OUTER HOUSE, COURT OF SESSION

[2017] CSOH 125

CA26/17

OPINION OF LORD DOHERTY

In the cause

(FIRST) McCLURE NAISMITH LLP; (SECOND) THISTLE PROPERTY HOLDING COMPANY LIMITED

Pursuers

against

(FIRST) HARLEY HADDOW PARTNERSHIP; (SECOND) HUGH JAMES EDWARD HENDERSON; (THIRD) CHRISTOPHER JOHN MacLAREN; and MARK JONATHAN LAWLER

Defenders

Pursuer: Jones (sol adv); BTO Solicitors LLP
Defender: Hawkes; Brodies LLP

26 September 2017

Introduction

[1] By an Appointment Agreement ("the Agreement") dated 16 and 24 June 2004 the second pursuers appointed the first defenders as civil and structural engineers and mechanical and electrical engineers in respect of works relating to the design and construction of an office development at 3 Ponton Street, Edinburgh. In terms of the Agreement the first defenders undertook that they had exercised and would continue to exercise in the performance of the Services to the second pursuers the reasonable skill, care

and diligence expected of a competent professional person of the relevant discipline in the performance of its services who was experienced in carrying out such services in relation to works of a similar size, scope and nature to the works.

[2] On 12 August 2004 the Agreement was novated to the main contractors, Rutland Design and Build Ltd ("Rutland"). The second pursuers agreed to let the office premises to the firm of McClure Naismith.

[3] The first defenders granted collateral warranty undertakings to the firm and to the second pursuers. Subsequently the whole rights and liabilities of the firm under the lease and under the collateral warranty undertaking in its favour were assigned by the firm to the first pursuers.

[4] On 16 December 2010 the first pursuers raised the present action against the defenders. They averred that the first defenders were in breach of the collateral warranty undertaking to the firm. They sought damages. The action was raised as an ordinary action. Following service the summons was not presented for calling until late 2011. The first interlocutor was pronounced on 7 December 2011, at which time the cause was sisted on the first pursuers' motion. Thereafter further sists were granted on the first pursuers' motion. On 4 March 2014 the most recent sist was recalled and the summons was amended to add the second pursuers as additional pursuers. The pursuers averred that the defenders were in breach their obligations under the Agreement and therefore also in breach of the collateral warranty undertakings.

[5] Thereafter the case was restored to the adjustment roll on several occasions. The record closed once again on 29 April 2015. The Closed Record No 13 of process was received by interlocutor dated 19 May 2015. On 29 May 2015 the case was appointed to the Procedure Roll on the defenders' motion. On 2 November 2015 the Procedure Roll was

discharged on the pursuers' motion, and on 26 November 2015 the Minute of Amendment for the pursuers No 16 of process was received. Thereafter Answers to the Minute were lodged by the defenders, and both the Minute and Answers appear to have been adjusted. The record does not seem to have been amended in terms of the Minute and Answers. On 22 March 2017 the cause was remitted to the commercial roll. It is possible that at that stage the averments which had been made in the Minute and Answers were treated as being adjustments. In any case, the pursuers made substantial adjustments on 6 April 2017, and they further adjusted a few weeks later. The case came before me for debate. The defenders' pleas-in-law included a general plea that the pursuers' averments were irrelevant and lacking in specification, and a plea of prescription.

The Appointment Agreement

[6] The Agreement was based on the ACE Agreement (B) 91) (2002). Clause 2 provided:

> "2. Duty of Care
>
> 2.1 The Consultants undertake that they have exercised and will continue to exercise, in the performance of the Services to the Clients, the reasonable skill, care and diligence expected of a competent professional person of the relevant discipline in the performance of its services who is experienced in carrying out such services in relation to works of a similar size, scope and nature to the Works.
>
> …"

In terms of the Agreement the Consultants were the first defenders and the Clients were the second pursuers, the Works were the office development. In terms of the Schedule Part I, the Services included Stages A to L for both the civil and structural engineering services and the mechanical and electrical engineering services. Stage A involved Appraisal; Stage B, Strategic Briefing; Stage C, Outline Proposals; Stage D, Detailed Proposals; Stage E, Final Proposals; Stage F, Production Information; Stages G/H, Tender Documentation and

