OUTER HOUSE, COURT OF SESSION

[2024] CSOH 43

CA41/23

OPINION OF LORD RICHARDSON

In the cause

LEONARDO HOTEL MANAGEMENT (UK) LIMITED

Pursuer

against

GALLIFORD TRY BUILDING 2014 LIMITED

First Defender

BUILDING DESIGN PARTNERSHIP LIMITED

Second Defender

Pursuer: T Young; MacRoberts LLP
First Defender: MacColl KC; Clyde & Co LLP
Second Defender: D Thomson KC, Hamilton; Kennedys

19 April 2024

Introduction

[1] This case concerns a claim by the proprietor of the Leonardo Inn Hotel, Union Square, Aberdeen. It is a claim for alleged defects arising at the hotel.

[2] The pursuer is the current tenant of the property. The first defender was the design and build contractor that was instructed by the landlord of the property, Union Square Developments Limited, in connection with its development. The second defender was the landlord's architect.

[3] I heard the case at debate. Both defenders advanced two separate arguments. First, the defenders argued that the pursuer's case against each of them had prescribed in terms of sections 6 and 11 of the Prescription and Limitation (Scotland) Act 1973. Second, each of the defenders challenged the relevancy and specification of the case that the pursuer had plead against them.

Background

[4] The landlord and the first defender entered into a building contract on 19 December 2006. The building contract was subsequently the subject of certain Minutes of Variation. The works undertaken by the first defender in terms of the building contract included the design and construction of a bus and railway station re-development together with a retail and leisure development. The latter included the design and construction of the hotel including, in particular for present purposes, the design and construction of the cladding of the various elevations of the property.

[5] On 11 January 2007, the landlord entered into a memorandum of agreement in relation to the appointment of the second defender. In terms of that agreement, the second defender undertook various obligations to the landlord including to provide architectural services in respect of the Union Square development and to carry out those services using:

> "…the reasonable skill, care and diligence expected of an appropriately qualified and competent architect who is experienced in the provision of services of a similar size, scope and complexity [in relation to developments equivalent to the present development]…"

On 22 July 2007, the landlord and the first and second defenders entered into a novation agreement in terms of which the first defender took over the second defender's appointment from the landlord.

[6] Subsequently, on 16 July 2008, the first defender granted a collateral warranty in favour of the pursuer. In terms of that warranty, the first defender undertook, among other things, to carry out and complete the development in conformity with the building contract. On 22 July 2008, the second defender also granted a collateral warranty in favour of the pursuer. In terms of that warranty, the second defender undertook to the pursuer that it had duly performed and would continue so to perform its obligations under its appointment in respect of the development whether before or after the novation agreement.

[7] The collateral warranty granted by the first defender provided that, in the event of a breach, the first defender would be entitled to rely, in any proceedings by the pursuer, on any limitation or defence, excluding rights of set-off, retention and counterclaim, as it would have had against the landlord (clause 1 of the warranty dated 16 July 2008). The warranty granted by the second defender provided that, excluding the second defender's rights of set-off, retention and counterclaim, the second defender would have no greater liability to the pursuer under the warranty than it owed under its appointment in respect of the development (clause 2.2).

[8] Practical completion of that part of the development which included the hotel was certified on 18 February 2009. The hotel was leased by the landlord to the pursuer by way of a lease dated 8 December 2009. In terms of the lease, the pursuer undertook a full repairing obligation: clause 3.7.1 of the lease obliged the pursuer:

> "… to keep the Property in good and substantial repair and condition and tidy and clean and … maintained to the reasonable satisfaction of the Landlords and in whole or in part, when necessary, to rebuild, reinstate or renew the same irrespective of the cause of damage, destruction, deterioration or decay necessitating such repair, rebuilding, reinstatement or renewal as aforesaid. …"

The pursuer's obligations under the lease also included the following:

> "To permit the Landlords or the Managing Agents or any of them with or without workmen and others at all reasonable times in a day (except in the case of emergency) upon giving to the Tenants not less than two Working Days' prior notice thereof (except in the case of emergency) to enter upon the Property for the purpose of examining the state and condition thereof and, in case any defect, default or want of maintenance, repair, rebuilding, reinstatement, renewal or decoration or cleanliness shall appear for which the Tenants are liable under the obligations herein contained, upon notice thereof in writing being given to the Tenants, to cause the same to be made good, maintained, repaired, rebuilt, reinstated, renewed, decorated or cleaned in compliance with the said obligations within such reasonable period of time as is specified in the notice…" (clause 3.11)

[9] In the present proceedings, the pursuer alleges that the hotel's cladding system is defective. The pursuer avers that the defects were caused by, or at least materially contributed to by, breaches of the obligations owed to it by the defenders both as a matter of contract and in delict. The pursuer seeks the cost of repairing the cladding which it contends it is obliged, under the lease, to carry out. The present proceedings were raised in February 2021.

The prescription arguments

The pursuer's averments

[10] The pursuer's pleadings in respect of prescription are all contained in Article 13 of condescendence. The material parts of the pursuer's averments in respect of the application of sections 6 and 11 of the 1973 Act are in the following terms:

> "With reference to the defenders' averments anent prescription, explained and averred that entering the Lease was not loss, injury and damage for the purposes of sec. 11 (1) of the Prescription and Limitation (Scotland) Act 1973 (cap. 52) (the '1973 Act'). The pursuer did not incur wasted expenditure in doing so. The pursuer did not acquire ownership of an asset that was worth less than it expected. The Cladding Defects were latent defects. They were not visible defects requiring repair. The need to repair them was not inevitable from the point of entering the Lease. The pursuer did not in fact suffer loss, injury, and damage until it came under an obligation to repair the Cladding Defects. That obligation only arose when the state

of disrepair arising from the Cladding Defects became known about. The discovery of the Cladding Defects was prompted by inspections of the Property conducted by the Landlord after the Grenfell tower fire on 14 June 2017. At the very earliest, the Landlord was aware of some (but not all) of the Cladding Defects around 18 September 2017. On or around that date, Wintech produced a report of a cladding survey conducted on the Property. At the very earliest, the pursuer became aware of some (but not all) of the Cladding Defects around 16 December 2020 when they were informed about them by the Landlord following the Landlord's investigation."

[11] In respect of section 11(3), the pursuer's pleadings were as follows:

"*Esto* the pursuer did suffer loss, injury and damage for the purpose of sec. 11 (1) of the 1973 Act more than 5 years prior to the raising of this action, which is denied, explained and averred that the pursuer was not aware, and could not with reasonable diligence have become aware, of having suffered such loss, injury and damage until, at the earliest, 16 December 2020. Reference is made to sec. 11 (3) of the 1973 Act."

