SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2018] SC GLA 61

CA93/18

JUDGMENT OF SHERIFF S REID

in the cause

VIRGIN MEDIA LIMITED

Pursuer

against

W H MALCOLM LIMITED

Defender

Act: Ms McNeill/Mr Gratwick, Addleshaw Goddard, Edinburgh
Alt: Ms McGowan, BLM, Glasgow

GLASGOW, 5th October 2018. The sheriff, having resumed consideration of the cause,

FINDS IN FACT:

(1) In or around 2000, the pursuer (or its predecessors) owned telecommunications apparatus installed in the area of Panmure Close, Glasgow ("the locus"), comprising *inter alia* approximately 100 metres of ducting lying along the full length of Panmure Close; two underground carriageway jointing chambers, an over-ground street-side cabinet and ancillary telecommunications connections and equipment ("the telecommunications apparatus").

(2) At some point thereafter, on a date or dates unknown to the pursuer, the area around Panmure Close was redeveloped.

(3) The redevelopment involved the wholesale demolition of existing blocks of flats and the construction of new houses, new footways and a new road at the locus.

(4) In the course of the redevelopment, the telecommunications apparatus at the locus was destroyed, removed and substantially damaged. Specifically, the over-ground street-side cabinet and communications connections were removed; the underground carriageway jointing chambers were substantially damaged, filled with rubble, and tarred over with asphalt; and the underground telecommunications ducting along the length of Panmure Close was cut and extensively damaged.

(5) On 14 February 2012 the pursuer first became aware of the foregoing damage to its telecommunications apparatus at the locus, when the pursuer's employee, David McLean, received a telephone call from the pursuer's contractors (Fujitsu Telecommunications) advising Mr McLean that the telecommunications apparatus at the locus had been substantially damaged and subsequently attended personally at the locus that day to inspect the damage.

(6) The pursuer's contractors had discovered the damage while carrying out work at the locus, on the instructions of the pursuer, in order to install a new business customer connection to school premises located on Panmure Street.

(7) David McLean was the first employee or agent of the pursuer to become aware of the existence of the damage to the telecommunications apparatus at the locus.

(8) No other employee or agent of the pursuer was aware of the damage to the telecommunications apparatus at the locus prior to 14 February 2012.

(9) The pursuer does not, and is not required to, carry out any regular, scheduled or *ad hoc* inspections of its telecommunications equipment.

(10) Between around 2000 and 14 February 2012, no customers of the pursuer were served by the telecommunications apparatus at the locus.

(11) Between 2000 and 14 February 2012, the pursuer had no cause to instruct any inspection of the telecommunications apparatus at the locus.

(12) Item 5/17 of process (pursuer's second inventory of productions, item 1) is a true copy of a Damage Report Form prepared by Mr McLean on 14 February 2012 following his inspection that day of the damage to the telecommunications apparatus at the locus.

(13) A system exists whereby utility and telecommunications providers (such as the pursuer) and their related contractors notify interested parties of their intention, and obtain permission, to carry out roadworks upon public roads and footpaths by electronically submitting and regularly updating a document (known as a "Road Opening Notice") to a central data-point, accessible to all other utility and telecommunications providers, and their contractors. This system is referred to as "Symology" and is operated on behalf of all the relevant local authorities in which the affected public road is located.

(14) Such Road Opening Notices alert the local authorities, and other utility and telecommunications providers, and their respective contractors, to planned and ongoing works in public roads and footpaths in the area.

(15) Such Road Opening Notices give brief, general details of *inter alia* the nature of the proposed and ongoing works, the identities of the relevant utility and contractor, the affected area, anticipated method of working (such as manual or machine excavation, depth of excavation and the like), the estimated duration, start and end dates, and ongoing progress.

(16) Prior to 3 February 2012, the pursuer had received an order from a business customer to install a telecommunications service to school premises located on Panmure Street; that order was received and processed by staff within the pursuer's Business Department; the pursuer's staff had instructed the pursuer's contractors (Fujitsu Telecommunications) to install the service by connecting the school to the pursuer's telecommunications apparatus at the locus, as the same was depicted on the pursuer's records (including, specifically, the plans forming item 5/24 & 5/6 of process: being, respectively, item 6 in the pursuer's third inventory of productions and item 6 in the pursuer's first inventory of productions); on 3 February 2012, pursuant to the pursuer's instruction, the pursuer's contractors attended in the vicinity of Panmure Close and concluded that, in order to carry out the instruction, it would be necessary to "de-silt" the pursuer's underground chambers opposite numbers 5 & 29 Panmure Close; and, to that end, on 3 February 2012, in compliance with proper practice, on behalf of the pursuer, the pursuer's contractors submitted a Road Opening Notice (reference 1311673) for the locus on 3 February 2012 ("the first Road Opening Notice").

(17) The first Road Opening Notice described the proposed work as "de-silt carriageway chamber"; it described the affected "location" as "outside 5 and 29 Panmure Close"; it described the "works type" as "minor with excavation", but described the works technique as involving "no excavation"; and it described the proposed start and estimated end dates as "6 February 2012".

(18) On 7 February 2012, the pursuer's contractors attended at Panmure Close.

(19) As at 7 February 2012, the pursuer's contractors became aware that the lids to the pursuer's underground jointing chambers, located opposite numbers 5 and 29 Panmure Close, had been tarred over with asphalt and were not readily accessible for the purpose of connecting the school premises on Panmure Street with the pursuer's telecommunications apparatus at the locus.

(20) As at 7 February 2012, the pursuer's contractors were aware that in order to de-silt the pursuer's carriageway chambers located outside numbers 5 and 29 Panmure Close, it would be necessary to carry out minor excavation to break open the tar covering the lids of the two chambers.

(21) Accordingly, the first Road Opening Notice was closed by the pursuer's contractors on 7 February 2012 at 9.27 am with no excavation or de-silt having been carried out by them.

(22) Item 5/36 of process (item 1, pursuer's fourth inventory of productions) is a true copy of the first Road Opening Notice.

(23) On 8 February 2012, the pursuer's contractors submitted a second Road Opening Notice (reference 1313944) ("the second Road Opening Notice") notifying the

local authority (and other interested parties) of their intention to carry out work at the locus.

(24) The second Road Opening Notice described the proposed work as "dig down and de-silt carriageway chamber"; it described the affected location as being outside "O/S [outside] 5 & 29 Panmure Close"; it described the works type as "remedial other" and the works technique as "hand"; and it described the dimensions of the proposed excavation (namely, to a standard depth, to a length of 1.50 metres and to a width of 1 metre).

(25) The second Road Opening Notice records the "actual start" of the works as 10 February 2012 at 9.10am, and the works being "in progress" at that point in time.

(26) Item 5/37 of process (item 2, pursuer's fourth inventory of productions) is a true copy of the second Road Opening Notice.

(27) Pursuant to the second Road Opening Notice, the pursuer's contractors continued to excavate at the locus from 10 February 2012 to 13 February 2012.