Tender Action; Stage J, Mobilisation; Stage K, Construction; and Stage L, Completion. In particular, Stage K provided:

> "After receiving the Clients' consent to proceed to the Construction Stage …:
> …
>
> 6. Examine installation drawings, shop drawings and builders work details submitted by design sub-contractors for the Works or parts thereof, in respect of the design intent and compliance with performance criteria. The Consultants shall not be required to examine the design of any proprietary products manufactured or supplied by contractors or sub-contractors.
>
> …
>
> 10. Attend relevant meetings and make periodic visits to the site as appropriate to the stage of construction or as otherwise agreed to assist the contractor to monitor that the Works are being executed generally in accordance with the contract documents and with good engineering practice and advise the contractor on the need for instructions. The number of periodic visits by the Consultant shall be a maximum of six.
>
> 11. Examine proposals prepared by others for carrying out commissioning procedures and performance testing. Comment to the contractor on any requirements of the proposals affecting the programme and progress of the work.
>
> 12. Subsequent to setting to work and regulation of the buildings, plant and equipment of the Works by the contractor and sub-contractors, examine the results of commissioning and the documentary records thereof.
>
> …"

Collateral Warranty Undertakings

[7] Clause 1 of the collateral warranty undertaking granted by the first defenders to the firm provided:

> "1. <u>Duty of Care</u>
>
> 1.1 We warrant that we have exercised and will continue to exercise, in the performance of our services to the Contractors under the Appointment, the reasonable skill, care and diligence expected of a competent professional person of the relevant discipline in the performance of its services who is experienced in carrying out such services in relation to works of a similar size, scope and nature to the Works. We shall notify the Company in writing as soon as reasonably practicable

> in the event of becoming aware of any matter which might materially prejudice the interests of the Company in connection with the Works.
>
> …"

The Contractors were defined as being the main contractor, Rutland, under the building contract for the works. Clause 1.1 of the collateral warranty undertaking granted by the first defender to the second pursuers was in identical terms except that "Clients" was substituted for "Contractors" and "Initial Clients" was substituted for "Company".

The Pleadings Prior to the Pursuers' Adjustments of 6 April 2017

[8] In the Closed Record No 13 of process the pursuers founded upon breach by the first defenders of Clause 1.1 of each of the collateral warranty undertakings. After narrating the terms of Clause 1.1 of the Agreement, and Clause 1.1 of each of the collateral warranty undertakings, the pursuers averred:

> "Cond. 4. The Appointment Agreement … includes for:
>
> 'Stage K
> 10 – make periodic site visits … to monitor the works as being executed in accordance with the contract documents and with good engineering practice.
>
> 11 – examine proposals for commissioning
>
> 12 – examine commissioning and documentary records.'"

The pursuers went on to aver:

> "Cond. 6. The Works were not carried out conform to the Building Contract. They were not carried out using suitable materials. They were not carried out using competent tradesmen nor executed with the skill and competence reasonably to be expected of such tradesmen…
>
> Cond. 7. The Pursuers have identified *inter alia* certain defects more fully hereinafter condesceneded (sic) upon (hereinafter the 'Works Defects')…"

The pursuers specified the Work Defects in Articles 8 to 12. In Article 8 of Condescendence the pursuers identified defects in the air conditioning system. Article 9 was in the following terms:

> "Cond. 9. Walling
>
> Throughout the floor edged columns there was a loss of continuity of breather membrane. This allowed water ingress and interstitial condensation, (sic) This was contrary to standard J4.1…"

Article 10 identified defects in structural glazing and Article 11 identified roofing defects. A further article also numbered 11, and Article 12 stated:

