



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 15  
CA117/21

Lord President  
Lord Malcolm  
Lady Wise

OPINION OF THE COURT

delivered by LORD MALCOLM

in the reclaiming motion by

TILBURY DOUGLAS CONSTRUCTION LIMITED

Pursuers and Respondents

against

OVE ARUP & PARTNERS SCOTLAND LIMITED

Defenders and Reclaimers

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**Pursuers and Respondents: MacColl KC, McKinlay; Brodies LLP**  
**Defenders and Reclaimers: Dean of Faculty (Dunlop KC), Steel; Clyde & Co (Scotland) LLP**

12 June 2024

**Introduction**

[1] Tilbury Douglas Construction Limited were the principal contractors in relation to enabling works required to prepare a former railway yard east of Haymarket station in Edinburgh for development. Ove Arup & Partners Scotland Limited were subcontracted to provide certain services, including the preparation of the design for the enabling works.

Tilbury allege that Arup produced a design which failed to reflect accurately the physical conditions of the site and which was therefore incapable of implementation. They claim damages for the losses they sustained when the works had to be redesigned. Arup plead that the claim against them has prescribed in terms of section 11(1) of the Prescription and Limitation (Scotland) Act 1973 (the Act). This is disputed under reference to sections 11(3) and 6(4) of the Act. (The relevant provisions are those which were in force prior to the commencement of the amendments contained in the Prescription (Scotland) Act 2018.) After a preliminary proof limited to the question of prescription the commercial judge repelled Arup's plea and allowed a proof on the merits of Tilbury's claim. Arup have reclaimed (appealed) that decision to this court.

## **Background**

[2] The development remains under construction. It is to comprise five buildings of mixed use, including office, retail and hotel, and a double height basement car park. Two shallow railway tunnels, a north tunnel and a south tunnel, underlie the yard. Both are of considerable vintage. The north tunnel came first, dating from 1849 and using "cut and cover" techniques. The southern tunnel was constructed some 40 years later and was mostly bored. This action relates to the enabling works around the north tunnel.

[3] In 2012 Tiger Developments Limited formed a joint venture in relation to the development with Interserve Developments (No 2) Limited, named Edinburgh Haymarket Developments Limited. Tilbury and EHDL entered into a fixed price contract dated 27 November 2013 whereby Tilbury were appointed principal contractors for the enabling works. At the same time Tilbury, Arup and EHDL completed a novation agreement which

meant that Arup were subcontracted to provide civil and structural engineering services to Tilbury, including the design of the enabling works relating to the tunnels.

[4] The works were intended to allow overburden to be removed safely from the ground above the tunnels and piling to take place in their vicinity, thereby enabling construction of the development. The contract between the parties provided that Arup's design had to be approved by Network Rail. In August 2013 approval was granted by Donaldsons Associates Limited acting on behalf of Network Rail. The design provided for reinforcement of parts of the north tunnel brickwork which were at risk of failing once the overburden was removed. The reinforcement was to be created by the use of stitch grouting, a method of bonding brickwork rings by inserting pins into them, and grouting the pins to fix them in place. The design recognised that certain additional works might be required, including further brickwork test cores to supplement the small sample provided to Arup in respect of the north tunnel. The final scope of the works depended upon what was identified after a physical inspection of each and every area of the brickwork, known as a tactile survey, had been carried out. The design assumed that there would be no need for annular grouting between the brickwork lining and the surrounding bedrock in the north tunnel. Annular grouting of the south tunnel was specified.

[5] On 5 December 2013, BAM Nuttall Limited was subcontracted by Tilbury to carry out the enabling works. Preliminary work began onsite on 6 January 2014. Later that month, BAM workers reported concerns about the condition of the brickwork in the north tunnel. Minutes of a weekly progress meeting dated 30 January 2014 recorded: that some of the tunnel walls were softer, or contained thinner bricks, than others; that the design required to be reviewed; and that further brickwork cores from the soft bricks and thin walls should be taken and tested. BAM were instructed to carry out this investigative coring,

which they did in March 2014. They invoiced Tilbury £12,455.20 for the coring work done on 24 March 2014. Arup reported the results of the investigation to Tilbury on 23 May 2014 following a progress review meeting on 20 May 2014. They confirmed that soft brick had been found in the cores, and that this had made Network Rail “nervous” and slower to provide approvals.

[6] The tactile survey was carried out in January/February 2014. It identified that brickwork repairs were needed. Arup prepared a report on 17 March 2014. This noted the results of the tactile survey and the coring work carried out. It reported defects identified by the survey, including possible softness and thinness of the brickwork in places, as well as the presence of possible voids within the brickwork and between the lining and the bedrock behind it. It noted that, subject to the results of the coring, there was nothing that had arisen to date that would cause alteration of the original design assumptions. Emails were exchanged on 26 March 2014 between Craig Adams, quantity surveyor for Tilbury, and Dr Jeremy Grant, associate director of Arup, in which Mr Adams expressed concern over the “serious commercial implications” arising from the additional brick repair works. They discussed an anticipated £300,000 increase in payments due to BAM as a result of the extra works. On 27 May 2014, BAM sought payment of £924,820.99 from Tilbury for the repairs. A second tactile survey led to further repairs being carried out. By 5 June 2014 Arup were reporting a 6 week delay to the enabling works. BAM sought payment of a further £100,000 for repairs on 24 June 2014.

