and thereafter to allow a proof before answer with all pleas standing.

[45] However, there may be other matters that were not discussed at the debate, beyond the formal adoption by parties of their notes of argument. I have in mind SMG's objection to the relevancy of certain of the pursuer's averments regarding section 10 of the 1973 Act and whether SMG, by entering into the podium defects agreement, should be taken to have

relevantly acknowledged anything. The pursuer's note of argument was silent on that matter, as it was on the water ingress defect generally.

[46] I have therefore decided to put both actions out by order to discuss (a) the terms of the interlocutor that would give effect to my decision, including the precise averments that require to be excluded from probation, (b) further procedure, and (c) any question of expenses.