(28) On 13 February 2012, the pursuer's contractors first become aware that the pursuer's underground chambers at the locus, to which they had been seeking to gain access, no longer existed, and that the pursuer's telecommunications apparatus at the locus was materially damaged.

(29) Accordingly, on 14 February 2012, the pursuer's contractors notified the pursuer's employee, David McLean of their findings at the locus, whereupon Mr McLean attended at the site that day to inspect the damage.

(30) Item 5/4 of process comprises colour photographs taken by Mr David McLean on 14 February 2012, depicting damage to the pursuer's telecommunications apparatus at the locus.

(31) In circumstances where the lid of an underground chamber owned by the pursuer has, without the pursuer's consent, been covered with rolled asphalt by a third party, the pursuer does not always seek to recover, from the culpable third party, the cost of breaking through the asphalt to access the chamber.

FINDS IN FACT AND IN LAW:

(1) In or around 2012, the pursuer's contractors (Fujitsu Telecommunications) were not agents of the pursuer.

(2) Such knowledge as was, or could with reasonable diligence have been, attained by the pursuer's contractors, prior to 14 February 2012, as to the condition of the pursuer's telecommunications apparatus at the locus (including, for example, knowledge that the lids to the pursuer's underground chambers there had been tarred over with asphalt; knowledge that the over-ground street-side cabinet was missing; and knowledge that the underground chambers had been filled with rubble), was not imputed or attributable to the pursuer.

(3) The tarring over of the lids of the pursuer's underground chambers (opposite numbers 5 and 29 Panmure Close, Glasgow) was not sufficiently material as to constitute "damage" to the pursuer's property, for the purposes of section 11(3) of the Prescription and Limitation (Scotland) Act 1973 Act.

(4) The pursuer was not aware, and could not with reasonable diligence have become aware, prior to 14 February 2012 that loss, injury and damage caused by an act, neglect or default had been sustained by it at the locus.

FINDS IN LAW:

(1) Any obligation upon the defender to make reparation to the pursuer arising from the averred damage to the pursuer's telecommunications apparatus at the locus not having been extinguished by prescription, the pursuer's plea-in-law anent prescription should be repelled.

ACCORDINGLY, Repels the fifth plea-in-law for the defender; Assigns Wednesday 24 October 2018 at 10.15am as a case management conference before Sheriff Reid to determine further procedure in the action, said case management conference to proceed by way of telephone conference call; meantime, Reserves the issue of the expenses of the preliminary proof before answer and Appoints parties to be heard thereon at the said case management conference.

NOTE:

Summary

[1] The pursuer claims to be the owner of underground telecommunications cables, ducts, jointing chambers and a cabinet that were allegedly located along or adjacent to the carriageway opposite numbers 1 to 29 Panmure Close, Glasgow. The pursuer avers

that the telecommunications equipment was damaged at some point after 2002 or 2003 in the course of building works carried out by the defender at Panmure Close. The works involved the wholesale demolition of the existing tenements there, and the construction of new houses and access roads. The pursuer avers that it first became aware of the damage to its telecommunications equipment on 14 February 2012.

[2] All of the foregoing is in dispute.

[3] A preliminary issue of prescription has arisen. The defender avers that any obligation of the defender to make reparation to the pursuer has prescribed by virtue of section 6 of the Prescription and Limitation (Scotland) Act 1973.

[4] The action called before me at a preliminary proof before answer restricted to the issue of prescription.

[5] Having considered the evidence and submissions, I have concluded that the pursuer was not aware, and could not with reasonable diligence have become aware, of the damage to its property prior to 14 February 2012. These proceedings having commenced on 10 February 2017, the pursuer's right of action has not prescribed. Accordingly, I have repelled the defender's fifth plea-in-law anent prescription. I explain my reasoning below.

Procedural history

[6] On 10 February 2017, the initial writ was lodged and a warrant of citation granted. The action was originally directed against two defenders. The action was served upon W H Malcolm Limited on 10 February 2017.

[7] After sundry procedure, the second defender was assoilzied from the craves of the writ on 21 July 2017. The action continued against the remaining defender (W H Malcolm Ltd).

[8] On 18 August 2017, the action was remitted to the commercial roll to proceed as a commercial action.

[9] On 13 December 2017, on joint motion, parties were allowed a preliminary proof before answer restricted to the parties' averments anent the issue of prescription (as raised in the defender's fifth plea-in-law), reserving the parties' preliminary pleas meantime.

[10] On 25 & 26 June 2018, the action called before me at the preliminary proof diet, when I heard evidence and part of the pursuer's submissions. On 15 August 2018, I heard further submissions for both parties and considered the parties' written submissions. I reserved judgment.

The evidence

[11] For the pursuer, I heard testimony from one witness only, namely David McLean. No witnesses were led for the defender. A detailed joint minute of admissions was lodged (number 29 of process).

David McLean

[12] Mr McLean (44) has been employed full-time by the pursuer since around 2009. He has 19 years' experience in the telecommunications industry. Between 2008 and

2016, in his previous role as "Delivery & Compliance Engineer", he was responsible *inter alia* for dealing with damage caused to the pursuer's network by third parties. He has held his current position (as "Senior Build Engineer") for two years and retains responsibility *inter alia* to deal with damage caused to the pursuer's network by third parties.

[13] Mr McLean spoke to item 5/24 of process (item 6, pursuer's third inventory of productions). He testified that this depicted the existence and "as built" layout of the pursuer's telecommunications equipment and apparatus in the location of Panmure Street approximately 20 years ago. Mr McLean acknowledged that the telecommunications apparatus had been built before his period of employment with the pursuer. He could not say when it had been built but believed it would have been in the mid-1990s or early 2000s.

[14] He explained that, at some point thereafter, the layout of Panmure Close and the telecommunications equipment had changed significantly. In a major redevelopment of the area, buildings and footways were demolished and a new roadway and flats were built in Panmure Close. Reference was made to the plan forming item 5/6 of process (item 6, pursuer's first inventory of productions). This was said to depict the current layout of roads and buildings at Panmure Close, with the former location of the pursuer's telecommunications equipment superimposed thereon. An over-ground street-side cabinet, two underground chambers, underground ducting and connectors (called "swept T's"), as depicted on the plan, had all been removed or destroyed at some point in the preceding 20 year period.