[12] In respect of section 6(4), the pursuer averred as follows in respect of the first defender:

"*Separatim*, and in any event, the Landlord was induced to refrain from making any claim for reparation in respect of the Cladding Defects against the first defender between practical completion of the Works in February 2009 and around 18 September 2017. The Landlord *et separatim* the first defender were induced to refrain from making any claim for reparation against the second defender until around 18 September 2017. The pursuer was also induced to refrain from making any claim for reparation in respect of the Cladding Defects against the first defender between entering the Lease in December 2009 and around 16 December 2020. This was due to errors induced by the first defender under and in terms of sec. 6 (4) of the 1973 Act. Accordingly, these periods do not fall to be reckoned as part of any prescriptive period in respect of either the Landlord or the pursuer. In particular, the first defender was under contractual duties to identify and report defects in the Works such as the Cladding Defects to the Landlord and Sweett as the Employer's Agent. Reference is made to Clauses 2.5.6 and 5.3.1, and the 'Management of the Works', 'Quality Standards / Control', and 'Building and Accommodation Requirements' sections of the Employer's Requirements in the Building Contract. Without prejudice to that generality, the first defender was expressly obliged to report any defects in the existing construction to Sweett as Employer's Agent without delay and obtain instructions before proceeding with the work. The first defender omitted to advise, inform, or otherwise draw the Landlord and/or Sweett's attention to the Cladding Defects. That omission contained an implied

representation that no such defects existed. Further, the pursuer is unaware of any sums outstanding under the Building Contract. In the circumstances, it is believed and averred that the first defender continued to apply for payments under the Building Contract. Those payments could not have been properly claimed in respect of that part of the Works comprising the Cladding Defects. In applying for payment, the first defender impliedly represented that the Works had been properly done. The Landlord had no reason to suspect that was not the case. Further, and in any event, in the Contractor's Collateral Warranty, the first defender warranted to the pursuer *inter alia* that they had carried out and completed the Development in conformity with the Building Contract; complied with, observed, and performed the obligations of the Contractor in the Building Contract. Reference is made to Clause 1.1 – 1.4 of the Contractor's Collateral Warranty. In warranting to the pursuer they had complied with their obligations when in fact they had not done so, the pursuer was induced to believe that the first defender had complied with its obligations and that no defects such as the Cladding Defects existed in the Property. By all of these omissions and acts, the first defender represented to, and induced a belief in, both the pursuer, and the Landlord, that they had each complied with their obligations and that no defects such as the Cladding Defects existed in the Property. That was an error. As a result of that error, both the Landlord and the pursuer refrained from making any claim for reparation against the first defender."

[13] Finally, the pursuer made the following averments in respect of section 6(4) in relation to the second defender:

> "*Separatim*, and in any event, the pursuer was induced to refrain from making any claim for reparation in respect of the defects hereinbefore condescended upon against the second defender between entering the Lease in December 2010 and around 16 December 2020. This was due to an error induced by the second defender under and in terms of sec. 6 (4) of the 1973 Act. Accordingly, that period does not fall to be reckoned as part of the prescriptive period. In particular, the second defender was under contractual duties to identify and report defects in the Works such as the Cladding Defects to *inter alios* the Landlord and first defender. Reference is made to, Clause 9.2, 9.4, 11.4, 13.2, 16, 37.3 and Paragraphs 7, 27, 34, 35, 49, 51, 53, 82 of Part 2 of Part 1 of the Schedule to the Architect's Appointment; Clauses 7.1 - 7.3 of the Architect's Novation Agreement. The second defender omitted to advise, inform, or otherwise draw the Landlord and/or the first defender's attention to the Cladding Defects. Further, the pursuer is unaware of any sums being outstanding to any of the defenders under the various agreements hereinbefore condescended upon. In the circumstances, it is believed and averred that they each claimed payment of the substantial remuneration due to them under each of the relevant Appointments. Further, in the Architect's Collateral Warranty, the second defender warranted to the pursuer that they had duly performed and observed all of the terms of the relevant

> Appointment. Reference is made to Clause 2.1 of the Architect's Collateral Warranties. In representing to the pursuer they had complied with their obligations when in fact they had not done so, the pursuer was induced to believe that they had complied with their obligations and no defects such as the Cladding Defects existed in the Property. By these omissions and acts, the second defender represented to, and induced a belief in, the pursuer, the Landlord, and the first defender that they had complied with their obligations and that no defects such as the Cladding Defects existed in the Property. That was an error. As a result of that error, the pursuer, the Landlords, and the first defender refrained from making any claim for reparation against the second defender in respect of the Cladding Defects."

The defenders' arguments

[14] The defenders argued that, in terms of sections 6 and 11(1) of the Prescription and Limitation (Scotland) Act 1973, the pursuer's case had *prime facie* prescribed. The defenders argued further that that *prime facie* position was not altered by the application of the terms of either section 11(3) or section 6(4) of the 1973 Act.

[15] The issue of prescription arose in two ways. First, it applied to the pursuer's claim. Second, insofar as the pursuer's claim relied on obligations owed to it by the defenders in terms of the collateral warranties, it was also necessary to consider the issue of prescription from the perspective of the original employers of each of the defenders. In the case of the first defender, that was the original developer – the landlord. In the case of the second defender, it was the landlord and then, following the novation agreement, the first defender.

The pursuer's claim

[16] On the pursuer's averments, it had suffered a loss as soon as it had entered into the lease on 8 December 2009. That date was after practical completion had been certified and was more than five years before the present proceedings had been raised. On this date, the pursuer became responsible for repairing the cladding defects which formed the basis of the present action in terms of clause 3.7.1. This point could be tested by asking whether,

immediately after the pursuer had signed the lease, it would have been possible for the landlord to enforce the repairing obligation in the lease against the pursuer in respect of the alleged cladding defects. On the basis of the pursuer's averments, the answer to that question was yes.

[17] It was submitted that this represented a straightforward application of the law of obligations. Clause 3.7.1 imposed an obligation on the pursuer "to keep the Property in good and substantial repair". With such an obligation, all that was required for it to arise was that the property was out of that condition (*Scottish Widows Services Ltd* v *Harmon/CRM Facades Limited (in liquidation)* 2010 SLT 1102 at paragraph 33). In the present case, there was no dispute that at the time that the pursuer entered the lease, the disrepair, being the cladding defects, existed. Viewed from this perspective, it was clear that, contrary to its averments, in entering the lease, the pursuer had acquired an asset which was worth significantly less than it had anticipated. This was because entering the lease carried with it the onerous repairing obligations.

[18] Accordingly, on the basis of the pursuer's averments, in terms of sections 6 and 11(1) of the 1973 Act, the five year prescriptive period started running from 8 December 2009. On the pursuer's averments, by this date there was a concurrence of the alleged failure (whether breach of contract or delict) by the defenders, and the loss said to have been caused by that failure.

[19] In terms of section 11(3) of the 1973 Act, the fact that the pursuer averred that it was unaware of the position until later was irrelevant (see paragraph 11). The pursuer's loss arose from entering into the lease. The pursuer was perfectly well aware of the terms of the lease including the tenant's obligation to repair. The defenders relied on Lord Hodge's judgment in *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287 at

paragraphs 20 to 23. The test was objective and Lord Hodge had recognised that it might seem harsh for creditors but it produced certainty.

