OUTER HOUSE, COURT OF SESSION

[2018] CSOH 64

A498/13

OPINION OF LORD DOHERTY

In the cause

HAMID KHOSROWPOUR (AP)

Pursuer

against

JAMES STEWART TAYLOR

Defender

Pursuer: D H McLean; Thorley Stephenson SSC
Defender: Brown; BLM

15 June 2018

Introduction

[1] In 1989 the defender was one of two partners in a firm of solicitors, Coutts & Palfrey. The other partner retired in 1992, but the defender carried on as a sole practitioner using the firm name until 2001.

[2] The pursuer avers that in about 1989 he agreed orally with his mother-in-law ("M") that he would provide her with the funds to purchase her council house ("the house") from the City of Glasgow Council. M proposed to exercise her statutory right under the Housing (Scotland) Act 1987 to buy the house at a discounted price. She was entitled to the

maximum discount. The pursuer avers that it was a term of the agreement that when M died the house would be left to him.

[3] The pursuer consulted the defender with a view to documentation being prepared to give effect to the agreement. He says that the defender did not advise him that he and M ought to conclude a binding written agreement which incorporated what had been agreed informally; that he did not draft such an agreement for them to execute; that he advised that M should execute a will containing a bequest of the house to the pursuer; and that he also advised that M should grant the pursuer a standard security over the house.

[4] The pursuer provided M with £8,000, being the discounted purchase price of £7,200 and £800 for legal fees and expenses. The pursuer avers that M executed a will ("the first will") which the defender prepared, and that the terms of that will included a bequest of the house to the pursuer. On 14 November 1991 M executed a standard security over the house "in security of all sums due or which may become due" to the pursuer.

[5] Years later the pursuer and his wife separated, and eventually they were divorced. On 24 January 2003, some years before the divorce, M executed a second will. The second will revoked all prior testamentary writings. Clause THREE contained a pecuniary legacy of £7,200 to the pursuer's former wife and it declared "that this sum is to represent her contribution to the purchase of my former council house". Clause FOUR directed that the whole residue of M's estate "including the sale proceeds of my dwellinghouse" (the house) should be paid to such of her three children as should survive her. M died on 15 February 2012.

[6] The pursuer avers that M's executor has offered to pay him £22,000, representing the £8,000 he advanced and interest. He avers that he has no option but to accept that offer as the informal agreement did not bind M and her estate. The backdrop to those averments

is that an action by the pursuer against M's executor seeking damages for breach of that agreement was dismissed by the Inner House in July 2016 (see *Khosrowpour* v *MacKay's Executor* [2016] CSIH 50, reversing [2014] CSOH 175).

[7] In this action the pursuer seeks damages from the defender. He avers that the defender was in breach of contractual and delictual duties to exercise reasonable skill and care on the pursuer's behalf in respect of advice and other services which he provided or failed to provide in connection with the agreement between the pursuer and M.

[8] The case came before me for a procedure roll debate at the defender's instance. The debate had been sought on the grounds that (i) the action is incompetent because it seeks to recover a debt owed by the dissolved partnership from only one of the partners without first constituting the debt against all the relevant partners of the dissolved partnership; (ii) any obligation the defender may have had to make reparation to the pursuer has been extinguished by the operation of prescription; (iii) the pursuer's averments relating to breach of contract and negligence are irrelevant and lacking in specification. However, counsel were agreed that issue (iii) ought not to be canvassed at the debate. In the event that the action was not dismissed on grounds (i) or (ii) the case should be put out by order to enable the pursuer to seek leave to reformulate his pleadings to meet the relevancy criticisms.