[7] It became apparent in August 2014, during repair works, that voids were present in the tunnel brickwork. This was indicated by the use of more grout than anticipated during stitch grouting. In an email dated 26 August 2014 BAM estimated that the excess grout used indicated 20% voiding behind the brick lining of the tunnel. On 29 August 2014 Dr Grant

proposed further investigative coring in response to the high grout usage. On 17 September 2014 Arup produced an updated report on brickwork repairs which recommended that the assumed parameters for the strength and thickness of the walls contained in the original design be reduced. On 25 November 2014, Michael Pratt, Tilbury's senior manager, made an internal report that the whole tunnel lining may now require to be grouted, and three days later Dr Grant confirmed that full grouting was required. On 10 December Tilbury advised Arup that they may hold them liable for the costs associated with the resultant alterations to the design. The parties, Donaldsons, Network Rail, Mott MacDonald (advisers to Network Rail) and EDHL met on 18 December 2014, and agreed that annular grouting would be carried out, as well as further coring and testing. Arup produced updated drawings for the grouting in February, March and June 2015. The grouting was carried out between June and October that year.

[8] Tilbury contend that, in producing the original design for the works, Arup proceeded on the basis of erroneous and overly optimistic assumptions about the strength and stiffness of the brickwork comprising the north tunnel, and failed to take account of the likely presence of voids within and behind the lining of the tunnel and the need for annular grouting to address that problem. They aver that, in doing so, Arup breached the contract and their duty of care by failing to exercise the skill, care and diligence expected of a competent civil and structural engineer. They contend that the redesign of the enabling works in December 2014 was necessitated by these errors and caused additional costs and delay to the project.

[9] The commercial judge heard a preliminary proof on the question of prescription. Arup contended that the five year short negative prescription had started to run in March/April 2014, but certainly no later than 24 June 2014. Since the summons was not

served until 30 July 2019, any obligation which Arup had to make reparation had been extinguished under section 11(1) of the 1973 Act. Tilbury argued that though they suffered loss when they contracted with EHDL in 2013, the running of prescription had been suspended by virtue of section 11(3), or alternatively extended by section 6(4), until November 2014. The judge agreed, and held that the prescriptive period had commenced in November 2014 2023 SLT 1047. He repelled the prescription plea and allowed the claim to proceed to a proof before answer.

### **The Prescription and Limitation (Scotland) Act 1973**

[10] The coming into force of the amendments to the 1973 Act wrought by the Prescription (Scotland) Act 2018 was long delayed. These proceedings are governed by the pre-2018 Act provisions. References to the 1973 Act should be construed accordingly. Section 6(1) provides that where an obligation has subsisted for a continuous period of five years after the appropriate date without any relevant claim having been made, or the subsistence of the obligation having been relevantly acknowledged, the obligation shall be extinguished upon the expiry of that period. The appropriate date is the date on which the obligation became enforceable. An obligation to make reparation for loss, injury or damage caused by an act or omission becomes enforceable on the date when the loss, injury or damage occurred (section 11(1)). However section 11(3) operates as an exception to that general rule, providing that where:

“the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage had occurred, [the obligation becomes enforceable] on the date when the creditor first became, or could with reasonable diligence have become, so aware.”

[11] Section 6(4) provides a further exception. It excludes a period from being reckoned as part of the calculation of the five year prescriptive period if during that period:

“(a) ... 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”

This applies subject to the proviso that any such period “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.”

### **The pleadings on the merits of the claim**

[12] Tilbury sue for a global figure of £5,951,533.99 in terms of the losses they aver they sustained as a result of Arup’s breaches of contractual obligations and fault. In reliance upon Arup’s design Tilbury entered into a fixed price contract for the execution of the works thus unanticipated costs and delays fell on them. It is averred that the original design was based on overly optimistic assumptions as to the strength and stiffness of the brickwork in the north tunnel, so a revised design was required (article 5 of condescendence). In December 2014 it became apparent that extensive grouting which was not in the design was needed.

[13] Article 7 of the condescendence begins with a statement of Arup’s duty when preparing the original design to exercise the skill, care and diligence of a competent civil and structural engineer having regard to the size, scope, nature, type and complexity of the project. Tilbury then aver “without prejudice to that generality, that particular breaches

are”: (i) failure, prior to work commencing, to carry out a sufficient number of test samples to derive a meaningful characteristic strength (and stiffness) for the brickwork in the north tunnel; more intrusive tests should have been undertaken or conservative values adopted for lining thicknesses and brickwork strength (ii) failure to note water leaks and the presence of voids and uncertainty in the bonding of the re-lining from the surveys taken of the north tunnel; (iii) adoption of a deterministic basis for the design based on single characteristic values for the lining and ground properties, as opposed to an observational/risk based methodology which reflected the unreliability of the available data and represented the variable condition of the tunnel; (iv) erroneously basing the design on full contact between the lining and the bedrock behind it; (v) failure to make provision for back grouting and interstitial grouting of voids; (vi) adoption of erroneous assumptions for the characteristic strength and stiffness of the tunnel bricks; failure to test a sufficient sample of bricks, and reliance upon data from the south tunnel in their analysis of the north; and (vii) failure to take into account the data available in relation to the north tunnel brickwork and the gaps in that data; further pre-design investigations should have been undertaken.

### **The commercial judge’s decision**

[14] Time starts to run on the prescriptive period applicable to an obligation to make reparation for loss, injury or damage when that obligation becomes enforceable. An obligation becomes enforceable when the loss, injury or damage occurs. The primary component of Tilbury’s loss was the need for the redesign of the enabling works and the resultant delay and costs. That loss occurred in August 2013, as soon as Tilbury relied upon Arup’s design. For the purposes of section 11(1), August 2013 was when time started to run.



[15] For the purposes of section 11(3), the commencement of the prescriptive period is postponed until a claimant first becomes aware, or could with reasonable diligence have become aware, of the occurrence of loss caused by the breach of duty of which they complain. Time will start running even if the claimant is not aware that the loss was caused by the breach of duty (*David T Morrison & Co Ltd v ICL Plastics Ltd* 2014 SC (UKSC) 222; *Gordon's Trustees v Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287). The prescriptive period commences when the claimant is aware of the objective facts that constitute their loss. The loss requires to be connected to the cause of action (*Gordon's Trustees*, para 17; *Midlothian Council v Raeburn Drilling and Geotechnical Ltd* 2019 SLT 1327, para 25; *WPH Developments Ltd v Young and Gault LLP (in liquidation)* 2022 SC 28, para 36); much is likely to turn on the proper characterisation of that cause of action.