[15] The witness testified that he first became aware of the damage to the pursuer's apparatus on 14 February 2012. On that date, he was first alerted to the existence of the damage by the pursuer's contractors (Fujitsu), and personally attended the site that day to investigate. The contractors had been on site for the purpose of connecting the pursuer's network to school premises at the opposite side of Panmure Street (not within Panmure Close). He spoke to his Damage Report Form dated 14 February 2012 (item 5/17 of process: pursuer's second inventory of productions, item 1). He spoke to the extent of the damage: an over ground cabinet was missing; two underground chambers had been destroyed, filled in and surfaced over with tar; the underground ducting beneath the carriageway had been damaged and partially removed; and the surface of the roadway had been raised, with the result that the pursuer's chambers and related equipment were found to be located substantially deeper below the surface of the new roadway than would normally be the case. Reference was made to item 5/4 of process comprising photographs of the locus taken by Mr McLean on 14 February 2012.
Mr McLean insisted that, prior to 14 February 2012, the pursuer had not been aware either that the redevelopment work at Panmure Close had been carried out or that the pursuer's telecommunications equipment there, as originally built, had been damaged or removed. The pursuer's apparatus had served flats at the locus which had since been demolished, whereas the new buildings there were all houses which had never been connected to the pursuer's apparatus. There would have been no reason for the pursuer to have become aware either of the redevelopment or of the damage unless the damage had been specifically reported to the pursuer by a third party or a customer had

contacted the pursuer to request the installation of a service. To Mr McLean's knowledge, neither had occurred. It was said this was not an unusual situation. In common with other telecommunications companies, the pursuer does not carry out any regular inspections of its equipment. Instead, the pursuer relies upon local authorities or third parties to notify the pursuer of any damage to their "street furniture" or apparatus.

[16] Mr McLean spoke to two Road Opening Notices (items 5/36 & 5/37 of process: items 1 & 2, respectively, in the pursuer's fourth inventory of productions). He conceded he was not an expert in completing or interpreting these notices but claimed to have sufficient experience to understand and speak to them in broad terms.

[17] In cross-examination, Mr McLean was questioned as to the extent of Fujitsu's authority. He confirmed that the contractor had authority on behalf of the pursuer to lodge Road Opening Notices in order to carry out a work instruction or order from the pursuer. If extra work (beyond the scope of the order) or extra expense was envisaged, then it would be normal for the contractor to seek prior approval from the instructing department within the pursuer. He confirmed that there had been no reason to check the apparatus at Panmure Close prior to February 2014.

[18] He was questioned in detail on the meaning of various entries in the Road Opening Notices (items 5/36 & 5/37 of process). Mr McLean insisted that it was not necessarily correct that the pursuer's contractor would have physically attended on site on or prior to 3 February 2012 (the date of opening of the first notice), though he conceded that "possibly a cabling crew" may have attended. The witness rejected

suggestions that the contractors would have been on site on 3 February 2012, and that they would, or could readily, have noted the "tarring over" of the chamber lids on Panmure Close and the absence of the over-ground cabinet. He eventually came to acknowledge that it was "more than likely" that Fujitsu contractors had been in the vicinity prior to 3 February 2012, that they had lifted a chamber lid, had noted that spoil was in it, and that it needed to be "de-silted"; but he surmised that this would have been the underground chamber at the junction of Panmure Close and Westercommon Road (not either of the chambers in Panmure Close itself). Moreover, he opined that the reference to "chamber" in item 5/36 of process (the first Road Opening Notice) would also be a reference to the accessible chamber at the junction of Panmure Close and Westercommon Road (and not to either of the blocked chambers formerly within Panmure Close).

[19] Reference was made to items 5/9 & 6/3 of process comprising, respectively, a Google image and a Google map. The witness did not know who had created the former document. He disputed that either he or his colleagues within the pursuer would have known, as at 2008, that damage had occurred to the pursuer's property.

[20] He was questioned as to the practices of telecommunications contractors of ordinary competence, specifically whether such contractors would have inspected the whole of Panmure Close prior to submitting the first and second Road Opening Notices; and whether such contractors would have notified their clients of the "tarring over" of the chambers there or the absence of the over-ground cabinet. Mr McLean insisted that the contractors would not have entered Panmure Close.

[21] Mr McLean interpreted the first Road Opening Notice as having been "closed down" quickly, and offered explanations as to why this may have happened (including, for example, that the relevant crew may have been redeployed elsewhere at short notice). He spoke to the meaning of various terms on the notices: "works type", "minor with excavation", "remedial other". He insisted that the wrong "works type" description must have been used in the second Road Opening Notice. Mr McLean acknowledged that the second Road Opening Notice dated 8 February 2012 would have been submitted after a cabling crew had attended the site and reported back that the chamber required to be de-silted.

[22] The witness acknowledged that normally a contractor would submit an invoice for carrying out a "de-silt" of a chamber; that a contractor would normally seek prior approval from the pursuer for that kind of work; but that sometimes "de-silts" were carried out free of charge by the contractors. Much depended on the nature and urgency of the job.

[23] Mr McLean testified that the apparatus had been installed by the pursuer's predecessor (CableTel) in the late 1990s (or early 2000s) but was inherited by the pursuer in 2007. There had been no reason to check it since as there were no live customers or orders for the service in the intervening period. There had been no reports of damage from local authority roads inspectors or members of the public. From 2008 onwards, Mr McLean was the person responsible to receive any such reports – and none had been received.

[24] In re-examination, the witness stated that it was not always clear whether prior approval was needed by the contractor to carry out a "de-silt" of a chamber. In any event, he testified that a request by a contractor to de-silt a chamber would "not necessarily" have alerted the pursuer to any material damage to the network, because silting can occur naturally for reasons not attributable to any fault. He opined that the tarring-over of a chamber lid would not be regarded by the pursuer as material damage. Sometimes the pursuer did not seek to recoup such expense. Road Opening Notices were logged electronically and were susceptible to change as time passed.

[25] The witness was referred to a copy letter dated 31 May 2017 bearing to be from the Scottish Road Works Commissioner to the pursuer's agents. Evidence on this document was heard under reservation.

[26] In supplementary cross-examination by the pursuer's agent (to address new matters raised in re-examination) the witness was further questioned regarding his expertise in interpreting Road Opening Notices and his actual knowledge of the content of the documents. He confirmed he merely had a working knowledge of such documents and the process for logging them.

Joint minute of admissions

[27] A lengthy joint minute of admissions was agreed, tendered and lodged in process (item 29).

Closing submissions

The pursuer's closing submissions

[28] Detailed written closing submissions, and accompanying lists of authorities, were lodged on behalf of both parties. These documents were very useful. I am indebted to both agents for the hard work invested in drafting them.

[29] I shall not rehearse the closing submissions in full. In summary, the pursuer invited me to accept the testimony of Mr McLean, in conjunction with the joint minute, and to conclude that the pursuer was not, and could not with reasonable diligence have been, aware of the damage to its property prior to 14 February 2012.

[30] To the extent that, prior to 14 February 2012, the pursuer's contractors may have been aware, or could with reasonable diligence have been aware, of the damage to the pursuer's property, it was submitted that the contractors' knowledge was not properly to be imputed to the pursuer because the contractors were not, in law, agents of the pursuer. In any event, it was said that such knowledge as the contractors attained prior to 14 February 2012 did not amount to knowledge of material damage to the pursuer's property. Accordingly, section 11(3) of the 1973 Act was said to apply; the earliest date upon which the pursuer became, or could with reasonable diligence have become, aware of the damage was 14 February 2012; and, therefore, the pursuer's claim had not prescribed. I was invited to repel the defender's plea-in-law number 5 and to assign a further case management conference to determine further procedure.