Competency

Counsel for the defender's submissions

[9] Mr Brown submitted that the pursuer's contract was with the firm. In order to constitute a debt against a dissolved partnership all partners at the time of the alleged breach had to be called as defenders provided they were within the jurisdiction of the court

when the action was raised. It was incompetent to seek to convene only one of two liable partners. Reference was made to *Bell's Principles*, section 356; Miller, *The Law of Partnership in Scotland* (2nd ed), at page 156; *Snodgrass* v *Hair* (1846) 8D 390, per Lord Justice Clerk Hope at page 396; *Muir* v *Cullet* (1862) 24D 1119, per Lord Justice Clerk Inglis at pages 1122, 1124; *McNaught* v *Milligan* (1885) 13 R 366, per Lord President Inglis at page 369, Lord Mure at page 369 and Lord Shand at page 369; *Mair* v *Wood* 1948 SC 83, per Lord President Cooper at page 86 and Lord Keith at page 89; *Trustees of the Scottish Solicitors Staff Pension Fund* v *Marshall Ross & Munro* [2018] CSOH 1, per Lady Wolffe at paragraphs 91-92.

[10] While it was true that the pursuer also has a delictual case, and it was conceded that that aspect of the case was competently brought against the defender, it would be odd if that circumstance permitted the pursuer to circumvent the need to constitute the contractual case against both partners of the dissolved partnership.

Counsel for the pursuer's submissions

[11] Mr McLean submitted that the defender had not been chosen at random by the pursuer. He was the actual wrongdoer. It was accepted that the pursuer's contract had been with the firm, and that it had been the firm which had been bound by the express and implied terms of that contract. However, the firm had delegated its obligations under the contract to the defender as its agent. He was directly liable to the pursuer - *qua* agent of the firm - for the firm's breach of contract. Reference was made to the Partnership Act 1890, section 10; Miller, *The Law of Partnership in Scotland, supra,* pages 311-312; *Kirkintilloch Equitable Co-operative Society* v *Livingstone* 1972 SC 111, per Lord Thomson at page 114, Lord President Clyde at pages 117-118, and Lord Cameron at pages 118-119. It was suggested that the rule in *McNaught* v *Milligan* only applies where a firm has not delegated a

particular duty to a partner. There had been no such delegation in that case or in *Trustees of the Scottish Solicitors Staff Pension Fund* v *Marshall Ross & Munro.* In any case the pursuer directed both contractual and delictual cases against the defender. Those cases were largely co-extensive. The defender did not suggest that the delictual case needed to be constituted against both former partners of the dissolved firm. In those circumstances even if, strictly speaking, the contractual case should have been, it would be highly artificial to ignore the realities of the parallel claims. The pragmatic course would be to allow both claims to proceed to proof before answer.

Decision and reasons

[12] It is common ground that the pursuer's contract was with the firm. It was the firm that engaged with the pursuer, and, *ex hypothesi* of the pursuer's averments, it was the firm which breached the express and implied terms of that contract.

[13] The firm's liability for those breaches was primary. Even if, as the pursuer contends, the correct analysis is that the defender acted as the agent of the firm in respect of the legal services which the firm provided to the pursuer, any breaches of contract were the firm's breaches. The liabilities of the defender and of his co-partner in respect of those breaches are merely accessory to the firm's liability (Partnership Act 1890, section 9). Section 10 is concerned soley with the firm's liability in delict and *quasi*-delict (Miller, *The Law of Partnership in Scotland, supra,* pages 314, 316, 346-347).

[14] If the firm had been in existence liability for its breach of contract would have to have been constituted against the firm. As the firm has been dissolved, liability has to be constituted against all of the relevant former partners. The authorities upon which counsel for the pursuer relies are clear on both those matters. In that regard reference may also be

made to *Neilson* v *Wilson* (1890) 17 R 608, per Lord President Inglis at pages 612 -613 and Lord Shand at page 618; and to *Jones Sewing Machine Company Limited* v *Smart,* 21 January 1987, unreported, Sheriff Principal Caplan QC (as he then was) at pages 2-4 (which decision is within the collection of bound unreported sheriff court decisions in the Advocates Library). However, here the pursuer seeks to recover damages for the firm's breach of contract by convening only one of the dissolved firm's former partners. In my opinion he is not entitled to do that. The position may have been different if it had been averred that it was not possible to convene the other partner (or his estate), but there is no suggestion that that is the case here.