> "Cond. 11. In or around May 2010 the First Pursuers instructed an inspection of the Development by Building Diagnostic and Assessment Services Limited (BDAS) In particular they requested BDAS to identify ingress paths/mechanisms relating to reported water ingresses at the Development and to make recommendations based on their findings. BDAS carried out an inspection on 25 May 2010 and prepared a report. They recommended that the external doors to balconies have their seals replaced and their weather bars extended. They also recommended that all seals at the main central glazed section to the front elevation be inspected and repaired as necessary. As of May 2010 the Pursuers were not aware and could not with reasonable diligence have been aware that the loss, injury or damage now claimed for had occurred.
>
> Cond. 12. In or around October 2010 the First Pursuers instructed an independent report as a result of water penetration through the roof and walling and problems with mechanical and engineering services. Following inspection and investigation by Hurd Roland and Morris Engineering Design Services, latent defects were discovered with the polymeric roofing membrane and with the structural glazing system to the street frontage. Remedial works were instructed and commenced in June 2012. Scaffolding was required in order to carry out these remedial works. Accessing the development by way of scaffolding allowed the build façade to be accessible in closer detail. Additional latent defects affecting the water tightness of the exterior of the development became apparent. In carrying out the remedial works further additional latent defects were also discovered as hereinbefore condescended upon (the Works Defects). The Works Defects were not apparent until remedial works being (sic) carried out. The Pursuers undertook all reasonable diligence to ascertain the works defects. The Pursuers could not reasonably have become aware of the Works Defects at an earlier stage."

In Article 13 the pursuers identified additional specific structural defects relating to the external walling, roof bracing, metal framing and structural steelwork:

> "Cond. 13. Structure
>
> (a) The external walling was inadequately executed. Support brackets had been extended by welded plates and the bolting of carrier brackets to slab edges. This provided an inadequate support to the structure of the masonry leafs (sic) …
> (b) On the north end bracing from the roofing was omitted…
> (c) On the external perimeter walling the framing is not securely fixed to the structural slab and is propped on two 100/50mm timber runners. This provides an inadequate transfer of wind loads to the structure resulting on (sic) the wall strength being reduced below recommended level…
> (d) On the external walling the head fixings are inadequate, Channel fixings to the structure are at inadequate centres and mid span strutting pieces have been omitted. This results in an inadequate transfer of wind loads from wall panels to structure. The wall strength is reduced below recommended level…
> (e) Within the pend walling the ground floor framing and the upper floor framing, metal framing from different sources has been lapped using timber sections. Consequently the structure is of inadequate strength integrity and rigidity …
> (f) Various locations incorrect top and bottom channels have been used on the metal framing inner leaf. Consequently there (sic) are of inadequate strength …
> (g) The structural steel work within the cavities has been exposed to windblown rain through the gaps in the exterior leaf…"

In a second Article 13 the pursuers averred that the Works Defects existed at Practical Completion on 23 December 2005. In Article 14 they averred that they were all matters falling within the first defenders' duties under the Agreement and the collateral warranty undertakings; that they would all have been apparent to the first defenders on inspection; that they would also have been apparent from an examination of the commissioning records; and that the first defenders had failed to obtain or review the commissioning records. Article 15 stated:

> "Cond. 15. The pursuer's (sic) loss and damage was caused by the breach of contract of the Defenders. It was its (sic) duty to exercise in the performance of its services to Thistle under the Appointment, the reasonable skill and care expected of a competent professional person of the relevant discipline in the performance of its services who is experienced in carrying out such services in relation to works of a similar size, scope and nature to the Works. It was its contractual duty to notify the firm of McClure Naismith in writing as soon as reasonably practicable in the event of becoming aware of any matter which might materially prejudice the interests of the firm … in connection with the Works. It was its duty to inform the firm of … the existence of the Works Defects. It was its duty to perform its services under the Appointment in accordance with the terms of the Appointment and in accordance

> with Clause 1.1 of the Undertaking … It was its contractual duty to carry out adequate site inspections and to review commissioning records. It was its duty to identify and report the existence of the Works Defects. It was its duty to design the Air Conditioning system (including the heating, cooling and ventilation) with an adequate capacity for the design population of the building … . It was its duty to design the Air Conditioning system with adequate heating and cooling capacity. In the foregoing duties the First Defender failed and by its failures so caused the Pursuer's loss and damage …"