The defender's closing submissions

[31] Again, I shall not repeat the full terms of the defender's written closing submissions. In summary, firstly, I was invited to conclude that the pursuer had failed to lead any evidence to prove when both *damnum* and *injuria* had occurred, with the result that the claim must fail. Secondly, in the alternative, if sufficient evidence had been led as to the date on which both *damnum* and *injuria* had occurred, I was invited to conclude that the pursuer had failed to discharge the onus of proof upon it to prove that it was not aware, and could not with reasonable diligence have become aware, that loss, injury and damage had occurred prior to 10 February 2012. I was invited to sustain the defender's fifth plea-in-law and to grant decree of absolvitor in favour of the defender.

Discussion

The law

[32] In Scots law, certain specific, defined obligations are extinguished if they have subsisted for a continuous period of five years without any relevant claim having been made in relation to the obligation, and without the subsistence of the obligation having been relevantly acknowledged, during that period. The obligations to which this short (five year) negative prescription applies are defined in schedule 1 to the Prescription and Limitation (Scotland) Act 1973.

[33] One of the obligations to which the five year prescriptive period applies is "any obligation arising from liability (whether arising from any enactment or from any rule of law) to make reparation" (1973 Act, schedule 1, paragraph 1(d)). The basic rule is that if

such an obligation has subsisted for five years after the date when it became enforceable ("the appropriate date"), without a relevant claim having been made or the subsistence of the obligation having been relevantly acknowledged, then that obligation is extinguished as from the end of that five year period.

[34] When does an obligation to make reparation become enforceable? The answer is found in section 11 of the 1973 Act. It provides, in short, that any obligation to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded, for the purposes of section 6 of the 1973 Act, as having become enforceable on the date when the loss, injury or damage "occurred" (section 11(1), 1973 Act).

[35] Pausing there, the statutory provision that the five year prescriptive clock begins to run from the date when the loss, injury or damage "occurred" (section 11(1), 1973 Act) may cause injustice in circumstances where the claimant (or creditor in the obligation) was not actually aware that the loss, injury or damage had occurred. That is because in theory a creditor might find that the prescriptive clock had been ticking, and his right to enforce an obligation to make reparation had prescribed, long before the creditor even became aware of the existence of the obligation.

[36] To address that perceived potential injustice, section 11(3) of the 1973 Act postpones the starting date for the operation of the five year prescriptive period in certain circumstances. Section 11(3) states, so far as material:

> "In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for

> the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware".

So, under section 11(3) of the 1973 Act, it is open to a creditor to seek to postpone the appropriate date (i.e. the date of commencement of the prescriptive period) to the date on which the creditor first became aware, or could with reasonable diligence have become aware, of the relevant loss, injury or damage. Broadly speaking, the purpose of section 11(3) is mitigatory in nature, to seek to ensure that the creditor in an obligation does not lose his claim before he even knows of its existence (*Johnston*, Prescription and Limitation, paragraph 6.87).

[37] Section 11(3) of the 1973 Act is concerned with the awareness of the creditor. Awareness takes two forms: actual knowledge and constructive knowledge. In other words, the issues to be determined are (i) when the creditor was actually aware of the necessary matters and (ii) when, with reasonable diligence, the creditor could have become so aware.

[38] For the prescriptive clock to start ticking, the creditor does not have to know that he has a legal right of action; he does not have to know the factual cause of the loss, injury or damage; he does not even have to know the identity of the wrongdoer (*David T Morrison & Co Ltd* v *ICL Plastics Ltd* 2014 SC 222). It is sufficient to start the prescriptive period running (in cases involving physical damage to property) that the creditor is aware, actually or constructively, that his property has been damaged; or (in cases not involving physical damage to property) that the creditor is aware, actually or constructively, that he has suffered a detriment in the sense that something has gone

awry rendering the creditor poorer or otherwise at a disadvantage, such as that he has not obtained something which he had sought, or that he has incurred expenditure (*Gordon & Others as Trustees of the Inter Vivos Trust of the late William Strathdee Gordon* v *Campbell Riddell Breeze Paterson LLP* 2017 UK SC 75 at paragraph 21).

[39] Section 11(3) says nothing about the burden of proof. However, it is generally accepted that the onus is on the creditor who contends for a particular later starting date to demonstrate that he was not, and could not have been, aware of the material facts until that later date (*Pelagic Freezing (Scotland) Ltd* v *Lovie Construction Ltd & Grontmij Group Ltd* [2010] CSOH 145 at paragraphs [109] to [110]). That seems logical and fair as the facts on which that contention would have to be based are peculiarly within the creditor's knowledge. It also accords with the ordinary rule of statutory interpretation that a party relying upon an exception to a general statutory rule must bring himself within that exception (*Johnston, supra*, paragraph 6.88).

[40] In this action, the pursuer seeks to invoke section 11(3) of the 1973 Act, in order to postpone the start date of the five year prescriptive period. To do so, the onus lies on the pursuer to prove that it first became aware, and could with reasonable diligence only have become aware, of the loss, injury and damage no earlier than 14 February 2012. (It will be recalled that the action commenced on 10 February 2017.)

Evidence allowed under reservation

[41] In the course of re-examination of Mr McLean, the pursuer's agent sought to elicit evidence of the contents of a letter dated 31 May 2007 bearing to be from the

Scottish Roads Works Commissioner to a firm of solicitors. Objection was taken to the leading of this evidence on two grounds: (i) the letter had not been raised in cross-examination and (ii) the witness (Mr McLean) was not able to speak to the terms of the letter as he was neither the author nor the recipient. I allowed the evidence under reservation of all issues of competency and relevancy.

[42] The objection having been insisted upon, and having considered parties' submissions, I have sustained the defender's objection.

[43] I have reached that conclusion for the following reasons. Firstly, the document (number 5/18 of process; item 2 on the pursuer's second inventory of productions) is merely a photocopy of an original document. It does not bear to be the original document. Mr McLean did not testify to having ever seen the original; he did not testify that the document lodged in process was a true copy of the original; and the document did not have the benefit of a docquet, in terms of section 6 of the Civil Evidence (Scotland) Act 1988, certifying that it was a true copy of the original. Accordingly, the document is not the best evidence and falls to be excluded from probation (*Japan Leasing (Europe) plc* v *Weir's Trustee (No 2)* 1998 SC 543*)*.

[44] Secondly, even if the copy document lodged in process was capable of being treated as equivalent to the principal, Mr McLean was unable to testify to its provenance. He was neither the author nor the recipient of the document; the letter was neither sent nor received on his behalf; and he had no involvement in, or knowledge of, the circumstances or instruction surrounding the sending or receipt of the letter. He was no better qualified to introduce the document into evidence than a member of the public

viewing the proceedings from the public gallery. Merely reading the terms of a letter that he had neither sent nor received, and to the provenance of which he was unable to speak, did not have effect of allowing the content of that document to be received in evidence.