[20] Turning to section 6(4) of the 1973 Act, the defenders emphasised that the pursuer required to aver that there was a period during which the pursuer had been induced not to make a claim as a result of an error induced by the words or conduct of the debtor or anyone acting on behalf of the debtor. This was subject to the proviso that any period during which the creditor could with reasonable diligence have discovered the error, was to be discounted.

[21] In relation to both defenders, the pursuer relied upon the fact that each of the defenders had granted a collateral warranty in favour of the pursuer. The pursuer averred in the case of the defenders that each had warranted that it had observed and performed its respective obligations under the building contract and the appointment. However, these averments were inconsistent with the sequence of events. In both cases, the granting of the collateral warranties pre-dated the achievement of practical completion (see paragraphs 6 to 8 above). The pursuer made no averment as to when the alleged breaches by the defenders in respect of the cladding had occurred and, in particular, whether those breaches occurred before or after the granting of the warranties.

[22] In respect of the achievement of completion of the development, the warranties each contained a promise as to future conduct. The defenders were warranting that they would continue to comply with their respective obligations under the building contract and appointment. As such, the warranties could not affect the running of prescription through section 6(4). If it were the case that a prospective statement – a statement which pre-dated the coming into existence of the claim – could "induce an error" on the part of the creditor in terms of section 6(4) then, it was contended, a coach and horses would be driven through the

law of prescription. On this basis, the warranties granted by the defenders were no different to any normal contractual stipulation in terms of which one party undertook to another party to act in a particular way. If section 6(4) were to be construed as contended for by the pursuer, it would have a very wide impact, potentially affecting all contractual relationships. It was submitted that this could not be the intention of parliament. In relation to the pursuer's reliance on *Rowan Timber Supplies (Scotland) Limited* v *Scottish Water Business Stream Limited* [2011] CSIH 26, the defenders submitted that the facts of this case were wholly different and it did not assist the pursuer on the issue of the timing of conduct relied upon.

[23] The defenders also submitted that the averments in respect of the alleged conduct by the defenders which related not to the pursuer but to others could not be relied on by the pursuer in relation to section 6(4). The pursuer made averments about failures by the first defender to report the cladding defects to the landlord and to the employer's agent, Sweett. In the same vein, the pursuer made averments concerning failures by the second defender to report defects to the landlord and the first defender. These averments could not be relevant to inducement of an error on the part of the pursuer.

[24] In the same way, the averments made by the pursuer in respect of alleged conduct by the defenders in granting the collateral warranties could not be relied by the pursuer in relation to the issue of prescription viewed from the perspective of the original employers of each of the defenders.

[25] In light of these averments, the defenders did not have fair notice of the case being advanced against them. That part of the pursuer's case which relied on section 6(4) was thus contradictory, irrelevant and ought to be excluded from probation.

Claims by the employers

[26] Senior counsel for the first defender submitted that, as the pursuer's case against it depended on the collateral warranty granted by the first defender, the starting point was that the collateral warranty would be subject to the same time-bar as applied under the building contract (see [7] above). Accordingly, if claims against the first defender under the building contract had been extinguished by prescription, then the pursuer would be barred, as a matter of contract on the basis of the terms of the collateral warranty, from bringing a like claim against the first defender (*British Overseas Bank Nominees Ltd* v *Stewart Milne Group Ltd* 2020 SC 24 (IH) at paragraphs 14 to 16). Senior counsel for the second defender essentially adopted the same argument based on the terms of the collateral warranty granted by the second defender (see [7] above).

[27] The prescriptive period for any claim by the landlord against both of the defenders had, on the face of the pursuer's pleadings, commenced at the latest on 18 February 2009 - the date of practical completion of the section of works which included the hotel. Thereafter, essentially, for the same reasons advanced in respect of the pursuer's claim, the defenders submitted that the pursuer had not averred a relevant case in relation to either section 11(3) or section 6(4). In respect of the former, on the factual basis upon which the pursuer's case proceeded, the landlord would undoubtedly have incurred wasted expenditure in respect of the development prior to practical completion of the building contract as a whole on 29 October 2009. In respect of the latter, senior counsel referred back to the submissions made in respect of the pursuer's averments in relation to the prescription issues arising from its own claim.

[28] Finally, senior counsel for the first defender also objected to the averments which the pursuer had made concerning the fact that the pursuer was unaware of any sums being

outstanding under the building contract (see above at [12]). The pursuer sought to use this as a basis for seeking to infer – through the use of the formulation "Believed and averred" - that the first defender continued to apply for payments under the building contract. However, the pursuer was not actually offering to prove that any payments were, in fact, either applied for or made. The pursuer's lack of awareness as to sums outstanding did not give rise to a necessary inference that applications were either made or paid. These averments were irrelevant and ought to be excluded from probation.

The pursuer's response

[29] Counsel for the pursuer submitted that, having heard the arguments advanced on behalf of the defenders, he did not consider that there was a significant difference between the parties as to the relevant legal principles to be applied. Rather, the parties differed as to the consequence for the pursuer's case of the application of those principles.

[30] Counsel also accepted that, as its case was based on the collateral warranties granted by each of the defenders, the pursuer required to address potential prescription issues arising both in respect of its case and which might arise in respect of a case brought by either of the employers of the defenders under the building contract or appointment respectively.

The pursuer's claim

[31] In relation to its own claim, the pursuer's position was, first of all, that the conclusion of lease was not loss for the purposes of section 11(1) of the 1973 Act. Counsel referred to the analysis of the Supreme Court decision in *Gordon's Trustees* (above at [19]) by the Inner House in *WPH Developments Ltd* v *Young and Gault LLP* 2022 SC 28 (in particular, at paragraphs 29 to 31). Lord Malcolm, in giving the opinion of the court, had stressed that, for

the purposes of section 11(3), what was necessary was contemporaneous knowledge of the objective facts which constituted the loss or detriment. It was not necessary for there to be any knowledge of the circumstances which rendered it detrimental.

[32] Against this background, the pursuer's primary position was that entry into the lease did not constitute loss because, at the point of entry, loss was not inevitable. Loss only manifested itself at the point at which the pursuer's obligation to carry out repairs in terms of the lease was triggered. This analysis was consistent with the nature of the relevant repairing obligation, clause 3.7.1 (above at [8]): the pursuer was required to carry out work "when necessary". The obligation was onerous and ought not to be given an expansive interpretation (see *Westbury Estates Ltd* v *The Royal Bank of Scotland Plc* 2006 SLT 1143, paragraph 33 (Lord Reed)). Construed in this way, the pursuer's obligation under the lease was contingent on the necessity becoming apparent during the currency of the lease.