In Article 16 the pursuers averred that as a result of the first defenders' breach of contract and the Works Defects the pursuers suffered loss and damage assessed by reference to the costs of remedying the Works Defects and consequential costs and losses. In particular they averred: "The Pursuers incurred remedial works costs of £1,865,606.07." As already discussed, the pursuers' Minute of Amendment No 16 of process proposed certain deletions and additions to the pleadings; and it seems that although no interlocutor was pronounced amending the record in terms of the Minute and Answers, the changes may ultimately have been implemented as adjustments. However, since I did not understand the pursuers to found for the purposes of the debate on any of the averments so introduced, it is unnecessary to clarify this aspect of the procedural position or to say any more about those averments.

The Pursuers' Adjustments of 6 April 2017

[9] The adjustments of 6 April 2017 were very extensive. In Article 4 the pursuers:

> (i) inserted that the Agreement:
>
> "specified that the Defenders (sic) services were to be provided relative to the '*Work Elements'* set out in Part 1 section 1 to the Schedule. The Work Elements included '*Structures in masonry, brickwork or blockwork*' and '*Structures in metalwork, ferrous or non-ferrous'*. The Services included developing the design of the Works in collaboration with *inter alia* the Contractor, sub-consultants or sub-contractors, integrating sub-consultants and sub-contractors (sic) requirements with the design of the Works, examining drawings and designs to ensure compliance with the

Employers' Requirements. Reference is made to Section 2 of Part 1 to the Schedule appended to the Appointment and in particular Stages C, D, E, F, G/H and K."

(ii) introduced reference to Stage K6:

"*6. Examine installation drawings, shop drawings and builders work details submitted by design sub-contractors for the Works or parts thereof, in respect of the design intent and compliance with performance criteria …"*

In Article 6 they inserted after the second sentence:

"In particular designs relative to the specified undernoted Work Elements consisting of *Structures in masonry, brickwork or blockwork'* and '*Structures in metal work, ferrous or non-ferrous'* had not been developed, produced or coordinated so as to comply with the performance criteria."

Certain deletions and additions were made to the averments in Article 8 (Air Conditioning).

Article 9 was changed substantially. The existing averments about walling were deleted and the following averments were substituted:

"Cond. 9. Walling and Structure

(i) In execution of their duties under the Appointment the Defenders had provided drawing number 2000185-02 setting out Structural Performance Requirements for curtain walling/inner leaf metal studs. The Defenders provided a structural design certificate for the Development stating *inter alia* that *'the design calculations for the entire completed structure including all structural elements, have been properly prepared'*. It was incumbent upon the Defenders, in execution of their duties under the Appointment, to check that any drawings provided by sub-contractors to be used to construct the curtain walling/inner leaf metal studs along with the specification of the metal studs could be properly constructed. In drawing number 2000185-12 Revision J produced by the Defenders they described a feature channel at floor level and described it as non-structural. The project Architects, Yeoman McAllister on drawing S2019 a (2-) 01 Revision D noted that the Defenders were to *'confirm suitability of weight, fixing, etc'* of that channel. This was indicative of a lack of coordination of the design. The Defenders were responsible for coordinating designs in terms of the Appointment. The Defenders were aware, or ought reasonably to have been aware of the requirement to design or specify the wall ties to be used to retain the stack bonded blockwork. Ancon Building Products provided drawing reference 840534/01A specifying the type of brackets. However that plan showed the Ancon brackets at the same level as the bottom runner of the metal stud inner leaf. It would not have been possible to construct those conflicting designs. The Defenders ought to have noted the conflicting designs. The Defenders ought to have brought those conflicting designs to the attention of the contractor. The Defenders ought to have deconflicted those designs. The Defenders received Minutes of Progress