[15] On the other hand the defender personally owed delictual duties of care to the pursuer. He has primary liability for breaches of those duties, and he may be sued for damages in respect of them. There was no need to convene the other partner in order to constitute that delictual liability against the former firm. Any liability of the former firm and of the other partner in respect of the defender's delict or quasi-delict would have been vicarious (Partnership Act 1890, sections 10 and 12).

[16] It follows that I agree with counsel for the defender that the action is incompetent in so far as the pursuer seeks damages from the defender for breach of contract. Another way of looking at the matter is that since any breaches of contract were breaches by the firm, the pursuer's averments of breaches of contract on the part of the defender are irrelevant. Either way, I am satisfied that this aspect of the case ought not to proceed to inquiry. Contrary to counsel for the pursuer's contention the claims are not co-extensive. Even if they were, the fact that the pursuer's delictual claim may be habile for inquiry is not a good reason for allowing an ill-founded contractual claim to proceed.

Prescription

The statutory provisions

[17] Sections 7 and 11 of the Prescription and Limitation (Scotland) Act 1973 provide:

"**7.— Extinction of obligations by prescriptive periods of twenty years.**

(1) If, after the date when any obligation to which this section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years—

(a) without any relevant claim having been made in relation to the obligation, and

(b) without the subsistence of the obligation having been relevantly acknowledged,

then as from the expiration of that period the obligation shall be extinguished:

....

(2) This section applies to an obligation of any kind (including an obligation to which section 6 of this Act applies), not being an obligation to which section 22A of this Act applies or an obligation specified in Schedule 3 to this Act as an imprescriptible obligation or an obligation to make reparation in respect of personal injuries within the meaning of Part II of this Act or in respect of the death of any person as a result of such injuries.

...

11.— Obligations to make reparation.

(1) Subject to subsections (2) and (3) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) 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 this Act as having become enforceable on the date when the loss, injury or damage occurred.

(2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased.

(3) 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.
>
> (4) Subsections (1) and (2) above (with the omission of any reference therein to subsection (3) above) shall have effect for the purposes of section 7 of this Act as they have effect for the purposes of section 6 of this Act."

Counsel for the defender's submissions

[18] Mr Brown submitted that the pursuer's averments of breach of contract and negligence were ill-focussed and of doubtful relevancy, but for the purposes of the debate the defender was prepared to proceed on the basis that the pursuer may be in a position to amend his pleadings to aver (i) that the defender ought to have advised the pursuer to conclude a binding written agreement with M that the house would be bequeathed to him on her death, and to have advised him that M's obligations under the agreement should be secured by a standard security over the house; (ii) that on receipt of that advice the pursuer would have instructed the firm to prepare those documents; and (iii) that M would have executed them.

[19] Any obligation the defender may have had to make reparation to the pursuer has been extinguished by the long negative prescription. Time began to run when there was the concurrence of *injuria* and *damnum*: Prescription and Limitation (Scotland) Act 1973, section 7 and section 11(4); *Dunlop* v *McGowans* 1980 SC (HL) 73, per Lord Keith of Kinkel at page 81; *David T Morrison & Co Ltd t/a Gael Home Interiors v ICL Plastics Ltd* 2014 SC (UKSC) 222, per Lord Reed JSC at paragraph 11. The action had not been raised until 10 September 2013. There had been concurrence of *injuria* and *damnum* more than 20 years before that date.

[20] The *injuria* occurred when the defender was negligent in 1989. *Damnum* occurred as soon as the pursuer provided the £8,000 to M. Alternatively, even if there was a continuing act, neglect or default during the period between then and the execution of the standard security on 14 November 1991, *damnum* would be deemed to have occurred on the date when the act, neglect or default ceased in 1991 (section 7 and section 11(2),(4)).

