OUTER HOUSE, COURT OF SESSION

[2018] CSOH 120

CA85/16, CA132/16, CA131/16

OPINION OF LORD CLARK

In the causes

AGRO INVEST OVERSEAS LIMITED

Pursuer

against

STEWART MILNE GROUP LIMITED

And

Defender

AGRO INVEST OVERSEAS LIMITED

Pursuer

against

MORGAN ASSOCIATES

Defender

And

AGRO INVEST OVERSEAS LIMITED

Pursuer

against

ROBERT TREMBATH t/a TREMBATH ASSOCIATES

Defender

Agro Invest Overseas Limited v Stewart Milne Group Limited
Pursuer: McColl QC, McKenzie; Brodies LLP
Defender: Johnston QC, Walker QC; Anderson Strathern LLP

Agro Invest Overseas Limited v Morgan Associates
Pursuer: McColl QC, McKenzie; Brodies LLP
Defender: Morton sol-adv, BTO

Agro Invest Overseas Limited v Robert Trembath t/a Trembath Associates
Pursuer: McColl QC, McKenzie; Brodies LLP
Defender: Marney; DWF LLP

18 December 2018

Introduction

[1] In 2007, the pursuer, Agro Invest Overseas Limited ("Agro") entered into a series of contracts for the design and construction of works at the Ben Alder Estate, Dalwhinnie, Inverness-shire. For present purposes, four separate locations of the works are relevant: the leisure centre, situated in the main lodge building at basement level; the breakfast room, also situated in the main lodge building, at the level above the basement; the north tower extension to the main lodge building; and a new private chapel and a beach turret, constructed on the shore of the loch, away from and not physically linked to the main lodge building.

[2] Stewart Milne Group "(SMG") was appointed as the main contractor, with the building contract providing for sectional completion of the works. Morgan Associates ("Morgan") was appointed as the civil and structural engineer for *inter alia* the leisure centre. Robert Trembath ("Mr Trembath"), trading as Trembath Associates, was appointed as the architect for the part of the works at the chapel and beach turret.

[3] In April 2015, Agro raised separate actions against SMG, Morgan and Mr Trembath. In the case against SMG, the summons was served on 28 April 2015. The claims against SMG concern losses allegedly sustained as a result of: (i) water ingress problems in the

leisure centre, breakfast room, north wing extension, the chapel and the beach turret; and (ii) structural issues affecting the chapel and the beach turret. The action against SMG proceeds upon the basis of alleged breaches of contract. In the case against Mr Trembath, the summons was served on 29 April 2015. That claim concerns alleged defects in the works at the chapel. It is based upon breach of contract and fault. In the case against Morgan, the summons was served on 30 April 2015. That claim concerns losses allegedly sustained by reason of water ingress problems caused by design defects in the leisure centre. It is based upon breach of contract and fault. Agro also sued another firm of architects which had been involved in the design of part of the works, but that action has been resolved. In due course, in the action against SMG, third party notices were served by SMG on Morgan and Trembath and they were convened as third parties in that action.

[4] SMG and Morgan take issue with whether, if loss has been sustained in relation to the alleged defects in the leisure centre, the breakfast room and the north wing extension, Agro has suffered loss. Another entity, Compania Financiera Waterville SA, ("CFW") a Panamanian registered company, is the owner of the land on which the leisure centre, breakfast room and north wing extension are situated. Agro claims that it had entered into an oral agreement with CFW that Agro would meet the costs of repair of defective work. SMG and Morgan argue that the basis for liability under the oral agreement has not been made out and further that any obligation on the part of Agro, owed to CFW, to meet the costs of repair must have been extinguished by prescription. SMG, Morgan and Mr Trembath also contend that any obligation they each may have had to make reparation to Agro has been extinguished by prescription. All three cases called together before me for

a preliminary proof before answer on these matters. SMG also raise an additional point concerning an alleged waiver by Agro of its right to sue SMG.