> Meetings held on 15 and 27 April 2005. The minutes of the April 2005 progress meetings disclosed that the project architects had sight of drawings for curtain walling and structural glazing. Consequently the Defenders knew or ought reasonably to have known of the existence of those drawings. In the discharge of their duty the Defenders ought to have requested sight of those drawings in order to check that they complied with the design intent and performance criteria. The Defenders ought to have requested sight of installation drawings relative to the curtain walling/inner leaf metal studs. The Defenders also ought to have requested sight of installation drawings for the components of the structural glazing/curtain walling and metal cladding. There is no record of the Defenders have (sic) requested sight of those drawings. In the circumstances it is reasonably believed and averred that the Defenders did not request those drawings and did not check any such drawings. Consequently the fixings of the masonry support system could not be installed properly. Furthermore the bottom channel of the runner of the metal stud inner leaf walling could not be installed properly. ...
>
> (ii) The build included the design and construction of a 2.2 metre high boundary wall between the Development and the adjacent primary school. The Defenders knew or ought to have known that such a boundary wall would require to be designed. It was part of the Defenders contractual duties to check that the wall to be constructed was of an adequate design. No design was produced. The boundary wall was constructed. The design was inadequate. The boundary wall was structurally unsound. The boundary wall required to be demolished and rebuilt."

The existing averments in Article 10 (Structural Glazing), Article 11 (Roofing) and in the first of two Articles 13 (Structure) were deleted. In the second numbered Article 13 (now renumbered as 12) the pursuers substituted for the words "Works Defects" the words "defects condescended upon in Article 9". In the current Article 13 the pursuers inserted new averments of additional contractual duties:

> "to examine the hereinbefore condescended upon drawings in order to ensure that the designs could be constructed and integrated to conform to the performance criteria specified by them"

and

> "to notify the Contractor that a design was required for the boundary wall and that construction drawings for the coordination of the metal stud inner leaf and the Ancon support brackets supporting the masonry blockwork were checked in order to ensure that they could be constructed and integrated to comply with the performance criteria."

as well as certain further duties relating to the air conditioning system. The previous averment of a duty to inform the firm of the existence of the "Work defects" was altered to substitute "the defects set out in Condescendence 9", and the same change was made in the passage at the end of the Article (which I set out above). In what is now Article 14:

> (i) the second and third sentences were adjusted so they read:
>
> "Had the First Defender performed its contractual duties, the Works Defects involving the Walling and Structure specified in Article 9 above would not exist. Had the First Defender performed its contractual duties the Works defects specified in Article 9 would not have been present …"
>
> (ii) head e. was deleted and heads c. and d. were adjusted so as to read:
>
> "c. Remedial works to the head fixings of the internal leaf metal framing cost £125,824.22.
> d. Demolition and reconstruction of the boundary wall at a cost of £38,556.74."

Further Adjustment by the Pursuers

[10] For completeness I note that a few weeks after the adjustments of 6 April 2017 (neither party could specify the precise date) the pursuers made certain further adjustments to Articles 2, 3, 4 and 9. Those adjustments appear in bold print in the most recent version of the closed record as amended and further adjusted.

Counsel for the Defenders' Submissions

[11] Mr Hawkes submitted that the pursuers' adjustments of 6 April 2017 had introduced new cases which relied upon the breaches of different particular contractual obligations from those previously founded upon. Leaving aside for the moment the pursuers' case relating to the air conditioning system (which it was accepted was not radically different), the thrust of the pursuers' case prior to 6 April 2017 had been that the defenders had breached their contractual obligations to carry out adequate site inspections and to review