[45] Thirdly, the attempted introduction of the letter in the course of re-examination was not competent. The letter had not been referred to in examination-in-chief. The letter had not been referred to in cross-examination. The subject-matter of the letter (namely the content and meaning of the Road Opening Notices) had been extensively ventilated in examination-in-chief; the letter (which had been timeously lodged as a production) was relevant to those issues; the letter could readily have been introduced in the course of that examination-in-chief; but, in the event, it was not so introduced. In my judgment, it was too late to seek to do so in the course of re-examination, long after the pursuer had "set out its stall" in examination-in-chief, and after the defender had completed its cross-examination on that stall. The evidence sought to be elicited was not truly evidence pertaining to a *new* issue emerging only in cross-examination.

[46] For the foregoing reasons, I sustained the defender's objection and disallowed the evidence anent the letter dated 31 May 2007 (item 5/18 of process).

Assessment of the testimony of Mr McLean

[47] In many respects, Mr McLean was an unsatisfactory witness. He persistently sought to speak to matters which, by his own admission, were not within his knowledge. He persistently sought to present as fact matters that were plainly nothing

more than speculation and conjecture by him. Despite repeated encouragement and, ultimately, admonition from me to take care to distinguish in his testimony those issues which fell within his knowledge and those issues upon which he was merely speculating, the witness persistently blurred the distinction between the two. Certain aspects of his testimony were internally inconsistent and contradictory; he often doggedly refused to concede the obvious; and, on several occasions, my clear impression was that he was overly-defensive and revisionist in his approach to the interpretation of the documentation, seeking to read in glosses that were not justified.

[48] In the course of a very able cross-examination, the reliability of large tranches of his evidence was significantly undermined.

[49] However, notwithstanding these significant weaknesses in certain aspects of his testimony, I concluded that on the critical issues (namely whether the pursuer was, and could with reasonable diligence have become, aware of the loss, injury and damage prior to 14 February 2012) the evidence of Mr McLean was sufficient in quality, credibility and reliability to discharge the onus of proof upon the pursuer.

[50] I accepted Mr McLean's essential testimony that he first became aware of the loss of and damage to the pursuer's apparatus at Panmure Close on 14 February 2012, when he received a telephone call from the pursuer's contractors to that effect; that this was the first occasion on which such information had been brought to the knowledge of any employee or agent of the pursuer; and that the pursuer could not, with reasonable diligence, have become aware of such loss or damage any earlier.

[51] While I concluded that the pursuer's contractors had indeed acquired a certain degree of knowledge (of the existence of damage to the pursuer's property) a little earlier than 14 February 2012, I am satisfied (i) that they did not have such knowledge, and could not with reasonable diligence have had such knowledge, prior to 10 February 2012, (ii) that such knowledge as they did have, prior to 10 February 2012, was limited to the fact that the lids to the pursuer's two underground chambers opposite numbers 5 & 29 Panmure Close had been tarred over with asphalt; but that this did not amount to damage of sufficient materiality or significance to constitute "damage" for the purpose of section 11(3) of the 1973 Act; and (iii) in any event, even if, prior to 14 February 2012, the contractors did have knowledge or awareness of material damage to the pursuer's property, that knowledge or awareness was, in law, not capable of being imputed or attributed to the pursuer prior to 14 February 2012. I explain my reasoning below.

The key disputed issues

[52] I identified the key disputed issues as follows: (i) what was known by the pursuer and its contractors, and when; (ii) is the knowledge of the pursuer's contractors to be imputed to the pursuer; and (iii) to what extent was certain damage material?

What exactly was known, when, and by whom?

[53] Firstly, I accepted as credible and reliable the testimony of Mr McLean that he first became aware of damage to the pursuer's telecommunications apparatus on 14 February 2012. His recollection on the sequence of events leading up to his

attendance at the locus, in response to a telephone call to him from the pursuer's contractors that morning, was clear and precise. It was also consistent with the terms of his contemporaneous written report dated 14 February 2012 (item 5/1 of process). Although, as I have explained above, Mr McLean's testimony began to go off the rails when he sought to interpret the Road Opening Notices, I am satisfied that on the preliminary issues of the extent and timing of his awareness of the damage, his testimony is to be accepted.

[54] Secondly, I am satisfied that Mr McLean was the first person within the pursuer's organisation to acquire such knowledge. I reach that conclusion for a number of reasons. In the first place, it was Mr McLean who had specific responsibility to deal with instances of third party damage to the pursuer's network, by receiving notification of such damage, by investigating the circumstances, and by processing any claims arising therefrom. That specific responsibility had formed an important part of Mr McLean's job description since 2008/2009, when he was first employed by the pursuer. Mr McLean struck me as someone who took this responsibility seriously. I was satisfied that if he had known of the existence of the damage earlier, or if it had been recorded on the pursuer's systems, he would have acted upon that information sooner. In the second place, Mr McLean's role in this respect was well-known. He had exercised that function for a lengthy period. The pursuer's contractors, in particular, were aware of Mr McLean's responsibility to receive notification of any such damage. They knew that he was the person to whom they should report any third party damage to the pursuer's equipment; and, of course, that is what they did in the present case. I

was satisfied that if this damage had been known of at an earlier date, it would have been reported to Mr McLean (at least after 2008/2009).

[55] Another way of looking at this is to apply the presumption *omnia rite et solemniter acta praesumuntur.* This rebuttable presumption of law is to the effect that "everything is done validly and in accordance with the necessary formalities" (*Walker & Walker, The Law of Evidence in Scotland* (4th ed.), 2015, paragraph 3.6.1). Mr McLean testified that he was the person within the pursuer's organisation to whom any reports of third party damage to the pursuer's network should be made. In that context, if another employee within the pursuer's organisation had indeed obtained knowledge or awareness of the existence of damage to the pursuer's apparatus prior to 14 February 2012, it can properly be presumed that, in accordance with the administrative arrangements within the pursuer's business, that information would have been reported to Mr McLean.

[56] Thirdly, I am satisfied on the evidence that the pursuer could not, with reasonable diligence, have become aware of the existence of the damage at the locus prior to 14 February 2012. Again, Mr McLean's testimony, which I accepted as credible and reliable, was that, in common with other telecommunications providers, the pursuer did not operate any system of regular inspection of its telecommunications apparatus; and that the pursuer relied upon reports or notifications from, principally, local roads authorities to alert the pursuer to the existence of any hazards attributable to their telecommunications equipment. In my judgment, the absence of a system of regular inspection cannot be criticised. The bulk of the pursuer's apparatus was underground and was therefore largely protected from the risk of damage. There was no evidence

that any other telecommunications provider operated a system of regular inspection of its telecommunications apparatus. As for the locus itself, Mr McLean's testimony, which I accepted, was that the pursuer (and its predecessors) had had no customers in that area for many years. That was said not to be an unusual situation. Therefore, there had been no need for the pursuer to attend at the locus at all or to inspect the equipment there. For these reasons, I was satisfied that the pursuer could not, with reasonable diligence, have become aware of the existence of the damage to its telecommunications apparatus at the locus sooner than 14 February 2012 (when the pursuer was finally notified of the existence of the damage by its contractors).

[57] Fourthly, we then come to the most difficult aspect of the case. This concerns the knowledge, not of the pursuer, but of the pursuer's *contractors.* (The separate issue of the extent to which the *contractors*' knowledge or awareness of the damage should be imputed to the pursuer is dealt with later.)