[21] Since the agreement remained informal and unenforceable, M did not bind herself to leave the house to the pursuer when she died. Notwithstanding that, M did make testamentary provision in his favour in the first will. Subsequently, she also granted the "all sums due" standard security. M was at liberty to revoke the first will at any time. The rights which the pursuer obtained at the time of the advance were less valuable than those he would have obtained had the defender duly performed his contractual and delictual duties. The pursuer suffered material *damnum* at that stage. As a matter of objective ascertainable fact a loss was suffered at that time. Reference was made to *Gordon's Trustees* v *Campbell Riddell Breeze Paterson* 2017 SLT 1287, per Lord Hodge JSC at paragraphs 19 and 22; *Osborne & Hunter Ltd* v *Hardie Caldwell* 1999 SLT 153, per Lord Justice Clerk Cullen at page 156D-E; *McLaren Murdoch & Hamilton Ltd* v *The Abercromby Motor Group Ltd* 2003 SCLR 323, per Lord Drummond Young at paragraph 34; *Santander UK plc* v *Allied Surveyors Scotland plc* [2011] CSOH 13, per Temporary Judge Wise QC (as she then was) at paragraphs 34-40; Johnston, *Prescription and Limitation* (2nd ed), paragraphs 4.36-4.39; *Beard* v *Beveridge, Herd & Sandilands WS* 1990 SLT 609, per Lord Cameron of Lochbroom at pages 611B-612C (cf *MacDonald-Haig* v *MacNeill & Critchley* 2004 SLT (Sh Ct) 75, per Sheriff Principal Sir S S T Young, BT, QC at paragraphs 24-37). It was irrelevant that the pursuer's loss might have been reversed had M not revoked the first will prior to her death, or had she decided to revoke the second will but made further testamentary provision for

the house to be left to the pursuer: *Jackson* v *Clydesdale Bank Plc* 2003 SLT 273, per Lord Eassie at paragraphs 21–29.

Counsel for the pursuer's submissions

[22] Mr McLean submitted that prior to the execution of the second will in 2003 the pursuer had not suffered *damnum.* Before then any loss which he had suffered had been merely "prospective" or "contingent". The law was correctly stated in Johnston, *supra*, at paragraph 4.45:

> "... There are two possible views: that prescription runs from the date when loss is realised, and that it runs from the earlier date of entry into the transaction complained of. The view that loss is sustained at the date of the transaction may be justifiable on the facts, provided that: (1) the loss is material; (2) the loss is certain or only to be avoided if some extraneous factor intervenes; and (3) the loss is not speculative, prospective, contingent or deferred. If these conditions are not met the loss will arise at a later date."

[23] An important feature of the present case was that the agreement between the pursuer and M was not a commercial agreement but an agreement between members of a family. The scenario here was similar to that in *Fitzpatrick* v *Pendreich & Co & Another*, an unreported Outer House decision of Lord Clyde dated 19 June 1986 where there had also been an informal agreement between family members. In that case the defender, a solicitor, failed in 1972 to take steps to see that the pursuer obtained a legally enforceable right to purchase (at a favourable price) his siblings' *pro indiviso* shares in a house. Lord Clyde proceeded on the basis that *damnum* did not occur before 1974 or 1975 because until then the parties might have been prepared to give effect to the informal agreement. The same approach should be followed here. It was not until 2003 that M decided not to abide by the agreement. Until then no material loss occurred. The court could not conclude at this stage, before inquiry

into the facts, that there had been *damnum* more than 20 years before the action was raised, and that the obligation to make reparation had therefore prescribed.

Decision and reasons

[24] The obligation to make reparation upon which the pursuer founds is an obligation to which section 7 applies. The obligation became enforceable on the date when loss, injury and damage occurred (section 11(1) and 11(4)) unless as a result of a continuing act, neglect or default the loss etc occurred before the cessation of the act, neglect or default, in which case *damnum* is deemed to have occurred on the date the act, neglect or default ceased (section 11(2); *David T Morrison & Co Ltd t/a Gael Home Interiors* v *ICL Plastics Ltd*, *supra*, per Lord Reed at paragraph 12).