[16] Arup were under a general duty of care to Tilbury, but the provision of the deficient design was not the single fault alleged against them. For the purposes of the running of the five-year prescription it was necessary to identify the particular respects in which the general duty was said to have been breached (*Musselburgh and Fisherrow Co-operative Society Ltd v Mowlem Scotland Ltd* 2004 SCLR 412). Though Tilbury could not artificially restrict the loss claimed, their several complaints ought not to be conflated. The pleadings should have been the starting point for Arup's analysis.

[17] Neither the cost of the investigative coring work carried out by BAM in March 2014, nor the cost of additional brickwork repairs of which the respondent became aware in March 2014, constituted a "loss" to the respondents as a result of a breach of duty by Arup. The design proposed to take additional cores to ensure that the strength values for the north tunnel were accurate. The additional coring was carried out in implement of the original design. It was not a modification of that design. The cost of that work had always been

anticipated as part of the enabling works, even if its precise amount was uncertain at the time the design was proposed. Similarly, the additional brickwork repairs were not caused by any breach of duty by Arup. They were carried out in accordance with the contractual arrangements between the parties, namely the tactile survey and a request from Network Rail, and did not result from a breach of duty by Arup.

[18] Tilbury had established that they were not aware, and could not with reasonable diligence have become aware, of the presence of voids in the tunnel brickwork until August 2014. The contention that they had suffered loss as soon as repairs to voids of any kind had been carried out at Tilbury's cost fell to be rejected. Tilbury's complaint was that the design had assumed that there was no deeper voiding in the brickwork lining or between the lining and the bedrock behind it. Dr Grant had explained in his supplementary statement that there were two types of hollowness, and that such deeper voiding was more serious. The tactile survey used a hammer test, whereby brickwork was struck with a geological hammer to test for defects. Dr Grant had stated clearly in an email to Donaldsons dated 17 September 2014 that hammer testing would not establish the presence of deeper voiding. The tactile survey could not have confirmed the presence of deeper voids. Tilbury became aware of the use of significant quantities of grout, which provided a basis for an awareness of deeper voids, for the first time in August 2014.

[19] However, with reasonable diligence Tilbury could have become aware of the delay to the works caused by the discovery of soft brick in May/June 2014. The critical document was the minute of the progress review meeting of 20 May 2014, which was sent to Tilbury on 23 May 2014. By 5 June 2014, Arup were reporting a delay of 6 weeks which was due at least in part to the discovery of soft bricks after the enabling works had commenced, and the resultant slowing down of the approval process. Therefore, for the purposes of section 11(3),

time started to run against Tilbury's first complaint (meaning that articulated in article 7.1) in May/June 2014 (which is more than five years before service of the claim). This did not obviously have any consequences for the other breaches complained of by Tilbury.

[20] Tilbury were in error as to the competence of the design and that there was no need for grouting, besides stitch grouting, in the north tunnel. The period up until the end of November 2014 was discounted in terms of section 6(4) because until 28 November 2014, Arup continued to assure Tilbury that the design remained valid. In the context of a project involving an antique Victorian tunnel, where Tilbury were relying upon Arup for specialist engineering services and they continued to provide assurances, Tilbury could be said to have been induced to refrain from raising proceedings. They were entitled to rely upon section 6(4) in relation to all of their pleaded grounds of complaint. It was unnecessary to identify a conscious and deliberate decision on the part of the respondents or their representatives (*BP Exploration Operating Company Ltd v Chevron Transport (Scotland)* 2002 SC (HL) 19, Lord Hope, para 30, Lord Clyde, para 66 and Lord Millet, paras 102 – 109). It did not matter that Donaldsons and Mott MacDonald were appointed to check the design; Tilbury did not require to argue that words or conduct of Arup was the sole cause of their error, (*Heather Capital v Levy & McRae* 2017 SLT 376, para 63). In any event, Tilbury's averments required to be taken *pro veritate* (assumed to be true), thus it was necessary to proceed on the basis that they were entitled to rely upon the assurances.

[21] Standing the assurances, the fact that Tilbury were aware of the discovery of soft bricks in May/June 2014 was not a sufficient basis for concluding that they would have discovered their error with the exercise of reasonable diligence. Reasonable diligence for the purposes of section 11(3) related to the awareness of loss; for the purposes of section 6(4), it related to the discovery of error. Those were different tests.

## The submissions of parties

### *Arup*

[22] The commercial judge erred in his application of section 11(3). He relied upon *Musselburgh and Fisherrow Co-Operative Society* in support of the proposition that, where there was a multiplicity of defects each caused by a different specific failure in a general duty, the proper approach for the purposes of the five year prescription was to examine each distinct defect and its correlative failure separately. That was not controversial as a general principle. Section 11(3) admitted the possibility of successive incidents of loss or damage flowing from separate and distinct defaults being treated independently for the purposes of prescription (*Pelagic Freezing (Scotland) Limited v Lovie Construction Group* [2010] CSOH 145, para [97]). A separate default which caused a separate defect created a separate and distinct cause of action, which would carry its own prescriptive period. However, that general principle did not apply in the present case.