[33] The pursuer's secondary position was that even if, as a matter of analysis, the pursuer had suffered a loss on entering the lease and the requirements of section 11(1) were fulfilled, it could not be said that the pursuer had the knowledge required for section 11(3). This was because the pursuer did not have either actual or constructive knowledge of the objective facts which constituted the loss. The pursuer was not in the equivalent position to someone purchasing an asset for what turns out to have been more than its market value or incurring expenditure which later transpires to have been wasted (*cf Gordon's Trustees* (above) at paragraph 21). The most that could be said was that the pursuer knew that it was subject to the repairing obligation. However, that was not sufficient. In order to know that loss had occurred, the pursuer required to know, either actually or constructively, that the cladding defects existed. Accordingly, on the basis of this secondary position, the commencement of the prescriptive period was, on the pursuer's averments, deferred until

16 December 2020 when the pursuer was informed by the landlord of the existence of the cladding defects.

[34] In respect of section 6(4), counsel for the pursuer submitted that the pursuer's pleadings were sufficiently clear. In respect of the pursuer's own claim, the pursuer relied solely on representations which had been made to it. In other words, the pursuer relied upon the representations which both defenders had made in granting collateral warranties to it.

[35] In respect of the argument advanced by the defenders based on the timing of the warranties, counsel submitted that it was somewhat unsatisfactory that this argument had only been fully developed during the course of oral submission at the debate before me. This issue had not been raised by either defender either in their respective pleadings or in the notes of argument. Accordingly, counsel submitted that were I to find that the timing of the works said to give rise to the cladding defects in relation to the granting of the warranties was critical, he would seek an opportunity to address this issue in the pursuer's pleadings.

[36] However, the pursuer's position was that the defenders' argument was misconceived in that the defenders took an unduly restrictive approach to the section 6(4). In this regard, the pursuer referred to *Rowan Timber Supplies* (as above at [22]). The facts of that case concerned claims by the pursuer for the repayment of charges which had been levied, in error, for many years by the defender. The pursuer's claim for repayment was met by a plea of prescription. The pursuer, in turn, responded to this plea by arguing that the defender had induced it, in terms of section 6(4), to refrain from claiming by repeatedly rendering notices to the pursuer in respect of the charges. The defender challenged the relevancy of

this approach. However, the defender's argument was rejected by the Inner House. In the view of the Lord President, delivering the opinion of the court, it was a matter for proof:

> "[17] The only conduct of Scottish Water relied on by the [pursuers] is their issuing of the charge notices. It was argued for the [defenders] that each obligation of repetition had to be viewed distinctly and that conduct inducing the creditor 'to refrain from making a relevant claim in relation to the obligation` must, logically, be conduct which post-dates the coming into existence of that obligation. As each obligation came into existence only after the charge had been raised and paid, the raising of the charge could not constitute a relevant inducement.
>
> [18] In our view this submission adopts an unduly restrictive approach to the statutory provision and to the [pursuers'] averments. It will in the end be for the [pursuers] to prove what in fact induced them to refrain from making their several claims earlier than they did. But it would be within the scope of their averments to seek to establish that the periodical and repeated issuing of charges (carrying the implication that the sums charged were due) induced them to refrain from pursuing a claim for repetition of a sum earlier charged and paid. It may also be that, looking at each transaction distinctly, the implicit representation contained in the notice was such that it not only induced payment but also subsequently induced the error which in turn induced the [pursuers] to refrain from making a relevant claim in repetition. These issues are properly for proof."

[37] Counsel submitted that the pursuer in the present case could not be in a worse position than the pursuer in *Rowan Timber Supplies* on the basis that in this case the representation was express whereas in that case the representation, in the form of the rendering of the notices, was implicit.

Claims by the employers

[38] The pursuer accepted that the prescriptive period for the claims against the first defender and the second defender in terms of the building contract and appointment, respectively, would have started by 18 February 2009, that being the date of practical completion of the hotel.

[39] In respect of the claim by the landlord against the first defender, the pursuer pled two alternative defences. First, the pursuer submitted that the landlord was unaware of the

cladding defects until after it had carried out investigations following the Grenfell Tower fire. The pursuer averred that the earliest that the landlord was aware of the cladding defects was 18 September 2017. On this basis, the pursuer submitted that the commencement of the prescriptive period fell to be postponed until this date in terms of section 11(3). Counsel for the pursuer argued that in claims against a building contractor, payments to the contractor itself did not fall to be characterised as a loss or as "wasted expenditure". These payments were properly to be understood to be payments made under the contract (see *Loretto Housing Association Limited* v *Cruden Building and Renewals Limited* [2019] CSOH 78).

[40] Secondly, the pursuer averred that the landlord had been induced not to claim against the first defender as a result of the first defender's actions in failing to identify or report the cladding defects during the currency of the works. On this basis, the pursuer averred that a period between practical completion of the works in February 2009 and around 18 September 2017 fell to be discounted from the prescriptive period in terms of section 6(4).

[41] In this regard, counsel submitted that the first defender's challenge to the pursuer's averments to the effect that it was unaware of any sums outstanding under the building contract was surprising. Counsel submitted that, in the circumstances, it was reasonable for the pursuer to infer that first defender had applied for and been paid under the building contract. Given that the hotel had been completed, this inference seemed more likely than that the first defender had carried out its work gratuitously.

[42] In respect of the second defender, the pursuer again relied upon its averments that the first defender had been induced not to claim as a result of the actions of the second defender during the course of the works in failing to identify and report defects including

the cladding defects. On this basis, the pursuer submitted that it had pled a relevant case in terms of section 6(4) of the 1973 Act.

Decision on prescription arguments

[43] The issue before me in relation to prescription is whether the pursuer has averred a relevant case which ought to be admitted to probation in respect of each of the defenders.

[44] That issue can be further broken down. First, it is necessary to consider the issues of prescription which arise from the pursuer's case against each of the defenders. Second, there are the issues of prescription which arise as matter of contractual bar because the pursuer's case is founded on the collateral warranties granted by each of the defenders. Resolution of the issues which arise as an issue of contractual bar require the issue of prescription to be considered from the perspective of the employers of the first and second defender. These are, respectively the landlord and, following the novation of the second defender's appointment, the first defender.

The pursuer's case

[45] In relation to the pursuer's case, the first task is to determine when, in terms of section 11(1) of the 1973 Act, the prescriptive period commenced in respect of each of the defenders. That involves establishing when there is a concurrence of a legal wrong and loss caused by that wrong.

[46] There is no dispute in respect of the first of these. In the present case, it is accepted that the alleged breaches by each of the defenders must have occurred prior to the date on which the hotel was practically complete on 18 February 2009.