[5] I reached the view that the appropriate course was to issue a single Opinion, dealing with all of the actions, rather than issuing three separate Opinions in each of which many similar points would require to be rehearsed. The primary factors which influenced that decision were that: (i) the background to each action was similar; (ii) the actions had been heard together; (iii) it had been agreed between the parties that the evidence in one action would be evidence in the other actions; (iv) the parties had, to some extent, relied in their submissions on the evidence in the other actions; and (v) submissions by a defender in one action were on occasion adopted by a defender in another action. One consequence of that approach is that the resulting Opinion is longer than usual.

[6] I have adopted the following structure: firstly, to deal with the issue of whether Agro has suffered loss in respect of alleged defects in the leisure centre, breakfast room and north wing extension, including the question of whether any obligation owed by Agro to CFW has been extinguished by prescription ("Issue 1"); secondly, to deal with the issue of whether any obligation owed by each of the defenders to Agro has been extinguished by prescription ("Issue 2"); and then lastly to deal with the issue of the alleged waiver by Agro of its right to claim against SMG ("Issue 3"). Before turning to address these issues, I make the following brief and general observations in relation to the evidence.

The evidence

[7] Evidence was led over a period of eight days. Factual evidence was given by the following witnesses: Alexander McKay, who acted (until July 2014) as the client

representative of Agro for the purposes of the building project; Brendan McKenna, a chartered quantity surveyor formerly employed by Riddet Ltd, responsible for co-ordination of aspects of the project and financial administration on behalf of Agro; William Lindsay, a chartered building surveyor whose firm took over, in July 2014, the role formerly carried out by Alexander McKay; Dr Ulrich Kohli, an attorney and author based in Switzerland, who is a director and the president of Agro; Dr Guido Urbach, an attorney from Switzerland, who is also a director of Agro; David Fyfe, a maintenance and quality manager for SMG; Douglas McCusker, formerly the area construction manager of SMG; Alexander Burnett, a chartered structural engineer and former partner in Morgan; James Welsh, the site construction manager with SMG; and Robert Blair, a regional quantity surveyor for SMG. There was also expert evidence led on behalf of each party. Neil Clarkson, a consultant civil engineer, gave expert evidence on behalf of Agro. Morgan's expert, William Reid, a chartered civil, structural and highway engineer, gave expert evidence in relation to the role of Morgan as consulting engineer. Donald Canavan then gave evidence, as an expert architect, on behalf of Mr Trembath. Lastly, Hamish Clark, a chartered architect, gave expert evidence on behalf of SMG.

[8] In view of the fact that the main aspects of the evidence relied upon by the parties are set out later, in the summary of the parties' respective submissions, and in the reasons I give for my decision, I do not intend at this point to narrate the evidence in any real detail. Instead, I will simply identify the main matters covered. The key strands of the factual evidence included the entering into of an oral agreement between Agro and CFW, the roles of each of the defenders in respect of the works, the building contract, the carrying out and completion of the works, the occurrence of water ingress in various locations and at various

points in time, discussions about remedial works and steps taken by the parties in that regard. The evidence about the works covered matters relevant to practical completion, including the absence of any certificate of practical completion, the dates when sections were completed, the timing of when SMG left the site, and when the defects liability period ended and retained monies were released. The evidence about water ingress included reference to events in 2008 and 2009, including at the leisure centre, the breakfast room and the chapel, the application of waterproof render in the basement, reference to email correspondence (particularly on 25 November 2009) regarding incidents of water ingress in various locations, and thereafter about further incidents of water ingress in March 2011, in January to March 2012, and at various dates in 2014. There was also evidence about the installation by SMG of pumps, in about July 2011, to remove water from the basement.

[9] Much of the expert evidence related to the incidents of water ingress and whether a person in the position of the pursuer, exercising reasonable diligence, ought to have taken steps to investigate these incidents, resulting in the nature and causes of the problems being ascertained.