[23] Tilbury claim a global loss, which is said to have been caused by Arup's breach of obligations under the contract. The various failures contended for combined to cause the global loss. There was no multiplicity of defects. The judge's reliance on *Musselburgh and Fisherrow Co-operative Society* was misplaced. In the present case there is one cause of action, the defective design. The judge's exploration of separate causes of action which may be available in respect of particular ways of breaching the duty to provide a competent design involved inappropriate "salami slicing" of what Tilbury themselves had framed as a global loss. That was an illegitimate approach (*Dunlop v McGowans* 1980 SC (HL) 73, page 81; *Pelagic Freezing*, paras 102 and 110). Any obligation on Arup to make reparation was single and indivisible. Tilbury could not raise an action based on the breach averred in article 7.1, then another one based on 7.2, and so on.

[24] The global loss claimed for included delay. The commercial judge found that Tilbury knew by June 2014 that there was delay, and that Arup were, at least partly, the cause of that delay. While the clock might have started earlier, for example at the time of the contract in November 2013, even leaving aside concerns identified earlier, the awareness of delay in June 2014 was sufficient to start time running under section 11(3). The summons was served on 30 July 2019; any obligation has been extinguished by the operation of prescription.

[25] The commercial judge's application of section 6(4) was wrong in law. It is well established that the claimant bears the burden of proving factors which delay the running of prescription (*BP Exploration v Chevron*, para 16). The rule that, in the context of a preliminary proof on prescription, averments of negligence and causation be taken *pro veritate* does not apply to a claimant's obligation to make good a case under section 6(4). The commercial judge proceeded on the basis that the rule did apply; that was an error of law. For section 6(4) to be engaged, Tilbury required to prove that a specific mental state existed, namely error on their part (fraud is not suggested). There was no evidence before the judge that Tilbury were labouring under an error as to the scope of its remedies. Furthermore the state of mind of one or more individuals had to be attributable to the company (*Dryburgh v Scott Media Tax Ltd (In Liquidation)* 2014 SC 651, para 21; *Legal and General Assurance (Pensions Management) Limited v Halliday Fraser Munro and Others* [2023] CSOH 81, para 36). The key question was whose act, or knowledge, or state of mind was intended to count as the company's act, or knowledge, or state of mind for this particular purpose (*Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500, page 506D). Tilbury relied upon the knowledge and state of mind of Mr Adams for the purposes of section 6(4), but they had failed to call him as a witness. In those circumstances, there was no basis upon which the requisite knowledge or state of mind could be attributed to Tilbury. The evidence

of Mr Adams was necessary to discharge the onus on Tilbury to establish error and inducement under section 6(4). Their failure to call him as a witness was fatal to that requirement.

[26] Tilbury claimed that, for the purposes of section 6(4), they erroneously believed that Arup had produced a competent design and that there would be no need for grouting, other than stitch grouting, in the north tunnel. The commercial judge found that by May/June 2014 at the latest Tilbury were aware that they had suffered loss as a result of Arup's alleged failure to obtain a sufficient number of test samples to carry out a meaningful characteristic strength and stiffness for the tunnel brickwork. He found that time began to run for the purposes of section 11(3) from that point. Under reference to Lord Millet's speech in *BP Exploration v Chevron* at paras 107ff and *Glasgow City Council v VFS Financial Services Ltd* 2022 SC 133, paras 52/55, those findings fatally undermined Tilbury's position on section 6(4). Their claim was a global one, and they had actual knowledge of the alleged negligence by May/June 2014. It was unimportant that at that time they may have been unaware of the issues pertaining to grouting. Any possibility of them having been induced by the errors they alleged ended when they became aware of facts which ought to have prompted investigations into when the known loss was caused by negligence, which they were by May/June 2014.

[27] In any event, there was no proper analysis by the commercial judge of the requirements of reasonable diligence under section 6(4). The question was what an ordinary prudent person would do having regard to all the circumstances. The judge did not ask himself that question. In circumstances where Tilbury's own quantity surveyor was expressing concern over the "serious commercial implications" arising from the additional brick repair works in March 2014, and where there was an awareness of delays caused by

Arup in May/June 2014, the ordinary prudent person would have interrogated why that was so. With reasonable diligence, Tilbury could have discovered any error shortly after April 2024 by asking Donaldsons for their views.

### *Tilbury*

[28] Arup require to succeed on both section 11(3) and 6(4). The commercial judge's application of section 11(3) was correct. Arup erroneously seek to treat the separate and distinct breaches of duty pled and the separate and distinct obligations to make reparation which flow therefrom as a single breach of duty and a single loss. The commercial judge correctly rejected this approach. Matters require to be analysed in respect of each obligation to make reparation. That is clear from sections 6(1) and 11(1). The distinct breaches of contract or common law duty set out in articles 7.1/7.7 give rise to separate and distinct obligations to make reparation. Arup conflate the separate and distinct breaches of duty pled by Tilbury. The judge did not misapply *Musselburgh and Fisherrow Co-Operative Society*; his analysis was consistent with that decision. Tilbury do not seek to plead their way out of prescription. There is no artificial restriction of the losses claimed.

[29] The commercial judge held that the delay of which Tilbury became aware in March 2014 related to Arup's failure to carry out sufficient brickwork testing prior to work commencing. In other words, it was not caused by any of the other breaches of duty advanced by Tilbury. It followed that the section 11(3) argument only failed in relation to that aspect of the case. The cost of the additional brickwork repairs was irrelevant when assessing issues of prescription because that work had been provided for by the original design, and neither party offered to prove that it constituted a loss caused by any of Arup's breaches of duty.

[30] As to whether section 11(3) could postpone the prescriptive period after the contract between Tilbury and EHDL, while this question did not feature before the commercial judge, nor in Arup's written submissions, senior counsel for Tilbury was prepared to address it. Counsel accepted that if there was objective knowledge of the loss that gives rise to the action, for example if a building explodes, section 11(3) cannot postpone prescription. However the decision in *Gordon's Trustees* does not rob the provision of content in a latent contractual issue such as the present case. In *WPH Developments* all the objective facts were known; here the subsequent delays and costs relied on by Arup were unknown at the time of the contract. For the five years to begin at the date of the contract, Tilbury would need to know that the breaches of duty had given rise to circumstances which objectively analysed would create an obligation to make reparation. The judge's analysis was correct.