[47] In respect of the second, the pursuer avers that it suffered no loss until "it came under an obligation to repair" the cladding defects and, further, that this obligation only arose when the state of disrepair arising from the cladding defects became apparent. On the other hand, the defenders submit that, as a matter of law and on the pursuer's own averments, this is wrong. The defenders contend that, on the hypothesis upon which the pursuer's case proceeds, the pursuer suffered loss when it entered into a lease of the hotel on 8 December 2009. That is because, so the defenders argue, of the coincidence of two factors. First, as soon as the pursuer entered into the lease of the hotel, it became obliged, in terms of clause 3.7.1 of lease "…to keep the Property in good and substantial repair and condition…" Second, on 8 December 2009, the hotel already contained the cladding defects which, it is accepted, must have been present at practical completion.

[48] I consider that the defenders' analysis is correct on this point. I reach this conclusion primarily because I consider that, properly construed, the obligation in clause 3.7.1 to keep the property in good and substantial repair is triggered as soon as the property is out of that condition (see *Scottish Widows* (above at [17]) at paragraph 33). This part of the obligation in clause 3.7.1 is not qualified by the phrase "when necessary" as is the case in respect of the obligation "to rebuild, repair or renew" which appears later on in the clause. Further, unlike other clauses in the lease, there is no requirement for the landlord to notify the pursuer or otherwise trigger the pursuer's obligation (*cf* clause 3.11). I do not consider that the wording of the clause, which begins with the words "At all times during [the term of the lease]", provides any support for deferring the pursuer's obligation until the state of disrepair becomes apparent.

[49] On the basis of this finding, it becomes necessary to consider whether the pursuer has relevantly averred a case in respect of either or both sections 11(3) and 6(4) of the 1973 Act.

[50] I consider that the pursuer has done so in respect of both sections.

[51] In respect of section 11(3), the pursuer avers that it was not aware and could not with reasonable diligence have become aware that it had suffered a loss until 16 December 2020 which was the date when the pursuer was informed by the landlord of the cladding defects (see paragraph 11). The defenders challenge the relevancy of this averment on the basis that it falls foul of Lord Hodge's analysis in *Gordon's Trustees*: the pursuer's loss arises from the pursuer's agreement of the lease and there can be no doubt, so the defenders contend, that the pursuer was aware of that.

[52] As Lord Hodge makes clear in *Gordon's Trustees*, the wording of section 11(3) postpones the commencement of the prescriptive period until the creditor first becomes aware, or could with reasonable diligence have become aware, of the objective fact of the loss or detriment (at paragraphs 19 and 20). Importantly, in terms of section 11(3), a creditor does not require to know that he or she has suffered a detriment or that something has gone awry. As Lord Hodge puts it: "It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure." (paragraph 21).

[53] In the present case, I do not consider that the objective facts of the pursuer's loss can be said to have been comprised solely by the pursuer's agreement to the terms of the lease. The pursuer's loss arises not solely because it has an obligation in terms of clause 3.7.1 of the lease to carry out repairs. The loss arises because the pursuer has this obligation and the hotel contains the alleged cladding defects which require to be repaired.

[54] Therefore, on the pursuer's averments, it was not aware, either actually or constructively, of the objective facts which constituted its loss. That is because knowledge of loss required knowledge both of the obligation to repair contained in the lease and also of the existence of the alleged defect which required to be repaired. While the pursuer remained in ignorance of the need to carry out repairs, it did not have knowledge of the objective facts which constituted its alleged loss. Unlike the examples given by Lord Hodge in paragraph 21 of *Gordon's Trustees,* there is no question in the present case that the pursuer was aware that it had failed to obtained something which it had sought or that it had incurred expenditure.

[55] In any event, I also consider that the pursuer has averred a relevant case in respect of section 6(4). As I understood the defenders' arguments, two arguments were advanced on this point.

[56] First the defenders argued that the pursuer's averments were irrelevant because they relied, in respect of the question of the prescription of the pursuer's own case, on conduct which was not directed to the pursuer. Read fairly, and in light of the pursuer's submissions, I do not consider that there is any such reliance by the pursuer. The averments made by the pursuer in respect of section 6(4) clearly address the issue of prescription both as it arises in relation to the pursuer's own case and, separately, as it arises in respect of each of the defenders' employers as a matter of contractual bar. To the extent that the pursuer has made averments about conduct directed towards: the landlord; Sweett, the employer's agent; and/or the first defender, it is clear that these are pled in support of the pursuer's case based on section 6(4) which relates to the prescription in the context of contractual bar. On this basis, there is no lack of fair notice of the pursuer's position.

[57] Second, the defenders argue that the pursuer's averments in respect of the collateral warranties granted by each of them are irrelevant essentially because the granting of these warranties pre-dates the achievement of practical completion.

[58] The defenders are undoubtedly correct that the pursuer's pleadings in respect of the collateral warranties are inconsistent with the sequence of events in which the granting of those warranties pre-dated the practical completion of the hotel (see paragraphs 12 and 13 above). In this regard, I also note that this issue was not one which was raised by either of the defenders until oral submissions were made on behalf of the defenders in the course of the debate before me.

[59] However, I do not consider that this issue materially affects the relevance of this part of the pursuer's case. In short, it is clear from the pursuer's averments that it contends that it was, as a result of the granting of the collateral warranties, induced to believe that both defenders had complied with their respective obligations and therefore refrained from making a claim. Although the warranties were granted prior to practical completion, the undertakings made by each defender to the pursuer in respect of the development related both to what they had already done and what they were yet to do in order to achieve completion.

[60] As the Lord President made clear in *Rowan Timber Supplies* (above at [36]), the wording of section 6(4) does not support the restrictive construction argued for by the defenders: the conduct relied upon by the creditor need not post-date the coming into existence of the obligation. Following the approach of the Inner House in *Rowan Timber Supplies,* it will be a matter for the pursuer to prove what in fact induced it to refrain from claiming. It would be open to the pursuer, on the basis of its averments, to prove that it was induced to believe that the cladding defects did not exist as a result of the representations

made as to both past and future conduct in the collateral warranties granted by each of the defenders. These are matters properly for proof.

[61] For completeness, I also reject the submissions, made on behalf of the defenders, that the construction of section 6(4) argued for by the pursuer and approved by the Inner House in *Rowan Timber Supplies* will have a dramatic impact on the law of prescription. First, I note that *Rowan Timber Supplies* has now been followed in a series of cases, see most recently: *Scottish Ministers* v *Scotland Gas Networks plc* [2023] CSOH 77; *Highlands and Islands Enterprise* v *Galliford Try Infrastructure Limited* [2023] CSOH 21; *Legal and General Assurance (Pensions Management) Limited* v *Halliday Fraser Munro* [2023] CSOH 81; and *Loretto Housing Association Limited* v *Cruden Building and Renewals Limited* [2019] CSOH 78. I do not consider that this construction, which flows from the plain words of section 6(4), has resulted in any dramatic change to the understanding of the law of prescription. Second, as to the principle underlying the construction of section 6(4), I respectfully agree with the analysis of Lord Harrower in *Legal and General Assurance* at paragraphs 33 and 34 (which was issued shortly after the debate I heard).