commissioning records to identify and report the Works Defects. In that regard, the aspects of the Services which the pursuers averred that the defenders had failed to perform adequately had been those described in Stages K10, 11 and 12. However, in the adjustments of 6 April 2017 the pursuers had departed from the cases based on failures of inspection and review of commissioning records and had inserted new cases that the first defenders had been in breach of their obligations to examine and review installation drawings in terms of Stage K6. More particularly, they now maintained that the first defenders (i) failed to check that drawings provided by subcontractors to be used to construct the curtain walling/inner leaf metal studs along with the specification of the metal studs enabled them to be properly constructed; (ii) failed to coordinate designs for a feature channel at floor level; (iii) failed to note and take steps to resolve conflicting designs relating to the wall ties to be used to retain the stack blockwork; (iv) failed to check that the boundary wall between the Development and an adjacent school was of an adequate design. In relation to all these suggested breaches there had been the concurrence of *injuria* and *damnum* at the date of practical completion (*Huntaven Properties Limited* v *Hunter Construction (Aberdeen) Limited & Ors* [2017] CSOH 57, at paras 51-59). The pursuers aver that the period between 23 December 2005 (practical completion) and 25 May 2010 should be left out of account in computing the five year period because they were not aware and could not with reasonable diligence have been aware during that time that loss, injury or damage had occurred (Prescription and Limitation (Scotland Act 1973, s 11(3)); but even on that basis the five year period had expired well before 5 April 2017. It would have begun to run from 25 May 2010. The pursuers did not claim to be unaware after 25 May 2010 of having suffered loss, injury or damage. By 26 May 2010 the pursuers were actually or constructively aware of the occurrence of *damnum* (*David T Morrison & Co Ltd (t/a Gael Home Interiors)* v *ICL Plastics Ltd*

2014 SC (UKSC) 222; *Gordon* v *Campbell Riddell Breeze Paterson LLP* 2016 SC 548). The previous claims for the enforcement of different obligations were not relevant claims which interrupted the prescriptive period applying to the obligations now founded upon (*NV Devos Gebroeder* v *Sunderland Sportswear Ltd (No. 2)* 1990 SC 291,per Lord President Hope at page 303; *Classic House Developments Ltd* v *G D Lodge & Partners & Ors*, Lord Macfadyen, Unreported, 30 January 1998; *JG Martin Plant Hire Ltd* v *Ballantyne, Kirkwood, France & Co* 1996 SC 105, per the Opinion of the Court delivered by LJC Ross at page 111A-B: cf *Macleod* v *Sinclair* 1981 SLT (Notes) 38; *Safdar* v *Devlin* 1995 SLT 530). On the pursuers' own averments those obligations had subsisted for more than five years before 6 April 2017.

[12] In a separate, secondary, submission Mr Hawkes maintained that the pursuers' averments relating to breach of contract in respect of the air conditioning "causing excessive ventilation noise" were irrelevant and lacking in specification. They did not give fair notice of any objective standard against which it was maintained that the air conditioning caused excessive ventilation noise, nor did they explain why mounting the units at ceiling level was a breach of the defenders' obligations. The pursuers' expert report did not assist on these points. In those circumstances the averments concerned were irrelevant and ought not to be admitted to probation.

The Submissions for the Pursuers

[13] Mr Jones invited the court to allow a proof before answer leaving all pleas standing.

[14] He accepted that neither in the pleadings nor in the expert report which had been lodged was there specification of the noise criteria which the pursuers maintain ought to have been met, or any explanation of the significance of the units having been mounted at

ceiling level. He suggested that, if the court thought such specification was necessary, the pursuers ought to be given an opportunity to address the matter.

[15] Mr Jones also accepted that, in relation to the obligations which the pursuers sought to enforce, there had been the concurrence of *injuria* and *damnum* at the time of practical completion. Their case was that the period up to 25 May 2010 was not to be taken into account in computing the five-year period because during it they were not aware, and could not with the exercise of reasonable diligence have been aware, that they had suffered loss, injury or damage (Prescription and Limitation (Scotland) Act 1973, s 11(3)). A relevant claim had been made by the pursuers within five years of that date in respect of the obligations they now sought to enforce. The proper analysis was that the obligations being enforced were the obligations to pay damages for the breach of Clause 1.1 of each of the collateral warranties. The original claim had been to enforce the obligation to make reparation for those breaches, and the claim after adjustment remained a claim to enforce the same obligations to pay damages. Cases such as *NV Devos Gebroeder* v *Sunderland Sportswear Ltd (No. 2)* and *Classic House Developments Ltd* v *G D Lodge & Partners* were readily distinguishable. The court should follow the same approach as had been adopted by Lord Milligan in *Safdar* v *Devlin*. The adjustments merely provided further specification of the manner in which the obligations in each of the contractual warranties had been breached. In any case, looking at the matter broadly, the adjustments merely sought enforcement of different aspects of the first defenders' obligation to monitor the works. The pursuers' case was primarily about defective blockwork. That had been caused through the defenders' breach of the obligation assumed in terms of each of the collateral warranties. There had been a failure to exercise due care in the performance of the Services set out in Stages K6 and K10 of the Agreement between the defenders and Thistle. All of the Services listed in