[58] What exactly did the pursuer's contractors know prior to 14 February 2012? In his testimony, Mr McLean asserted that the contractors only became aware of the damage to the pursuer's property on 14 February 2012. In this specific respect, I rejected Mr McLean's evidence as unreliable because (i) it was inconsistent with the natural inferences from terms of the Road Opening Notices (items 5/36 & 5/37 of process) and (ii) it was difficult to reconcile with the extent of the "hand" excavation work depicted in his own photographs (item 5/4 of process).

[59] Instead, in my judgment (i) the contractors knew, as at 7 February 2014, that the surface lids to the pursuer's two underground chambers (located opposite numbers 5 &

29 Panmure Close) had been tarred over with asphalt; and (ii) the contractors knew, as at 14 February 2012, that the two underground chambers and underground cabling in Panmure Close had been destroyed and extensively damaged. For the reasons more fully explained below, neither of these factual conclusions leads to the extinction of the defender's obligation by operation of prescription.

[60] To explain, Mr McLean testified that the contractors had been instructed by a Business Services Department within the company to connect the pursuer's network to new school premises located on Panmure Street (which is on the other side of the road from Panmure Close). Mr McLean testified that the pursuer's staff (within its Business Services Department) and the pursuer's contractors would have identified the pursuer's apparatus as shown on the original plan (item 5/24 of process); they would have assumed that the school premises could be connected to the pursuer's apparatus by "pulling a cable through", first to the underground chamber located at the junction of Panmure Close and Westercommon Road, then to the chambers within Panmure Close (see the chambers located on item 5/24 of process). Given the passage of time since the pursuer's apparatus at this locus had been used for the purposes of a live connection, Mr McLean testified that it would not have been unusual for the underground carriageway chambers to require "de-silting" to remove debris and built-up "muck", in preparation for "pulling a cable through" and making a new connection to the school premises. In all these respects, I accepted Mr McLean's testimony. It was consistent with the terms of the first Road Opening Notice (item 5/36 of process), lodged on 3 February 2012, which described the proposed works as being to "de-silt carriageway chamber"

and that the location was "outside 5 & 29 Panmure Close". (Although the Notice refers to "carriageway chamber" (singular), I interpret the notice as referring to two chambers, namely the chamber opposite number 5 and the chamber opposite number 29 Panmure Close. That is consistent with the fact that there were, in fact, two chambers; two chambers were represented on the original "as built" plan (item 5/24 of process) from which both the pursuer and the contractors were working as at 3 February 2012; and the Notice identifies the location as being "outside" two *specific* addresses on the street, which addresses happen to correspond to the location of both chambers.) Crucially, that first Road Opening Notice is predicated upon the logical assumption that the underground chambers themselves were intact and still functioning. That is the logical inference from the lodging of the Notice. There would have been no point in seeking to "de-silt" a chamber that was known, or suspected, not to exist at all; or to de-silt a chamber in which the ducting was known, or suspected, to have been destroyed. It is also significant that the first Road Opening Notice contains no dimensions of the proposed "excavation" (the works type being described as "Minor with Excavation"). The length and width of the excavation is stated as zero, with the depth being stated as "NOEXC" (which Mr McLean interpreted as meaning "no excavation"). Viewed in context, the first Road Opening Notice supports the inference that, as at 3 February 2012, in submitting the Notice, the pursuer's contractors were working merely from the plans; that they were not aware, at that point, of any damage to the telecommunications apparatus at the locus; and that they anticipated gaining relatively easy, routine access

to extant functioning carriageway chambers for the purpose of cleaning them in preparation for establishing the new customer connection.

[61] But the position changed slightly on 7 February 2012.

[62] According to the first Road Opening Notice, the proposed works thereunder were intended to start on 6 February 2012. In the event, according to the Notice, the works commenced as at 7 February 2012 at 9.26 am. The Notice then records that the works "closed" just one minute later on 7 February 2012 at 9.27am, with no excavation having been carried out. (Mr McLean testified that that the further abbreviation "NOX" (appearing under the heading "Site status" on the first Road Opening Notice) also meant "no excavation".)

[63] The inference I draw is that the contractors' workmen did indeed attend site on the morning of 7 February 2012; they discovered that the two chambers on Panmure Close had, in fact, been tarred over with asphalt; and, as a result, the proposed de-silting of those chambers could not proceed. I am fortified in that conclusion by the fact that the following day a second Road Opening Notice (dated 8 February 2012) was submitted by the contractors which describes the proposed works as "*dig down* and de-silt carriageway chamber" (my emphasis) at the very same location ("O/S [*outside*] 5 & 29 Panmure Close". On this occasion, in contrast with the first Road Opening Notice, the second Road Opening Notice gave precise dimensions of the intended excavation, namely an excavation with a length of 1.5 metres, a width of 1 metre and a depth described as "STD" (which Mr McLean translated as meaning "standard)". In my judgment, the plain inference is that the pursuer's contractors, having attended at the

locus on 7 February 2012, realised for the first time that the chamber lids on Panmure Close had been tarred over.

[64] I rejected Mr McLean's firmly-held view that the pursuer's contractors had never attended site on 7 February 2012, but had instead been called away to another job. This was merely a supposition on his part. Besides, it was a supposition that did not sit comfortably with the terms of the second Road Opening Notice lodged the very next day.

[65] So, by 7 February 2012 the pursuer's *contractors* were aware that the chamber lids outside numbers 5 & 29 Panmure Close had been tarred over with asphalt and that they required to "dig down" to gain access to those chambers.

[66] However, for the same reasons as are explained above (at paragraph [60]), I also infer that, as at 7 February 2012, the pursuers' contractors still did *not* know, and could *not* with reasonable diligence have known, that the underground chambers themselves (or any of the cabling therein) had been damaged or removed. That could not have been known until the surface had been broken, and the excavation carried out. That conclusion is both logical and consistent with the evidence. The second Road Opening Notice records an intention to "de-silt" the two chambers from which, again, I infer that the contractors were in fact still proceeding in the belief that the chambers themselves remained intact and functioning, albeit the lids were tarred over. This inference is consistent with Mr McLean's own testimony to the effect that the mere tarring over of a chamber lid with asphalt does not necessarily imply that the chamber underneath is damaged. The chamber lid would normally have sat at, or very slightly below, road

level, whereas the chamber itself would be located a further (standard) distance beneath the level of the roadway; the mere tarring over of the lid would not normally involve the addition of any substantial depth, still less would it normally involve any damage to the underlying chamber; and all that was required to gain access to the (now concealed) underground chamber was a relatively minor excavation through a shallow layer of rolled asphalt.