Claims by the employers

[62] In the debate before me, there was no dispute that the pursuer's claims, which were founded on the collateral warranties granted by each of the defenders, would also be subject to the same time bar which applied under, respectively, the building contract in respect of the first defender, and the appointment in respect of the second defender (*British Overseas Bank Nominees*, as at [26] above, paragraphs 14 to 16).

[63] The pursuer also accepted that the prescriptive period in terms of the building contract and appointment, respectively, would have started by 18 February 2009, being the date of practical completion of the hotel.

[64] Accordingly, for present purposes, the question is whether the pursuer has pled a relevant case in respect of either section 11(3) or section 6(4) of the 1973 Act. Again, I am satisfied that the pursuer has done so.

[65] In respect of section 11(3), the pursuer only makes the argument in relation to the claim against the first defender. The pursuer's position is that the landlord was unaware of the cladding defects until June 2017 when the property was inspected following the Grenfell Tower fire. The first defender argues that, on the factual basis upon which it proceeds, the landlord would have incurred wasted expenditure prior to practical completion and would necessarily have been aware that it had incurred such expenditure. However, that characterisation is denied by the pursuer.

[66] I do not consider that I can conclude, without hearing evidence, that the pursuer's averments made to engage section 11(3) in respect of a claim by the landlord, if proved, will necessarily fail. The pursuer contends that the payments made by the landlord under the building contract did not fall to be characterised as wasted expenditure because they were being made under and in terms of that contract. I note that none of the parties' pleadings address the nature of the landlord's expenditure in any detail. In the circumstances, without an inquiry into the facts, I am not persuaded that I ought to determine that the pursuer's position is obviously wrong (*cf Loretto Housing Association* at paragraphs 34, 35 and 54).

[67] However, even if I am wrong about that, I consider that the pursuer has pled a relevant case to engage section 6(4) in respect of both of the defenders. The criticisms advanced by the defenders were essentially pleading points.

[68] The principal argument was that the pursuer's pleadings relied on averments in respect of the claims by the landlord on conduct which was directed towards the pursuer. This was essentially the same argument with which I have already dealt above in the context of the pursuer's own claim (see paragraph 56 above). As I have noted above, I consider that the pursuer's averments are sufficiently clear: the conduct relied upon in respect of the claim by the landlord against the first defender and by the landlord and/or the first defender against the second defender, is conduct which was directed to those parties. In other words, I do not understand the pursuer to be relying upon the granting of the collateral warranties in relation to the application of section 6(4) to the claims by the employers of the defenders.

[69] The only additional argument, which was made by counsel for the first defender, was that which concerned the pursuer's use of the formulation "believed and averred" in connection with the first defender's applications for payment under the building contract (see paragraph 28 above). This argument is misconceived.

[70] It is necessary to consider the pursuer's averment: "In the circumstances, it is believed and averred that the first defender continued to apply for payments under the Building Contract." against the background of the pursuer's averments as a whole. The pursuer's averments include: the incorporation of the building contract (in Article 2) which, in turn, includes the contractual payment provisions; the practical completion of the works (in Article 11); and that the pursuer is unaware of any sums outstanding under the building contract (in Article 13). Viewed in this light, I do not consider that the pursuer's averment can be said to be irrelevant and I decline to exclude this averment from probation.

The defenders' remaining arguments

[71] Separate from their arguments in relation to prescription, both of the defenders sought dismissal of the action, which failing the exclusion of certain averments from probation on the grounds of relevancy and specification.

[72] The starting point for the second defender's arguments were the calls which the second defender had inserted in its pleadings calling upon the pursuer specifically to aver three matters:

- the respects in which it was alleged any duties were owed by it in terms of the appointment and the collateral warranty;
- the basis upon which the alleged breaches of duty were said to have caused or materially contributed to the cladding defects averred; and
- the basis upon which the pursuer had quantified the remedial scheme condescended upon and the extent to which remedial works had been carried out.

Senior counsel drew attention to the fact that although these calls had been inserted in the defences by adjustment on 5 July 2023, they had not been answered.

[73] Against this background, senior counsel recognised that advancing arguments based on a lack of specification in your opponent's pleadings was a relatively unusual occurrence in a commercial action. However, at its heart, the defenders' argument was straightforward - the pursuer failed to give fair notice of its position. Senior counsel recognised that, although never expressly overturned, pleading practice had moved on since the decision of the Inner House in *Eadie Cairns* v *Programmed Maintenance Painting Limited* 1987 SLT 777. That had been recognised by Lord Tyre in *Grier* v *Lord Advocate* 2021 SLT 371 (at paragraph 39). However Lord Tyre had also recognised that "[t]he principle,

nevertheless, remains the same: fair notice must be given by each party of the facts relied upon and of which evidence will be led".

[74] The defenders focussed, in particular, on three areas of the pursuer's case: (i) the substantive allegations of breach of contract; (ii) the question of joint and several liability; and (iii) the quantum of the claim.

Allegations of breach

[75] The defenders drew attention to the fact that the pursuer's averments set out the terms of the building contract (Article 3); the first defender's collateral warranty (Article 4); the second defender's appointment (Articles 6 and 7); the novation agreement (Article 8); the second defender's collateral warranty (Article 9); and practical completion and the lease (Article 9).

[76] In Article 12, the pursuer made averments about a series of defects which it is contended the cladding contains. These defects are collectively referred to as the "Cladding Defects". The defenders highlighted that the pursuer had not specified in respect of the majority of the defects detailed whether each of the defects arose from the fault of the first defender, the second defender or both of them. The exceptions were the defects referred to in Articles 12.7 and 12.10 but even these paragraphs specified neither the breach of which obligations was said to have caused the defect nor any other explanation.

[77] The averments of breach and causation were contained in Article 13:

> "The Cladding Defects were caused, or at least materially contributed to, by breaches of the obligations owed by the defenders to the pursuer, including without prejudice to that generality by breaches of all of the obligations of each of the defenders condescended upon above, such breaches have caused the pursuer loss and damage. But for breaches of those obligations, the Cladding Defects would not have occurred."

The defenders highlighted that it followed from these averments that the pursuer's case was that every one of the obligations referred to in the foregoing articles of condescendence had been breached and that every one of those breaches has caused the cladding defects as defined. The defenders also pointed out that these averments were not exhaustive. The "without prejudice to that generality" formulation left open the possibility that the pursuer was seeking to contend that there were other breaches not condescended upon which had caused or materially contributed to the cladding defects.

[78] When one read the earlier articles of condescendence which set out multiple diverse obligations owed by each of the defenders, in light of what was said in Article 13, it was entirely unclear both how these breaches were said to arise and how each was said to have contributed to the cladding defects.