[31] The commercial judge's application of section 6(4) was acceptable and in line with the statutory scheme. Tilbury established at proof that they had been operating under two errors, namely: that Arup had produced a competent design and that there was no need for grouting in the north tunnel; that those errors had been induced by Arup's words or conduct; and that the errors induced Tilbury to refrain from making a relevant claim in relation to the relevant obligations. There was direct evidence as to error, albeit little analysis of it. Reference was made to Mr Brindley's witness statement (paras 22, 30, 33 and 59/64) as establishing that Tilbury relied on what they were told. There was reliance, thus error. After works commenced, Arup provided assurances that the design remained valid, and Tilbury relied upon those assurances. A finding that they were entitled to do so was natural and inevitable. Beforehand Arup provided and were paid for the design. The understanding was that the job had been done in a proper manner. Arup were engaged as Tilbury's advisor. They said nothing to contradict this understanding till November 2014.



Any concerns raised by Donaldsons or Mott MacDonald flowed from their roles on behalf of Network Rail.

[32] As Dr Grant accepted in cross-examination, it was incumbent upon Arup to alert Tilbury if they became aware of a problem with the design. He accepted that a client was entitled to proceed on the basis that his engineer remained of the view that a design met the required standard. Indeed Arup still maintained that their design was competent; there was a tension between that position and their contention that with reasonable diligence Tilbury could have discovered that they had been induced into error as to its competence. Tilbury only discovered their error in November 2014 when Arup advised that full grouting of the north tunnel would be required.

[33] The judge correctly held that there was no need for a conscious act of self-restraint by Tilbury, see *BP v Chevron* at paras 30/31 and 66. The error persisted “up until the end of November 2014” (para 97), thus it began at the outset, namely August 2013 when the design was submitted. If defective services are sought, provided and accepted, then everything else being equal, there is error within the meaning of section 6(4) (*Rowan Timber Supplies (Scotland) Ltd v Scottish Water Business Stream Ltd* [2011] CSIH 26).

[34] It was for Arup to establish the proviso concerning reasonable diligence. There was no inconsistency between Tilbury being aware of the delay to the works caused by the failure to take sufficient test samples from the brickwork in May/June 2014 and reliance upon section 6(4). Sections 11(3) and 6(4) address different issues, one discovery of loss, the other of error. At para 90 the judge was addressing knowledge of loss, not of fault. Knowledge of a delay caused by Arup’s breach of duty did not disabuse Tilbury of the errors upon which they founded for the purpose of section 6(4).

[35] The judge did not make any findings that Tilbury were, or ought to have been aware of facts which should have prompted investigations into whether the delay in the works was caused by negligence. The fact that the scope of the brickwork repairs required to be expanded did not reveal that the design was incompetent. It was anticipated that additional work might be needed depending on what was found on site and during the tactile survey. That was a fair and appropriate conclusion for the judge to reach on the evidence that was before him. The judge applied the correct test to the circumstances of the case (*Glasgow City Council*, para 57).

[36] The commercial judge correctly identified that it was Tilbury's averments regarding fault and negligence which required to be taken *pro veritate*, not the case that it reasonably relied upon the assurances. The judge found as a fact that Arup's words and conduct caused or contributed to errors on the part of Tilbury which induced them to refrain from raising proceedings. There was therefore no need for those averments to be taken *pro veritate*. The somewhat throwaway remark was infelicitous, but it has no significance given the findings made by the judge. If this was an error of law, it was not material to the judge's decision.

[37] There is no dispute that the onus lay on Tilbury to establish that they were proceeding on the basis of error and inducement under section 6(4). Oral evidence from Mr Adams would not have been relevant to that question. The judge noted that he did not face any evidential doubts which would have been assisted by evidence from Mr Adams. There was no evidence that he was a key person. His concern as to commercial implications related to the separate brickwork repairs. If Arup wanted to prove the proviso, they could have called Mr Adams.

**Analysis and decision on section 11(3)**

[38] Two main issues arise in respect of section 11(3). First, was the judge wrong to apply the reasoning in *Musselburgh and Fisherrow Co-operative Society* to the circumstances of the present case? Secondly, did he err by failing to recognise the implications of his finding that the defective design caused Tilbury loss when they entered into the fixed price enabling works contract in November 2013? The answer to both questions is yes. In summary, the alleged breaches of duty in each of articles of condensation 7.1 to 7.7 are not separate and distinct causes of action; and the judge has failed to apply the approach to section 11(3) settled in *Gordon's Trustees* in respect of Tilbury's knowledge of that which first caused loss flowing from the flawed design. There is a degree of overlap, so both issues will be discussed together.

[39] At para 3 of his opinion the commercial judge noted that it was a matter of concession that Tilbury sustained loss and damage on 27 November 2013 when, in reliance on Arup's defective design, they made the contract with EHDL for the enabling works (for present purposes it is to be assumed that the design was deficient). This was because the costs and delays consequential on the redesign would fall on Tilbury, thus, although not appreciated at the time, as at that date the contract was worth commensurably less to Tilbury than it would have been had Arup provided a competent design.

[40] Standing the decisions in *Gordon's Trustees* and *WPH Developments*, on the face of it the prescriptive clock started ticking as at the date of the contract. In line with the construction of section 11(3) upheld by the majority in *David T Morrison & Co*, even in cases involving financial loss the provision does not postpone the five year period until the creditor knows or ought to know that something has gone wrong or that he has suffered a detriment. Once he is aware of whatever it is that constitutes loss, injury or damage caused

by the wrongful act or omission, here the making of the fixed price contract with EHDL for the enabling works, he has five years to raise an action. (Any harshness which this may cause has now been mitigated by legislation, but it has only recently come into force.)