[67] Thereafter, the second Road Opening Notice bears to record that the works thereunder commenced on the morning of 10 February 2012. This can be seen from the entry on that day and at that time that the "works status" had "changed" from "proposed works" to "in progress". A further entry on the Notice also records the "actual start" as being 9.10am on 10 February 2012. The second Notice records that the works remained "in progress" thereafter (indeed, the status remains as "in progress" right up to 20 February 2012). The inference I draw from this documentary evidence is that the excavation started on 10 February 2012, and it continued for several days until 14 February 2012 when the contractors finally discovered the true condition of the underground chambers. Having reached that stage of awareness, they contacted Mr McLean immediately. That inference is consistent with Mr McLean's evidence that one of the significant discoveries at the locus was that the chambers were located at a significantly greater depth below the surface of the road than was expected. The road surface had been "built up", with the result that the contractors had required to dig down much deeper than the "standard" depth to locate both chambers. When one considers that the second Road Opening Notice describe the "works technique" as being

carried out by "hand", it is perhaps unsurprising that it took several days of manual work (from 10 to 14 February) for the contractors to dig down deep enough finally to locate the concealed chambers. The photographs of the excavations (item 5/4 of process) also give a corroborative (albeit impressionistic) flavour of the substantial extent of the work that required to be carried out by the contractors to locate the concealed underground chambers.

[68] Taking all of this evidence together, I infer that, having commenced the excavation work on the morning of 10 February 2012 (as recorded on the second Notice), the work continued over several days until 14 February 2012, before it could fairly be said that the contractors had acquired "awareness" of the material damage to the pursuer's property (that is, of the effective destruction of the underground chambers and ducting). In the period from 10 to 14 February 2012, the contractors were merely carrying out routine works (to dig down and de-silt two chambers) in the belief that the chambers and ducting were extant and functioning. It was only at the end of that period that it can fairly be said that their routine work had come to a halt, and that they had acquired "awareness" of the damage to the underground chambers and apparatus. No doubt, over the course of those few days commencing on the morning of 10 February 2012, it might be said that the contractors' confidence in their initial "belief" as to the existence of the chambers had gradually faded, to be replaced perhaps with a growing suspicion that the chambers might well have been destroyed; but it would be arbitrary and unjust merely to select a random date (sometime between 10 and 14 February 2012) at which to attribute "awareness" to the contractors of such damage. Instead, in my

judgment, adopting a pragmatic broad-brush approach, the proper conclusion on the evidence is that, in the period from 10 to 14 February 2012, the pursuer's contractors were indeed merely carrying out routine works to access two underground chambers, in the genuine belief that the chambers and equipment were extant, undamaged and within reach; but that, by 14 February 2012, those routine works ended, coinciding with the contractors having attained "awareness" of the true extent of the damage to the pursuer's property. There is no proper evidential basis to conclude that the contractors could or should have worked any faster or reached their conclusion any sooner.

[69] Accordingly, in my judgment, the contractors first became aware, and could with reasonable diligence only have become aware, of the damage to the pursuer's property on 14 February 2012. This happens also to be the date on which the contractors first notified the pursuer of the damage.

Is the contractors' knowledge (prior to 14 February 2012) to be imputed to the pursuer?

[70] A critical point of dispute in the present case is whether the contractors' knowledge or "awareness", prior to 14 February 2012, is to be imputed to the pursuer. In my judgment the answer is no.

[71] Section 11(3) addresses the state of knowledge of "the creditor". Two types of knowledge are involved: actual and constructive. The section requires an enquiry into the actual knowledge of the creditor (what did the creditor actually know) and the constructive knowledge of the creditor (what could the creditor have known if reasonable diligence had been exercised).

[72] There is nothing in the subsection to say that the knowledge (actual or constructive) of the pursuer's agent, guardian or legal representative should be imputed to the creditor. However, as a matter of general principle this must be the case (*Johnston,* Prescription and Limitation, paragraph 6.89). The general rule *qui facit per alium facit per se* would apply, to the effect that a person who acts through an agent is treated as acting in person. Besides, ordinary canons of statutory construction suggest that references to a person in legislation are usually taken to include that person's authorised agent (*Bennion*, Statutory Interpretation (5th Ed) section 351). The ordinary rule according to the law of agency is that the actual awareness of an agent is imputed to the principal where the agent acquired the knowledge within the scope of his authority to act (*Bowstead on Agency* (19th ed.) paragraph 8.204).

[73] However, there is no such rule in relation to a mere contractor. An independent contractor is not an agent. There is no rule that the knowledge acquired by an independent contractor in the course of carrying out the service for which he has been contracted is to be imputed to the employer. I was referred to no authority to vouch such a proposition.

[74] In the present case, there was no evidence that the pursuer's "contractors" were, in law, also agents. Rather, Mr McLean's evidence, which I accepted, was to the opposite effect. Fujitsu, an entirely separate company, was merely an independent contractor to whom the manual service of installing customer connections had been contracted. While certain special categories of "independent contractor" might also fairly be

regarded as an "agent" (the most obvious example being a solicitor), I did not regard Fujitsu as being in an analogous position.

[75] The circumstances of *Stewart Milne Westhill Limited* v *Halliday Fraser Munro* [2016] SCOH 76 were also distinguishable. In that case, the employer and the contractor were companies within the same group, with shared directors, with the result that the knowledge acquired by one company (the contractor) in the group was capable of being imputed to another company (the employer), by virtue of the shared directorship.

[76] Accordingly, in my judgment the actual and constructive knowledge of the independent contractor (Fujitsu) prior to 14 February 2012 cannot, in law, be imputed to the employer (the pursuer). Therefore, even if Fujitsu had been fully aware (or even if it could, with reasonable diligence have become aware) prior to 14 February 2012, that all or any of the pursuer's property at the locus had been damaged, that knowledge is not capable of being imputed to the pursuer, because Fujitsu (as an independent contractor) was not an "agent" of the pursuer.

[76] Even if I am wrong in that conclusion, and if, as a matter of law, the contractors' knowledge prior to 14 February 2012 can be imputed to the employer (the pursuer), nevertheless I have concluded, as a matter of fact, that the pursuer's actual and constructive knowledge prior to 14 February 2012 was rather limited. Specifically, I have concluded (for the reasons explained above) (i) that the contractors first became aware, on 7 February 2012, that the surface lids to the pursuer's two underground chambers (located opposite numbers 5 & 29 Panmure Close) had been tarred over with asphalt; and (ii) that the contractors first became aware, on 14 February 2012, that the two

underground chambers and underground cabling in Panmure Close had been extensively damaged.

[77] The second finding-in-fact (i.e. finding (ii), above) does not assist the defender in advancing its prescription plea.

[78] In contrast, the first finding-in-fact (i.e. finding (i), above) may appear to do so. However, I consider that the contractors' knowledge of even that particular damage (to the pursuer's chamber lids) did not trigger the commencement of the prescriptive period, because the damage was not sufficiently material in the circumstances. I explain my reasoning below.

The chamber lids: Was the damage material?