[25] Accordingly, subject to section 11(2), the general rule is that the obligation to make reparation in respect of the alleged act, neglect or default becomes enforceable on the date of the concurrence of *injuria* and *damnum* (section 11(1) of the 1973 Act; *Dunlop* v *McGowans*, *supra,* per Lord Keith of Kinkel at page 81; *David T Morrison & Co. Ltd* v *ICL Plastics Ltd, supra*, per Lord Reed at paragraph 11; *Gordon's Trustees* v *Campbell Riddell Breeze Paterson, supra,* per Lord Hodge at paragraphs 14-19). In *Gordon's Trustees* Lord Hodge explained (paragraph 19):

> "In s.11(1) the phrase 'loss, injury or damage'... is a reference to the existence of physical damage or financial loss as an objective fact ...
>
> Thus if, as a result of a breach of contract, a person purchases defective goods, incurs expenditure or fails to regain possession of his or her property when he or she wishes to do so, the s. 11(1) clock starts when the person acquires the goods, the expenditure is incurred or when the person fails to obtain vacant possession of the property."

[26] In my opinion it is clear that Lord Hodge was not making an exhaustive statement of the circumstances in which loss, injury or damage might occur. Rather, he was providing examples to illustrate the principles he was elucidating. It is not difficult to think of other instances which could have been used, eg where as a result of a breach of contract or duty by a professional a client ends up with less in the way of rights than he would have had but for the breach. *Beard* v *Beveridge, Herd & Sandilands, WS* is an example of such a case. There the defenders, solicitors acting on behalf of a landlord, negligently failed to give effect to the pursuers' instructions to include an enforceable rent review clause in a long lease of commercial property which they were asked to prepare. The defenders argued that no *damnum* occurred until the rent review date because it was possible at that date that the tenant might agree to the rent being reviewed. Lord Cameron of Lochbroom rejected that contention. He held that the pursuers suffered *damnum* as soon as the lease was executed. It seems to have been common ground that rental levels had risen between the commencement of the lease and the review date. It does not appear to have been disputed that had the lease included an effective rent review clause its value to the landlords at the time of execution would have been greater than its value without such a clause (see pages 610F-G, 610L, 611F-G). Other cases (all of which were are discussed in Johnston, *supra*, paragraph 4.44 to which I was referred) where the decisions and reasoning have been to similar effect are *J G Martin Plant Hire Ltd* v *Bannatyne Kirkwood France & Co* 1996 SC 105; *Stewart* v *J M Hodge & Sons*, unreported, 17 December 1995, Lord Coulsfield; *Monaghan* v *Buchanan* [2010] CSOH 69; and *Jackson* v *Clydesdale Bank*, *supra.* Some of the discussion of their Lordships in *Law Society* v *Sephton & Co* [2006] 2 AC 543 (dealing with the analogous question of when plaintiffs first suffered damage for the purposes of limitation) is also

persuasive in the present context: see Lord Hoffman at paragraphs 21-22; Lord Walker of Gestingthorpe at paragraphs 43-48; and Lord Mance at paragraphs 67-70.

[27] The essence of the pursuer's case is that the defender ought to have embodied the informal agreement between the pursuer and M in a legally enforceable written agreement. Had the defender done so M would have duly performed her obligations or, if she did not, her estate would have been liable in damages for her breach of the agreement. While the pursuer averred (article 10 of Condescendence) that the pursuer had not suffered *damnum* until M's death in 2012, and that if *damnum* occurred before then it did not occur until the second will was executed in 2003, Mr McLean did not seek to support the later date.

[28] In my opinion, on a proper analysis the pursuer suffered *damnum* immediately he parted with the £8,000. In my view it is self-evident that what he got in return for that payment was less than he ought to have got had the defender duly performed his duties. Instead of M being bound to leave the house to the pursuer when she died, she was free to transfer it to anyone she chose during her lifetime or to make any testamentary provision she wished in respect of it. At worst for the pursuer he would have been entitled to damages if M died without making the agreed testamentary provision. Instead, all that he had was a precarious expectancy which could be defeated at any time.