Nonetheless Tilbury sought to persuade the judge that the prescriptive period began a year later because until then they were not aware, and could not through reasonable diligence have become aware, that they had suffered loss because of the need for an extensive redesign of the works.

[41] The commercial judge records that the written submissions for Arup proceeded on the basis that loss first occurred in March/April 2014 when delays and additional costs occurred. They did not address section 11(3). In oral submissions to him, counsel for Arup had noted the concession that loss first occurred in November 2013. He suggested that the only question was whether the start of the prescriptive period should be postponed either by virtue of section 11(3) or section 6(4) until a date within five years of the service of the summons on 30 July 2019. However it is noteworthy that none of the arguments for Arup summarised by the judge at paras 58/63 suggested that awareness of the contract itself meant that the clock started then; and the same applies to the written submissions to this court.

[42] At para 66 of his opinion the judge noted that Tilbury sues in respect of the need for an extensive redesign of the enabling works and the resulting delay and costs. He held that the primary component of that loss occurred as soon as Tilbury relied on Arup's design. (He dates that in August 2013, but he probably intended, or at least should have said, when the contract for the enabling works was made, namely late November of that year.) The judge's reasoning was that by then extensive redesign was going to be required, all at

Tilbury's cost. It was noted that in terms of section 11(1) the five year period began when this loss occurred.

[43] The commercial judge appreciated that the recent UKSC decisions in *David T Morrison & Co* and *Gordon's Trustees* meant that knowledge that loss was caused by a breach of duty was not required. He said, correctly, that for the purposes of section 11(3) the prescriptive period will commence when the creditor is first aware of objective facts which constitute loss, here 27 November 2013. (It is not necessary to be able to calculate the claim at that stage.) However, he did not take the logical next step of holding that there was no scope for section 11(3) to postpone the running of prescription till a later date. Instead, commenting that the loss required to be connected to the cause of action, and under reference to *Musselburgh and Fisherrow Co-operative Society Ltd*, the judge directed himself to the task of identifying the particular respects in which Arup's general duty to exercise care when designing the works had been breached (para 71).

[44] It was noticed that articles 7.1 to 7.7 of condescendence articulate seven breaches of the general duty to provide a competent design (albeit without prejudice to that generality). Tilbury had limited the claim to reparation for the consequences of the need for an extensive redesign. Thus should any of those breaches have caused an "earlier loss", presumably meaning earlier than appreciation of that need, of which Tilbury were or ought to have been aware more than five years before the action was raised, "the cause of action in respect of that particular breach will not be saved by section 11(3)" (para 72). This was so even if Tilbury were unaware of the problem until much later.

[45] The difficulty is that, perhaps because of Arup's approach, the judge did not retrace his steps and notice that he had already held that because of the failures that caused the need for a redesign, Tilbury sustained loss at the earliest possible date. Instead he said: "I

now turn to what the defender identified as earlier established losses of which [Arup] had actual or constructive notice." As already mentioned, Arup's list started in March/April 2014 and enumerated costs regarding additional brickwork cores, brickwork repairs, dealing with voids, and delays starting in May 2014. It ignored the loss sustained in November 2013 when Tilbury entered into a fixed price contract based on the flawed design.

[46] The judge concluded that only one of the various costs and delays relied on by Arup, namely that of the delays in May 2024, could be attributed to any of the seven specific breaches, and specifically that set out in article 7.1 (paras 88/91). Thus section 11(3) operated to postpone the start of the prescriptive period until May 2014 but only in respect of that alleged default. None of what were regarded as separate obligations arising under the other alleged breaches of duty (articles 7.2/7.7) had been extinguished.

[47] Arup's complaint of "salami slicing" the pleadings is well made. Unlike in the *Musselburgh and Fisherrow Co-operative Society* case, Tilbury's claim does not involve a multiplicity of defaults causing separate and distinct defects. The various articulated breaches, many of which overlap, are simply specification of the complaint in articles 5 and 6 as to a faulty design caused by the use of inadequate data and overly optimistic modelling assumptions, all leading to one global loss based on the costs and delays resulting from the redesign. Articles 7.1/7.7 do not specify separate wrongful acts or causes of action, each with its own date for commencement of the prescriptive period. The fact that all loss flowing from defects in the design was sustained when the contract with EHDL was made, albeit unquantifiable until the bills were received, demonstrates that any obligation on Arup to make reparation is single and indivisible.

[48] It follows that, even on the judge's approach of looking only at awareness of events after the works began, the identified knowledge of loss caused by the discovery of bricks

softer than was assumed for the purpose of the design more than five years before the commencement of the action was sufficient to start the clock running on the whole claim more than five years before service of the action.

[49] However, as indicated earlier, and with respect, we consider that there was an additional flaw affecting the judge's approach to section 11(3). The prescriptive period for a particular cause of action can start only once. In November 2013 Tilbury were aware of the contract, albeit they did not appreciate that in due course there would need to be an extensive redesign with the costs falling on them. That need was caused, so Tilbury intend to prove, by Arup's negligent failure to provide a design which allowed for the safe removal of overburden and construction of the development. Though expressed in a variety of ways, essentially the pleadings complain of inaccurate data being used and overly optimistic design assumptions as to brickwork strength and the adherence of the tunnel lining to bedrock. None of the specifics involve separate causes of action with different starting points for the five years. The alleged failures all occurred during the design process and caused financial damage when Tilbury entered into the fixed price contract which locked in those losses. As the judge put it, on that date the contract was worth less to Tilbury than it would have been but for Arup's alleged breaches of duty (para 3). It matters not that the financial damage could not be quantified till later, nor that at the time Tilbury did not see the agreement as detrimental and could not appreciate that the design was flawed. The five year clock started in November 2013 which means that only section 6(4) can prevent any obligation on Arup to pay damages from being extinguished by the operation of prescription.