[79] The short negative prescriptive period begins to run only when a creditor has sustained loss, injury or damage that is material (as opposed to merely negligible, insignificant or trivial damage). By extension, for the purposes of section 11(3) of the 1973 Act, it seems appropriate that the creditor's awareness of "loss, injury or damage" should also be interpreted as meaning "material" loss, injury or damage (as opposed to merely negligible, insignificant or trivial damage). This was the approach adopted by Lord Docherty in *Huntaven Properties Limited* v *Hunter Construction (Aberdeen) Limited & Anor* [2017] CSOH 57 where he stated (at paragraphs [45] to [46]):

> "In my opinion the issue is whether the defects apparent in September 2009 represented material, as opposed to mere negligible, insignificant or trivial, damage…… [T]his issue involves questions of fact and degree which are not free from difficulty."

This also appears to be how the Scottish Law Commission understands the law to stand at present, but the Commission has recommended that, for the sake of clarity, both sections 11(1) & 11(3) should be amended to state expressly that (i) for the purposes of section 11(1) of the 1973 Act, the loss, injury or damage must be material before the prescriptive time limit starts to run and (ii) for the purposes of section 11(3) of the 1973 Act, before the prescriptive period begins to run, the creditor should be aware that he has sustained material loss, injury or damage (*Scottish Law Commission Discussion Paper (No. 160)*, paragraphs 5.8 to 5.23).

[80] The decision in S*tewart Milne Westhill Limited* v *Halliday Fraser Munro* [2016] CSOH 76 (again of Lord Docherty) also supports this conclusion. In *Stewart Milne*, office building works were certified as practically complete in September 2008. In December 2008 there was some water ingress into a sub-floor of the south wing of the office. Some investigations and remedial works were carried out, but without the cause being established. In October and November 2009, there was further, more extensive, water ingress at the same location. Specialist investigations revealed defects in the tanking and extensive remedial works were carried out. Court action commenced in September 2014, more than five years after practical completion, more than five years after the (initial) 2008 water ingress, but less than five years after the (second) 2009 water ingress. Lord Docherty concluded that *injuria* and *damnum* had coincided at practical completion, but that the damage was latent at that stage. The start of the prescriptive period was postponed to the date when the pursuer became aware, or could with reasonable diligence have become aware, of the loss, injury and damage. Lord Docherty

concluded that the (first) 2008 incident of water ingress (in 2008) was relatively minor on any view (including objectively); that the pursuers' contractors had classified it as akin to a snagging item; and, in the absence of any evidence as to how much the remedial works cost and who ultimately paid for them, it was a reasonable inference that their cost was met by the contractor (not the creditor).

[81] In the present case, Mr McLean's explicit testimony was that the mere tarring over of the chamber lids was not material damage; it would not necessarily have resulted in any claim being made by the pursuer against a third party; it was not normally a difficult operation to break through the asphalt (indeed the reference to digging down by "hand" in the second Road Opening Notice is consistent with the relatively minor nature of the work involved); and Mr McLean's evidence was to the effect that it was not uncommon for the cost to be borne by the pursuer, in order that a customer installation was not delayed.

[82] On the basis of the foregoing evidence, I conclude that the mere tarring over of the two chamber lids, while it may properly be regarded as damage in a general sense, was not sufficiently material in nature and extent as to constitute "damage" for the purposes of (and to trigger the commencement of the prescriptive period in terms of) section 11(3) of the 1973 Act.

[83] Accordingly, even if the pursuer had been aware (actually or constructively) of that damage to the chamber lids on or prior to 10 February 2012 (which, I conclude it was not), and even if the contractor's knowledge of that damage can be imputed to the pursuer (which, again I conclude it cannot), it would not constitute damage of sufficient

materiality to trigger the commencement of the prescriptive period under section 11(3) of the 1973 Act.

The overground street-side cabinet

[84] Separately, the defender's agent placed much weight upon the contractors' presumed awareness of the missing overground street-side cabinet or box (the location of which is depicted by a triangle marked "B" on the original "as built" plan of the locus: item 5/24 of process). It was said for the defender that the pursuer's contractors must have been aware (or ought, with reasonable diligence, to have become aware) that that cabinet was missing by at least 7 February 2012.

[85] I am not persuaded that the pursuer had actual or constructive knowledge of the missing street-side cabinet as at 7 February 2012. That is because, in the context of the work that was being carried out by the pursuer's contractors, the overground street-side cabinet was not the focus of their attention at that time. It was neither relevant nor significant. Rather, the contractors' attention was focused upon gaining access to the underground chambers (at the junction with Westercommon Road, and within Panmure Close itself) in order to pull a cable through from those chambers to connect the pursuer's apparatus with the school premises on Panmure Street. There was no evidence to the effect that it was necessary for there to be any connection with the cabinet itself. My understanding was that the purpose of the cabinet was to divide and distribute sub-connections from the pursuer's apparatus into the individual residences within the flatted dwelling houses formerly located on Panmure Close. Indeed, it was only when

Mr McLean arrived at the scene to carry out a full inspection on 14 February 2012 that he identified the absence of the cabinet in his fuller audit of the missing and damaged apparatus.

[86] If I am wrong in that understanding, and if the pursuer's apparatus did indeed require to be connected to the overground cabinet (for the purpose of making the new connection to the school premises), then I would acknowledge that, as at 7 February 2012, the pursuer's contractors must have known (or ought with reasonable diligence to have known) that the street-side cabinet was missing. It was plainly marked with a triangle and letter "B" on the "as built" plan that was available to the contractors (item 5/24: item 6, pursuer's second inventory of productions); and it was, equally plainly, no longer in existence as at 7 February 2012 when the pursuer's contractors were on site, because the new housing development had been built upon it. However, this actual or constructive knowledge of the pursuer's *contractors* as at 7 February 2012 is not, in law, imputed to the pursuer, for the reasons discussed earlier.

[87] Lastly, if I am wrong in each of the foregoing conclusions then, in contrast to the position concerning the tarring over of the chamber lids, I would acknowledge that the loss of the street-side cabinet would have been regarded by me as material damage, triggering the commencement of the prescriptive period for the purposes of section 11(3) on 7 February 2012.

[88] However, my primary conclusions are that the prescriptive period did not commence on 7 February 2012 because (i) the contractors were not, and could not with reasonable diligence have become aware of the absence of the cabinet prior to 14

February 2012 (when Mr McLean carried out his full audit of the extent of the damage), because the cabinet was not relevant or significant to the separate connection work that was being carried out by the contractors at the locus; and, in any event, (ii) the contractors' actual or constructive knowledge of the missing cabinet as at 7 February 2012 is not, in law, capable of being imputed to the pursuer because Fujitsu were merely independent contractors, and not agents.

Conclusion

[89] For the foregoing reasons, in my judgment the pursuer first became aware (and could with reasonable diligence only have become aware) on 14 February 2012 that it had sustained (material) loss and damage, for the purposes of section 11(3) of the 1973 Act. That awareness triggered the start of the five year prescriptive period applicable to the defender's alleged obligation to make reparation. Since the present proceedings commenced on 10 February 2017, the defender's alleged obligation to make reparation has not been extinguished by operation of prescription.

[90] Accordingly, I shall repel the defender's fifth plea-in-law and assign a case management conference to determine further procedure. I shall reserve the issue of expenses meantime for discussion at that further hearing.