[29] I am not persuaded otherwise by the fact that the informal agreement was reached between mother-in-law and son-in-law rather than between commercial actors. The pursuer instructed the defender's firm to put the agreement on a proper legal footing so that M would be bound by it and he would not be merely reliant on her honouring an otherwise unenforceable obligation. Nor do I think that the decision or reasoning in *Fitzpatrick* v *Pendreich & Co & Another* are of any real assistance to the pursuer. In that case the pursuer's mother died in 1968 leaving a house, Hayfield, to the pursuer, his brother and his sister,

subject to a liferent in favour of their father. The three children were appointed trustees on their mother's estate. The pursuer averred that in 1970 an informal agreement was reached with his father, his brother and his sister whereby the one-third *pro indiviso* shares of his brother and sister would be conveyed to the pursuer for £3,250 and the father would reside with the pursuer at the house. He further averred that in about 1972 the defender undertook to do the necessary conveyancing to give effect to the agreement, that he failed to advise that the agreement be incorporated in binding missives, and that the house was not conveyed to the pursuer by the trustees. By 1 April 1975 it was clear that the father was no longer prepared to abide by the informal agreement. He died in 1980. The pursuer's sister insisted that the house be sold and that the proceeds be divided between the children. In 1983 the pursuer agreed to purchase the one-third *pro indiviso* shares of his siblings for £7,000 each. In September 1984 he sued the defender for damages. The defender maintained that any obligation to make reparation had been extinguished by operation of the short negative prescription. Following a procedure roll debate Lord Clyde sustained the defender's plea of prescription and dismissed the action. A salient feature of the case was that it was sufficient for the defender to show that *damnum* had occurred before September 1979. The defender did not have to demonstrate (and he did not seek to demonstrate) that *damnum* had occurred in 1972. He maintained that *damnum* and *injuria* concurred when he lost the opportunity of securing a formal agreement, and that that had happened in 1974 or at the latest by April 1975. The defender's position was that no loss occurred until the father's death in 1980 because, it was said, up until that time it remained possible that the other parties to the informal agreement would give effect to it. That was how battle lines were drawn. The issue which arises sharply in the present case was not a matter of contention in *Fitzpatrick*, and Lord Clyde did not have the benefit of being addressed on it. Moreover, in so far as

there was a live dispute as to the date *damnum* first occurred, Lord Clyde rejected the pursuer's contention that no loss occurred right up to 1980 because it remained possible that the brother and sister might have decided to convey their shares to the pursuer at the price agreed in 1970:

> "... But whether or not the brother and sister would have been prepared to convey their shares during the years up to 1980 seems to me to be irrelevant. The agreement which the pursuer founds upon ... and the formalisation of which is the basis of his case of fault ... is the agreement between the four parties including the father. If the brother and sister were by themselves prepared to convey their shares to the pursuer that would be by a different agreement than that involving the father which is the subject matter of the action. The pursuer does not make any case related to another agreement simply between himself and his brother and sister about the conveyance of the latter's interests in Hayfield ... In the course of his submission counsel for the pursuer claimed that it was not until 1980 that the pursuer sustained any loss ... He submitted that it was still possible for the agreement to be honoured up until 1980 and while that was still possible there was no loss. That approach however as it seems to me confuses the occurrence of damnum with the quantification of damages. It might be that notwithstanding the absence of an enforceable obligation the sister and brother would have agreed to sell their interest at the executory valuation. But that would only have gone to reduce the amount of the damages. What the pursuer complains about is the absence of such an obligation and that obligation could only have been secured when all four parties to the arrangement were still willing that it should proceed ..." (pages 9-10).
>
> "The final submission by counsel for the pursuer was to the effect that his loss occurred in 1980 when he put the matter to the test and found that he had to pay more than he would have paid had the agreement been honoured. Until then, so counsel submitted, the pursuer only had a potential loss. Only then did a quantifiable loss emerge. Counsel for the defender was in my view correct in pointing out that this approach could not stand with the decision in Dunlop v McGowan (sic) and in particular Lord Russell's speech at page 78/79 of the report. It [i.e. the approach] acknowledges a loss existing prior to 1980, albeit 'potential', but nevertheless constituting the harm suffered by the alleged breaches of duty and contract ... From the pursuer's averments and from the letters which were admitted as having been written I take the view that the pursuer's loss had occurred by at the latest April 1975." (pages 11-12).