[79] Senior counsel recognised that the pursuer referred to and incorporated two expert reports prepared by Euan Geddes of HKA. Including appendices, these two reports comprised more than 1000 pages. In this regard, senior counsel referred to Lord Macfadyen in *The Royal Bank of Scotland plc* v *Holmes* 1999 SLT 563 at 570 G-H on the particular circumstances in which it was appropriate to incorporate a lengthy document into the pleadings. However, these reports did not and, in any event, could not provide the necessary specification in respect of breaches which should be set out in the pursuer's pleadings. It was not the proper function of an expert to set out the legal basis on which a claim is being advanced.

[80] In these circumstances, the defenders were not being given fair notice of the case against them. The defenders could not, it was submitted, be expected to prepare for proof on this basis.

Joint and several liability

[81] The starting point of this part of the defenders' argument was that the pursuer convened both defenders on a joint and several basis (see first conclusion). Senior counsel for the defenders recognised that it was competent for two parties being sued under separate contracts to be convened on this basis (*Grunwald* v *Hughes and others* 1965 SLT 209). The test was whether the two defenders have contributed albeit in different ways to cause a single wrong.

[82] The short point was that the pursuer had made no averment to that effect on record. The pursuer had provided no explanation as to the interaction of the alleged breaches of each defender either cumulatively or in respect of the individual breaches detailed in Article 12. It was not sufficient for the pursuer to say, in effect, both defenders were involved in the design and construction of the cladding, there are defects in the cladding, therefore the defenders are jointly and severally liable.

Quantum

[83] The pursuer's averments in respect of quantification were set out in Article 13. The pursuer set out, at very high level, a series of remedial steps and then averred: "The pursuer's loss and damage is reasonably estimated at £5,575,243.51. That is the sum concluded for." No further specification was provided. The sum concluded for was clearly not a round number. It was said to be a "reasonable estimate" but no averments were made as to how it had been calculated. Again, the defenders' submission was that fair notice had not been given by the pursuer of its case.

[84] Drawing these three strands together, the defenders' primary submission was that the pursuer's case ought to be dismissed. In the alternative, the defenders argued that I

should refuse probation in respect of the averments in question. Senior counsel for the second defender recognised that this might seem an unattractive submission but he reminded me of the calls that had been placed on the pursuer.

[85] In the event that I was not with the defenders in respect of either submission, the defenders' final position was that the pursuer ought to be required to provide adequate specification in respect of the issues raised by the defenders.

The pursuer's response

[86] The pursuer submitted that the criticisms made by the defenders of its pleadings were without merit and should be rejected. The pursuer submitted that it had provided fair notice of its case.

[87] The approach adopted by the pursuer had been in accordance with the guidance set down in paragraph 13a of Practice Note Number 1 of 2017:

> "Pleadings in traditional form are not normally required or encouraged in a commercial action. The default position is that pleadings should be in abbreviated form. … Where the pursuer's position on any matter is contained in another document, such as a Scott Schedule or the conclusions of an expert report, it is permissible to adopt the document, or a specified part thereof, as part of the pursuer's case. Where damages are sought, a summary statement of the claim or a statement in the form of an account will normally be sufficient."

Allegations of breach

[88] In respect of the averments made in Article 13 (above at [77]), counsel for the pursuer noted first of all that the breaches which the pursuer averred had caused the cladding defects were breaches of the obligations the defenders owed to it. In other words, the pursuer relied upon breaches of the obligations owed by each of the defenders in terms of the two collateral warranties (see Articles 4 and 9).

[89] Thereafter, the pursuer submitted that the further specification sought by the defenders was to be found in the report prepared by Euan Geddes dated 13 September 2023. This report contained a table in section 2 (on page 8) which set out, in respect of each of the five types of alleged cladding defects condescended upon in Article 12, the particular clauses of the building contract and the second defender's appointment which were said to have been breached. The clauses referred to in the table had been set out in the corresponding parts of the pursuer's pleadings.

[90] Counsel accepted that the reference to "including without prejudice to that generality" in Article 13 had remained in the pleadings, in error, from the initial drafting of the summons. He also accepted that it would have been possible to make reference in the pursuer's pleadings to the particular part of Mr Geddes' report dated 13 September 2023 which was relied upon – namely section 2.

Joint and several liability

[91] In relation to the issue of the joint and several liability of the defenders, the pursuer's position was that each of the defenders had contributed, through their breaches of contract, to creating a cladding system for the hotel which was defective. The pursuer's loss was the cost of repairing the cladding.

[92] In this regard, counsel referred to the opinion of Lord Drummond Young in *Scottish Widows* (as above at [17]) at paragraphs 49 to 51. That case was analogous in that it involved a claim for the cost of repairing a defective cladding system which was claimed against separate defenders on the basis of collateral warranties. Lord Drummond Young, following *Grunwald* (see [81] above), considered that it was essential to identify the loss that the pursuer claimed to have sustained. His Lordship went on:

> "The loss in the Harmon action is the construction of a building with defective cladding, resulting in the building's not being wind and watertight. On the pursuers' averments, I am of opinion that that loss is claimed to be the result of breaches of contract by both Harmon and BDP. As in *Grunwald*, the contracts entered into by Harmon and by BDP, including the collateral warranties, are inter-related in the sense that they were granted for the purposes of the same building project."

[93] The pursuer submitted that it was in the same position as the pursuer in the Harmon action referred to by Lord Drummond Young. Its case was that both defenders, in breach of their respective obligations in the collateral warranty agreements, had caused or at least materially contributed to the cladding defects. As a result of those breaches, the pursuer had suffered a loss which was quantified as the cost of repairing the cladding system. It was not necessary for the pursuer to aver that both of the defenders had caused all of the loss claimed. It was sufficient to aver that they had each contributed in material but different ways to a single result or loss (*McGillivray* v *Davidson* 1993 SLT 693 at 695 to 696).

Quantum

[94] The pursuer's short response to this part of the defenders' argument was that it had set out the remedial works it contended were required in Article 13 and detailed the estimated cost. Nothing further was required. Counsel for the pursuer accepted that if the case were to proceed to proof, he would expect further specification to be produced in the form of an expert report.

[95] Counsel for the pursuer finally submitted that in considering the defenders' complaints of a lack of specification in the pursuer's case, it was necessary to have regard to what he characterised as a lack of engagement with the pursuer's case by each of the defenders in their own pleadings.

Reply by the defenders

[96] In reply, the defenders were prepared to accept the explanation provided by the pursuer as to the specification of the alleged breaches contained in section 2 of Mr Geddes' report dated 13 September 2023. However, the provision of this specification gave rise to further issues.

[97] When one considered the table contained in section 2 of Mr Geddes' report, it was apparent that no allegation of breach by the second defender was made in respect of the alleged defects relating to the granite cladding (see paragraph 12.9 of condescendence) one of the five cladding defects founded upon by the pursuer. Accordingly, on the pursuer's own averments, the alleged breaches by each of the defenders could be separated. However, the pursuer had made no such attempt in relation to the losses claimed and no explanation had been provided as to why it was not possible to sub-divide the sum claimed. This appeared inconsistent with the averments the pursuer made in respect of the required remedial works and undermined the pursuer's position in respect of the alleged joint and several liability of the defenders. The case of *Scottish Widows* relied upon by the pursuer turned on its own particular facts and was not of general application.