Stage K involved "ways in which the works were to be monitored in accordance with the contract documents and good engineering practice". On a proper analysis, Stages K6 and K10 were both aspects of the defenders' monitoring duties. The adjustments of 6 April 2017 did not involve any fundamental change in the pursuers' case. While it was true that before those adjustments there had been more emphasis on inspection, that had merely been one aspect of monitoring. The adjustments relating to the blockwork claim were concerned with essentially the same claim for damages in respect of defective blockwork as had been advanced prior to the adjustments. It was not a new claim with a different legal basis. The damages claimed for the blockwork remedial work remained largely the same. Mr Jones maintained that "well before 6 April 2017" the pursuers had averred that remedial costs attributable to the defenders' breach of contract had included:

> "b. Remedial works to the walling and structure, including replacing external leaf masonry support brackets cost (sic) £539,221.56."

In the case of each of the pursuers the claim as adjusted was fundamentally the same claim as had been made before adjustment. The obligation being enforced was the obligation to pay damages for breach of the obligation to exercise reasonable skill etc in the performance of the Services.

[16] Mr Jones accepted that the pursuers' position was less strong in relation to the adjustments relating to the boundary wall with the school than it was with the adjustments relating to the blockwork. Prior to 6 April 2017 there had been no mention of any failure in relation to the boundary wall or of any remedial costs in respect of it. Nonetheless, Mr Jones submitted that the case relating to the boundary wall was just a further consequence of the defenders' breach of contract in failing to monitor the works.

Decision and Reasons

[17] I deal first with Mr Jones' submission that for the purposes of prescription the only obligation which each of the pursuers seeks to enforce is an obligation to pay damages for breach of the general obligation (Clause 1.1) contained in each of the collateral warranty undertakings; and that all that the recent adjustments have done is to provide further specification of the same general breach of contract as had previously been founded upon.

[18] I reject that analysis. In my view, the correct approach where one is dealing with general contractual duties, such as those contained in Clause 2.1 of the Agreement and Clause 1.1 of the collateral warranty undertakings, is to focus on the particular obligation to pay damages for breach of contract which a pursuer seeks to enforce (see *Cole* v *Lonie* 2001 SC 610, at paragraph 16; *Musselburgh & Fisherrow Co-operative Society Ltd* v *Mowlem Scotland Ltd* 2004 SCLR 412, per Lord Eassie at paragraph 50; *Johnston, Prescription and Limitation* (2nd ed), paragraph 2.23; *Huntaven Properties Limited* v *Hunter Construction (Aberdeen) Limited & Ors, supra,* at para 65). That requires identification of the particular respect or respects in which the general obligation is said to have been breached. As Lord Eassie observed in *Musselburgh & Fisherrow Co-operative Society Ltd* v *Mowlem Scotland Ltd,* at paragraph 50:

> "… although a contractual relationship will often contain general provisions such as a general duty of care or a general duty to construct in a workmanlike manner, for the purposes of the running of the five-year prescription it is necessary to identify the particular respect in which the general duty is breached and which leads to the particular defect in question."

The appropriate comparison is between the specific obligations founded upon before and after the adjustments of 6 April 2017 in relation to each particular defect.

[19] It is also worth noting that if Mr Jones' proposition was right it would have very strange consequences. It would mean that if the pursuers made a relevant claim that the first defenders had breached the Agreement (and therefore also the contractual warranties)

in respect of one specific aspect of the Services, the claim would also fall to be treated for the purposes of prescription as a relevant claim for any other breach of the Agreement in respect of any aspect of the Services.