[30] In the present case, in my opinion, on the hypothesis that the defender was indeed in breach of his contractual and delictual duties in 1989, the pursuer sustained an immediate actual loss. The rights which he obtained were not as valuable as they would have been had

the defender duly performed his duties. That loss was actual, not merely contingent or potential. *Prima facie* it occurred in 1989. Alternatively, in the event that the defender's act, neglect or default was a continuing one which continued until November 1991, that actual loss is deemed to have occurred at that time (section 11(2)). In my view the possibility that M might subsequently have agreed to enter into a binding contract, or might have maintained the first will as her testamentary provision until her death, ought not to lead to any different conclusion. We know, of course, with the benefit of hindsight, that neither of these possibilities came to pass and that, *ex hypothesi* of the pursuer's averments, the defender's breach was in fact causative of the pursuer's loss (*cf Gordon's Trustees* v *Campbell Riddell Breeze Paterson, supra,* per Lord Hodge at paragraph 24, page 1293D-E). It would be odd if the existence of possibilities of that nature suspended the running of the prescriptive period. I am not persuaded that they should. It seems to me they are, to use Johnston's terminology, extraneous factors. As Lord Eassie concluded in *Jackson* v *Clydesdale Bank Plc, supra,* at paragraphs 25 and 28:

> "[25] The cases of *Fitzpatrick* and *Beard* appear to me to exemplify that where a transaction is concluded (or its conclusion is omitted) in circumstances involving negligence or *iniuria* and productive of immediate loss, the possibility of voluntary steps being taken by a third party to remedy, cancel or mitigate the amount of the loss will not on that account delay the starting point for the running of time for the purposes of prescription. I would add that, seen from one perspective, the decision of the court in *Forster* v *Outred* is in accordance with that view. As was pointed out by the majority of the judges in the High Court of Australia in *Wardley*, the court in *Forster* v *Outred* considered that by mortgaging her property in security of her son's debts the plaintiff suffered immediate loss on the straightforward view that an unencumbered property was inherently more valuable than one which was encumbered by a security right. The fact that the diminution in value might be removed if the son were to pay off the creditor holding the security right did not therefore suspend the running of time.
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> ...
>
> [28] ... [O]ne reverts to the issue whether, loss having been sustained, the point in time for the running of the prescriptive period may be suspended for so long as there is the possibility of the wrongdoer's procuring reversal of the loss. In my opinion the answer to that question must be in the negative..."

I respectfully agree. I also note that in *Kusz* v *Buchanan Burton* 2010 SCLR 27 the First Division observed (paragraph 20 of the Opinion of the Court delivered by Lord President Hamilton) that it was not difficult to see that a loss in *Jackson* had occurred at the outset.

[31] In the circumstances I see no point in reserving determination of the prescription plea and allowing inquiry into the facts. On the hypothesis upon which the pursuer proceeds it is clear in my opinion that there was the concurrence of *injuria* and *damnum* more than 20 years before the action was raised, and that the obligation to make reparation upon which the pursuer founds was extinguished by the operation of the long negative prescription.

[32] In *David T Morrison & Co. Ltd* v *ICL Plastics Ltd, supra*, at paragraph 54, Lord Neuberger of Abbotsbury PSC succinctly summarised the competing interests involved in imposing prescription and limitation periods:

> "54. ... The imposition of prescription and limitation periods inevitably involve (sic) balancing competing public and individual interests. In particular, it involves balancing the public interest in valid claims being litigated and legal wrongs being righted with the public interest in claims not lingering over the heads of potential defenders and claims not being difficult to dispose of justly due to their antiquity. Similarly, it is an area which throws up another, familiar, tension: on the one hand, it is desirable to have general and clear rules about limitation, even if they occasionally appear to produce a harsh result; on the other hand, it is sometimes appropriate to have specific exceptions to avoid too many unfairnesses..."