**Induced error in terms of section 6(4)**

[50] The summons was served 5 years 8 months and 3 days after the prescriptive period commenced, thus Tilbury needs to prove that it was interrupted for at least 8 months 3 days. This requires evidence (1) that there was a period when Tilbury laboured under an error which meant that they did not make a claim against Arup, (2) when that period began and ended, and (3) that the error was caused by Arup. Arup contend that Tilbury did not lead any evidence that they were in error as to whether it had a claim, and certainly none attributable to the guiding mind of the company.

[51] The commercial judge noted that Tilbury averred errors as to the competence of the design and Arup's view that there was no need for grouting. (The latter seems to be a subset of the first.) Tilbury founded on the preparation and presentation of the design; the claim for payment; the absence of any warning that the design was not competent or that material changes would be required; and ongoing assurances from Arup as to its design from its issue until around September 2014. Tilbury say that the error ended in December 2014 when Arup advised of a need for full grouting of the north tunnel.

[52] The judge held that the prescriptive period was interrupted until late November 2014. He referred to assurances tendered by Arup to Tilbury that their design was sound. The context was that after the enabling works began Donaldsons were expressing concerns about soft bricks, and the nervousness of Network Rail, who were the ultimate arbiters of the soundness of the works, was causing delays. It is plain from the witness statements of Messrs Pratt, Brindley and Shepherd that Tilbury placed reliance on those assurances. That is hardly surprising. By June 2014 Mr Adams was dealing with subcontractor claims in excess of £1m. Given the consequences for Tilbury if additional work was necessary (now said to be at a cost of almost £5.5m), they must have been hoping that Donaldsons and



Network Rail would eventually accept the design upon which Tilbury tendered for the contract at a fixed price. It by no means follows that Tilbury were persuaded that all was well and that there was no scope for a claim against Arup.

[53] Tilbury required to establish that Arup caused an error on their part which induced them to refrain from making a relevant claim against Arup. It is not suggested that any of the contemporary documentation speaks to such a state of mind. The judge held that Tilbury were in error as to as to the need for an extensive redesign and more grouting, and because of this refrained from taking legal action against Arup (para 97). He does not refer to any evidence to that effect. He notes that on 23 May 2014 Arup provided an assurance that although soft bricks had been discovered their design remained valid. (There is no suggestion of fraudulent concealment, deception or dishonesty on the part of Arup.) On the basis of that and other assurances said to have been noted earlier in the opinion (which we have not found easy to identify) the conclusion was that “the pursuer had no cause to believe it had any remedy against the defender in respect of the need for any extensive redesign or its resulting delay and costs” (para 94). That is not a finding that because of a state of error induced by Arup Tilbury were unaware of the possibility of making a claim and so were induced to refrain from legal action against Arup. Similarly when the judge goes on to say that had Arup advised at that stage that full grouting would be necessary, Tilbury would have promptly responded holding them liable for the resulting costs. The judge then states: “In that sense [Tilbury] can legitimately be said to have ‘refrained’ from taking legal action as a result of error induced by the defender.”

[54] With respect, the judge erred in this reasoning. He appears to be making inferences but does so in the absence of the necessary factual evidence, not least from someone speaking to an erroneous state of mind on the part of Tilbury at the time and its influence on

what was and was not done. The judge has conflated the evidence that Tilbury relied on the assurances with the requirements of section 6(4). Mr Pratt said that Tilbury had no reason to challenge Arup, and if Network Rail or other engineers challenged them, Tilbury would wait for the issue to be resolved between them (para 12 of his witness statement). In the whole circumstances that made perfect sense for Tilbury; whatever their own views, if any, might have been it was not in their commercial interests to make a claim against Arup until it was plain that the design was deficient and that additional works at Tilbury's expense were required.

[55] At para 47 of his statement Mr Pratt recorded that there were heated discussions between Arup and Donaldsons who questioned all of the technical and design submissions. Tilbury "*obviously* had to back up [Arup] who [were Tilbury's] designer" (our emphasis). All of this is entirely consistent with Tilbury waiting to see how things developed, no doubt hoping that Arup's views would be vindicated. Mr Brindley's and Mr Shepherd's statements were to a similar effect. No one spoke to their own state of mind on the controversy between Arup and Donaldsons, let alone anything which could be attributed to the company.

[56] Under reference to various passages in the speeches in *BP Exploration Operating Company Ltd v Chevron Transport (Scotland)* 2002 SC (HL) 19, the commercial judge said that it was unnecessary for him to identify a "conscious and deliberate decision" on the part of Tilbury or anyone representing the company. It is not entirely clear what was intended here, but *BP v Chevron* is not authority for the proposition that an erroneous state of mind need not be established. As soon as the oil terminal was damaged by Chevron's vessel, BP knew that it had a claim. The induced error was as to the identity of the debtor in the obligation. The claim against the wrong company was served one week before the end of

the five year period. Once the correct party was identified its domicile in Liberia delayed service beyond the seven day balance. Not being in a position to prove that the error played a part in the date of the first claim, before the First Division BP did not contend that prior thereto it was causing them to refrain from suing the correct defender. Rather the interruption should extend from the commencement of the first action to the date of service on the correct defender, including the period when it was attempting to achieve this in Liberia. Against that it was argued that once the error was corrected and BP was trying serve a summons, the error was no longer causing them to refrain from making a claim.

[57] The First Division held that the obligation had been extinguished by prescription. The view was that “refrain” meant “stopping oneself from doing something”. Section 6(4) could not operate to protect BP once it was no longer in error and was doing its best to make the claim.