Decision

[98] Before considering the particular arguments advanced by the defenders in this case, it is perhaps helpful to remind oneself of the approach to pleadings adopted in a commercial actions. The current practice is set out in Practice Note 1 of 2017 as follows:

> "Pleadings in traditional form are not normally required or encouraged in a commercial action. The default position is that pleadings should be in abbreviated form. Provided that paragraphs 10 - 12 of this Practice Note (pre-action communication) have been complied with, parties will be aware of each other's position before the action has been commenced. The overriding requirement is one

> of fair notice: the purpose of the pleadings is to give notice of the essential elements of the case to the court and to the other parties to the action. … Where the pursuer's position on any matter is contained in another document, such as a Scott Schedule or the conclusions of an expert report, it is permissible to adopt the document, or a specified part thereof, as part of the pursuer's case. Where damages are sought, a summary statement of the claim or a statement in the form of an account will normally be sufficient." (at paragraph 13a)

It follows from the fact that the parties are neither required nor encouraged to set out their pleadings in traditional form that, as the Lord President put it in *Marine & Offshore (Scotland) Ltd* v *Hill* 2018 SLT 239 at paragraph 16, the rules applicable to averments in an ordinary action do not normally apply with the same rigour in a commercial action. However, as Lord Tyre noted in *Grier* (at [73] above) this apparent relaxation does not take away from the fundamental need to give fair notice: "[t]he principle, nevertheless, remains the same: fair notice must be given by each party of the facts relied upon and of which evidence will be led".

[99] As the passage quoted from the Practice Note above makes clear, where a party's position on any matter is contained in another document, it is permissible to incorporate that document or a part of it as part of that party's case. Clearly, where such an approach avoids repetition in the pleadings of detailed and technical information which can be more easily understood in another format – for example, a schedule or table – it is to be welcomed. In such a case, there is no question that the other parties to the action are not being given fair notice of the case against them.

[100] As Lord Macfadyen emphasised in *Royal Bank of Scotland* (as at [79] above), the question of whether the incorporation of documents into the pleadings does indeed represent a satisfactory way of providing specification will depend on the particular circumstances of the case including, obviously, both the nature of the case and the nature of the document being incorporated.

[101] Applying this approach to the first criticism made by the defenders of the pursuer's case – namely, that the pursuer had failed adequately to specify the allegations of breach upon which it founded – I am sympathetic to the defenders' position.

[102] First, considering the pursuer's pleadings on their own terms and, at this stage, setting the reports of Mr Geddes to one side, the averments in Article 13 (see above at [77]) self-evidently do not give fair notice of the particular breaches that the pursuer founds upon. Apart from anything else, this much must follow from the use by the pursuer of the formulation "including without prejudice to that generality".

[103] From that starting point, I do not consider that this lack of specification is cured by the blanket incorporation of the over one thousand pages of Mr Geddes' two reports. Leaving to one side the sheer volume of information contained in the two reports, the pursuer's positon is not assisted by the fact that it is unclear from their face how the two reports are supposed to inter-relate.

[104] However, although I consider that for these reasons there is some merit in the defenders' criticisms of the pursuer's pleadings, I have also had the benefit of the informative submissions of pursuer's counsel. In light of those submissions, I understand that the pursuer founds its case only on the breaches which are set out in the table contained in section 2 of Mr Geddes' report dated 13 September 2023. On the basis of the way the argument developed before me, I understand further that, at least as regards their first criticism, the defenders accept, in light of the submissions made on behalf of the pursuer, that adequate notice of the pursuer's case on breach has been provided.

[105] In these circumstances, I consider that either to dismiss the pursuer's case or to exclude the averments in question from probation (which in the circumstances would seem to amount to the same thing) would be entirely disproportionate and not in the interests of

justice. But I also consider that it would be of assistance both to the parties and to the court were the pursuer to clarify its pleadings to bring them into line with the submissions made at debate before the case proceeds further.

[106] As to the two remaining criticisms made by the defenders which relate to the pursuer's pleadings in respect of the basis of the defenders' joint and several liability and the quantification of the pursuer's loss, I consider that the key to both lies in the relatively undeveloped pleadings of the pursuer in respect of the repair works it contends require to be carried out and the estimated costs of those works.

[107] In respect of the issue of the defenders' joint and several liability, the pursuer argues that both defenders, in breach of their respective obligations in the collateral warranty agreements, caused or at least materially contributed to the cladding defects. As a result of those breaches, the pursuer claims that it has suffered a loss in that the cladding system was defective and required to be repaired. This being a single loss caused by or at least contributed to by both defenders, it was competent to sue the defenders on a joint and several basis in line with *Grunwald* and *Scottish Widows*. This is what the pursuer avers in Article 13 (see above at paragraph 77).

[108] On the other hand, the defenders argue that the pursuer's averred position of a single loss is inconsistent with the pursuer's position in submissions in respect of the breaches upon which it founds. The thrust of the defenders' position is to ask, insofar as the breaches upon which the pursuer founds can be identified and the remedial steps to be taken are capable of being broken down, on what basis, in the absence of any averred explanation, can the pursuer assert that what is being claimed is indeed a single loss.

[109] As such, the issue of joint and several liability links to the defenders' final criticism of the pursuer's pleadings – namely the lack of specification of the way in which the sum sued for of £5,575,243.51 has been calculated.

[110] During the course of the debate, counsel for the pursuer conceded that, were the case to proceed to a proof, further specification of the pursuer's position would be provided.

[111] Against this background, the question which I require to address is whether, in light of the present admittedly undeveloped state of the pursuer's pleadings on quantum, I can uphold either the defenders' arguments in respect of the joint and several liability or, more generally, in respect of the lack of specification.

[112] In respect of the joint and several liability argument, I do not consider that it can be concluded, at this juncture, that the pursuer's averments are irrelevant and cannot succeed. Equally, as was conceded by counsel, it is clear that some further development of the pursuer's position in respect of quantum is required before any hearing of evidence.

[113] In the circumstances, therefore, I again do not consider it appropriate either to dismiss the action or to exclude the averments in question from probation. Instead, I am minded to order the pursuer to provide further specification of the quantification of its loss. This will, in itself, address the defenders' third criticism as well as enabling the positions of all parties on the joint and several liability issue to be clarified.

Disposal

[114] In light of my decisions in respect of the matters argued before me, I reject the defenders' motions for dismissal.

[115] Given my decisions in respect of the defenders' arguments in relation to the specification of the pursuer's case (at paragraphs 105 and 113), I will put the case out by order in order that I can be addressed on further procedure in light of those decisions.

[116] I will reserve all questions of expenses meantime.