Similarly, the Scottish Law Commission observed in its recent *Report on Prescription* (no 247) at paragraph 4.9:

> "4.9 ... [W]here time runs from the date of the damage, it is quite possible for a long period to pass without the prescriptive period even starting to run. That is capable of undermining one of the principal rationales of prescription, namely that after a certain period a defender should be able to arrange his or her affairs on the assumption that the risk of litigation has passed. That rationale is based upon considerations of general fairness, as well as the practical consideration that with the passage of time witnesses may no longer be available and documentary evidence may be lost."

The outcome in the present case does not strike me as being in any way a harsh result. The action was raised 24 years after the defender carried out his initial work and almost 22 years after he drafted the standard security. The terms of section 7 are very favourable to pursuers. Few other jurisdictions are as generous in that regard (see Scottish Law Commission, *Discussions Paper on Prescription* (no 160), paragraphs 6.6-6.12 for a brief review of some comparative material). More commonly, legal systems provide that their long-stop period should run from the date of the act or omission. In Report no 247 the Commission recommended that, for obligations to pay damages in respect of loss, injury or damage caused by an act or omission, the 20 year period should commence on the date of the act or omission giving rise to the claim (paragraph 4.14, recommendation 11; and Draft Bill, section 8). The Prescription (Scotland) Bill was introduced to the Scottish Parliament as a Scottish Government Bill in February 2018 and it is currently at stage 1. Section 8 if enacted would substitute the following provision for section 11(4) of the 1973 Act:

> "(4) For the purposes of section 7 of this Act, any obligation referred to in subsection (1) of this section is to be regarded as having become enforceable on –
>
> (a) the date on which the act or omission occurred (or the last such date, where there was more than one act or omission), or
>
> (b) where the act or omission was a continuing one, the date on which it ceased."

If the proposed new regime had applied to the obligation upon which the pursuer founds, the obligation would have been extinguished.

[33] Finally, I note that counsel for the pursuer did not suggest that a partner's accessory obligation in respect of a firm debt or obligation only becomes enforceable for the purposes of the running of the prescriptive period once the debt or obligation had been constituted against the firm. Since there was no constitution of the debt against the firm before the

expiry of the prescriptive period, that argument would not have assisted the pursuer. In any case, while I have not had the benefit of the matter having been canvassed during submissions, and it would not be right in those circumstances to express a definite conclusion, I incline to the view that the premise of any such argument would have been unfounded. Some support for the premise may be found in the decision and (fairly brief) reasoning in *Highland Engineering Ltd* v *Anderson & Anr* 1979 SLT 122, per Lord Grieve at pp 123-124, but the commentary by Johnston, *supra,* at para 4.08 seems more compelling (see also the doubts expressed in the Law Commission and the Scottish Law Commission's Joint Report on Partnership Law (no 192), at para 7.69). As Johnston observes (at p 66):

> "It seems that *Highland Engineering Ltd* may conflate two things: the question whether an action can be raised and the question of execution of a decree. So far as the first is concerned, it is clear that there must be an obligation in existence before an action can be raised against the firm and its partners. That need not await constitution of a debt against the firm, so there is no reason why the running of the prescription against individual partners should be postponed. So far as execution is concerned, partners are liable to be charged in relation to the debts of the firm only once a decree has been obtained against it.[31]"
>
> [31]Partnership Act 1890, s. 4(2)

Disposal

[34] Since I am satisfied that the obligation upon which the pursuer founds has been extinguished by the operation of prescription I shall repel the pursuer's third plea-in-law, sustain the defender's first plea-in-law and pronounce decree of absolvitor.

[35] In those circumstances no further action is required to give effect to my decision on the competency point. However, had I been persuaded that the issue of prescription was not capable of being disposed of without inquiry into the facts, I would put the case out by order to discuss the terms of an appropriate interlocutor to give effect to my decision on the competency issue.

[36] As counsel did not make any submissions in relation to expenses I shall reserve meantime all questions relating to that matter.