[20] Following the proper approach, in my view it is clear that, other than in relation to the air conditioning, the specific obligations to pay damages founded on in the adjustments of 6 April 2017 are not the same obligations which were previously founded on. With regard to those obligations, I agree with Mr Hawkes that before adjustment the breaches of the Agreement, and the corollary breaches of the collateral warranties, were said to be failures to carry out adequate site inspections and to review commissioning records. I also agree that, on a fair reading of the pursuers' averments, they were maintaining that the failures had been failures in the performance of aspects of the Services listed in Stage K10, 11 and 12. By contrast, the adjustments found on alleged failures to exercise reasonable care, skill and diligence in relation to different stages and aspects of the Services. Rather than founding on alleged failures to carry out adequate site inspections and to review commissioning records, the failures now founded upon are failures (i) to check drawings prepared by subcontractors including installation drawings; (ii) to alert the pursuers to conflicts in designs; (iii) to de-conflict (sic) the designs; and (iv), in relation to the boundary wall, to check that its design was adequate. Specific reference is made for the first time to the Services in Stage K6 of the Schedule to the Agreement. It is clear that some of the aspects of the Services now said to have been inadequately performed relate to that Stage, but that others (eg the failure in relation to the design of the wall) do not relate to either K6 or to any of the Services focussed on in the pre-adjustment pleadings.

[21] So far as the boundary wall is concerned, the obligation to pay damages now founded upon makes its first appearance in the adjustments. Moreover, prior to the adjustments, there was not even any mention of the boundary wall being defective.

[22] There was some reference to there being walling defects prior to the adjustments, but it is not clear from a comparison of the pleadings contained in the closed record received on 19 May 2015 and the pleadings as adjusted on 6 April 2017 that the walling defects upon which the pursuer now relies are essentially the same walling defects which were relied upon in 2015. I do not think this is a matter upon which I could have reached a concluded view on the pleadings alone without the benefit of evidence which clarified the walls' design and construction and which elucidated whether the averments covered the same matters. However, since I am clear that the adjustments found on different obligations from those previously founded upon, it is unnecessary to explore whether the defects described at each of these times are essentially the same.

[23] I conclude therefore that the obligations founded upon in the adjustments are not the same obligations as were previously founded upon. They are different obligations to pay damages in respect of separate and distinct breaches by the first defenders. I do not accept that prior to the adjustments the pursuers case was founded on breach of an overarching obligation to monitor the works. That was not the case pled.

[24] It was common ground that if I concluded that the obligations founded upon in the adjustments of 6 April 2017 (other than those relating to air conditioning) were not the same obligations previously founded upon, then the obligations founded on on 6 April 2017 had been extinguished by prescription (Prescription and Limitation (Scotland) Act 1973, section 6 (1), 6 (2), 11(1); and Schedule 1, para 1(g)). In relation to each of the obligations founded upon Mr Jones accepted that there had been concurrence of *injuria* and *damnum* at the date

of practical completion. Accordingly, *prima facie* the five-year period began to run on that date. The pursuers rely upon lack of awareness of damage (s 11(3)) to exclude the period between practical completion and 25 May 2010 in the computation of the prescriptive period (Article 13). Somewhat confusingly, they also aver (Article 11) that:

> "The defects set out in condescendence 9 were not discoverable to the Pursuers until after October 2010."

However, whether the five-year period ran from 25 May 2010 or from 1 November 2010, the adjustments of 6 April 2017 came well after the period's expiry.

[25] I turn finally to the Mr Hawkes' criticisms of the specification of the pursuers' averments that the air conditioning caused excessive noise. I agree that the defenders are entitled to fair notice of the basis upon which the pursuers say that the air conditioning causes excessive noise, including (i) reference to any applicable objective standards which the pursuers maintain have not been met; and (ii) an explanation of why installation at ceiling height is said to have caused or contributed to excessive noise. However, in this regard I am inclined to accede to Mr Jones' request that the pursuers be given an opportunity to provide fair notice of their position.

Disposal

[26] I shall put the case out by order to discuss the terms of an appropriate interlocutor to give effect to my decision, and to discuss further procedure.