[58] The House of Lords disagreed with that interpretation of the provision, and in particular of the term “refrain”. It was enough that from an early stage the creditor was in error as to the right to sue the correct party and did not do so. From then BP was “refraining” from making a claim against the true debtor. There was no need to establish the date when, if they had not been in error, the claim would have been made. The clock stopped as soon as the error was induced. The term “refrain” in section 6(4) did not mean “a conscious act of self-restraint” or a “conscious and deliberate decision” not to raise an action, Lord Hope at paras 30/31. Were it otherwise anyone unaware of a claim because of fraud on the part of the creditor would not be protected from the operation of prescription.

[59] Their Lordships were addressing the singular facts and circumstances of the case before them. It is not obvious that anything turns in this appeal on the competing approaches to “refrain”. No one is suggesting that Tilbury must demonstrate when they

would have sued absent any error. Importantly for present purposes, the decision in *BP v Chevron* does not elide the need to prove an erroneous belief on the part of the creditor in the obligation and its causative role. As Lord Hope made clear at para 33, it remains necessary for the creditor to show that the reason he did not make a claim was that he was misled by the debtor's fraud or because of an error induced by the debtor. Lord Clyde confirmed that the debtor must lead the creditor to believe something different from the truth (para 65). Once Arup changed their position and it was apparent that a redesign would be needed, that was certainly a significant change of circumstances which altered Tilbury's attitude; but it does not demonstrate that only then did Tilbury cease to be in a state of error as to its rights and remedies, as opposed to appreciating that supporting Arup's position was no longer an option.

[60] At the end of para 96 the commercial judge indicated that he was taking Tilbury's averments on the matter *pro veritate* (as assumed to be true). This was an error. In the preliminary proof on prescription it was for Tilbury to lead sufficient evidence to establish that they were entitled to rely on section 6(4) and thereby avoid the consequences of the expiry of the five year period. Counsel for Tilbury played down the significance of the remark. It is true that it is not expressed as the primary reasoning, however it may help to cast light on the already acknowledged lack of analysis of the evidence upon which the findings in this regard are based.

[61] The judge held that Tilbury were entitled to rely on section 6(4) in relation to all their pleaded grounds of complaint, including article 7.1, "by discounting the period up until the end of November 2014 as part of the prescriptive period" (para 97). It would therefore appear that the view was that Tilbury were induced into error from at least the date of entering into the contract with EHDL, presumably on the basis that they were relying on

Arup having provided a sound design. As noted above, section 6(4) requires words or conduct on the part of Arup which led Tilbury into an error as to their remedies which meant that they did not make a relevant claim against Arup. Once problems were discovered, the issue of fraud or error operating on the mind of the company might arise. However it is doubtful whether the subsection is aimed at conduct as everyday as providing services and accepting payment therefor. If merely tendering a design or sending an invoice in respect of what turns out to be defective work is sufficient for the purposes of section 6(4), not many prescriptive periods will commence. The case of *Rowan Timber* relied on by counsel for Tilbury concerned invoices sent for services which were not received – a very different kind of case.

[62] As to the assurances, Arup were expressing confidence in their design. It is not suggested that there was any bad faith concealment or misrepresentations. It was up to Tilbury whether to accept those assurances, or at least not question them. It was not in their interests to do otherwise. That they decided to “back up” Arup is not the kind of erroneous mental state envisaged by section 6(4) as an induced error which causes a party not to make a claim. It was not really an error at all – it was a choice driven by obvious self-interest.

[63] It is difficult to reconcile the judge’s finding regarding error lasting until late 2014 with the decision that several months earlier they knew of delays caused by the discovery of soft bricks (para 90). It is plain from the pleadings that a main theme of the complaint is that pre-design Arup should have done more to identify the true strength and stiffness of the bricks or adopted more conservative assumptions in the modelling for the works. However at para 97 the commercial judge drew a distinction between awareness of soft bricks causing delay and an error as to the need for an extensive redesign and grouting. In theory, perhaps it is possible that despite knowledge that the predicted compressive strength of the tunnel

brickwork was inaccurate, nonetheless it was thought that overall the design was sound, but at the least one would have expected evidence to that effect.

[64] A similar issue arises regarding the proviso to section 6(4). It excludes from consideration any period after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be. The judge accepted that, given the soft bricks, reasonable diligence could have led Tilbury to appreciate that insufficient test samples were taken at the design stage. However, as a result of Arup's assurances, Tilbury were in error as to the need for an extensive redesign and more grouting. He considered that standing those assurances, reasonable diligence would not have allowed Tilbury to appreciate the true position.

[65] There is an echo here of the judge once again separating out the various specific examples of Arup's overall design failure. However, in the absence of proof of an error it is difficult to elaborate on how reasonable diligence might have avoided or corrected it. Given the obvious incentive for Tilbury to support rather than undermine Arup's position, consideration of the reasonable diligence test has an artificial flavour. However on the assumption that the design was deficient, had Tilbury seen a need to explore the issue, on the face of it there was more than enough to alert those involved to the need to be less accepting of Arup's statements.

We shall allow the reclaiming motion, recall the commercial judge's interlocutor, sustain Arup's plea of prescription, and grant decree of absolvitor (which absolves Arup of the claimed liability).

### **Postscript**

[66] As so often in cases of this kind, Tilbury's problems can be traced to the long delay

between their awareness of a possible claim and the raising of the action. Sir David Edward's brief opinion in *Adams v Thorntons* WS 2015 1 SC 30 at 58 could have been aimed at the circumstances of the present case. He noted that one of the reasons for the law of prescription is that as time passes it becomes increasingly difficult for a court to reach a just solution. He considered it important

“to hold to the principle that it is for the party claiming the protection of sec 6(4) or of sec 11(3) to demonstrate that the statutory conditions for avoiding the axe of prescription are satisfied. .... the court's decision (cannot) depend on speculation as to acts, omissions or motives.”

We endorse those observations.