[10] On behalf of the pursuer, it was submitted that the court should treat the evidence of Mr Canavan (the expert who gave evidence on behalf of Mr Trembath) with significant care. It was contended that, in giving his evidence, Mr Canavan at times gave the clear impression that he was present to act as an advocate for the position of his client, and, in particular, was prepared to engage in speculation, in the interests of his client. Further, it was argued that Mr Canavan had relied upon things he had been told about Mr Trembath's position on factual matters, but there had been no opportunity for the pursuer to explore those factual matters with Mr Trembath, who had not given evidence. Similarly, the court was invited on

behalf of the pursuer to treat the evidence of Mr Reid (Morgan's expert) with significant care. It was said that he had relied upon material which was of doubtful relevance and had not attempted to assess the costs of the investigative testing he suggested as being reasonable for the pursuer to have carried out. It was further argued that SMG's expert witness, Mr Clark, had acted as an advocate, his report being partial (omitting matters that did not favour his client's position) and putting points, in his evidence, somewhat pejoratively when there was no need to do so. Reference was made to *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59. In addition, Mr Welsh's recollection of matters was said to be particularly poor.

[11] Understandably, given the passage of time, there were certain areas of the factual evidence which were somewhat vague, including aspects of the evidence of Mr Welsh. I have taken that into account. Each one of the factual witnesses, however, appeared to me to be doing his best to tell the truth. As to the expert witnesses, where an expert has neglected to give proper consideration to a relevant matter which goes against the views he has expressed, and which was sufficiently obvious that on a balanced approach it plainly required consideration, that can be a cause of real concern. At one level, it can demonstrate that an expert is being partisan and dogmatic and hence can materially undermine his evidence. While both Mr Canavan and Mr Clark were forthright about the views that they expressed, it seemed to me that they were doing no more than vigorously defending their own opinions and reasoning, rather than being partisan. In relation to Mr Clark, he gave an explanation as to why the matters raised by Senior Counsel for the pursuer were omitted. While not entirely cogent, it satisfied me that he was not seeking in any way to present a

biased view or to otherwise mislead the court. The issues raised about Mr Reid's evidence go to questions of weight and I have had regard to them in that respect.

Issue 1: Does Agro have a right to recover for the alleged losses in respect of the leisure centre, breakfast room and north wing extension?

The averments on Issue 1

[12] In Article 2 of Condescendence in the SMG action, the pursuer averred:

> "The pursuers are an owner of part of the Ben Alder Estate, Dalwhinnie. In about 2007, the pursuers and the other owners of the relevant parts of the Estate had decided to undertake significant development work at and about that part of the Estate known as "the Lodge". This work included the construction of: (a) an underground (or basement level) spa and leisure centre; (b) a north tower extension to the main lodge; and (c) a breakfast room above the underground spa and leisure centre. The underground spa and leisure centre and the north tower extension were to be situated within an area owned by Compania Financiera Waterville SA, a Panamanian registered company. In addition, a private chapel and beach turret (linked to the chapel by underground transept) was also to be built as part of the project. These were located in an area away from (and were not physically linked to) the main Lodge. The chapel and turret were to be situated within areas owned by the pursuers (in respect of a 75% *pro indiviso* share) and [eight named individuals] (each to the extent of a 3.125% *pro indiviso* share). The pursuers were the party with whom the defenders contracted in respect of the development works. The pursuer acted as the development agents and principal developers in respect of this construction project for the other owners. The pursuers are the party that were liable to the defenders for their fees and have to bear the costs of the losses arising from the defenders' breaches of contract. Pursuant to a verbal agreement entered into between Compania Financiera Waterville SA and the pursuer in 2006, the pursuer acted as agents and principal developers for that company in respect of the aforementioned construction project in so far as it concerned works on that part of the Estate owned by that company. Pursuant to that agreement, the pursuer is liable to meet the cost of repairing any defects in such works."

[13] In response, both SMG and Morgan averred that any obligation on the part of the pursuer to make reparation to CFW had prescribed. SMG averred that the pursuer had suffered no loss. Morgan averred that the pursuer had no title or interest to sue for loss or damage sustained by CFW.

Submissions on Issue 1

Submissions for SMG

[14] The submissions for SMG on this issue can be summarised as follows. The pursuer had advanced no pleaded basis as to why it should be entitled to claim for losses relating to the 25% share of the chapel and beach turret that is owned by the eight named individuals mentioned in Article 2 of Condescendence. There was no mention of any verbal or other agreement with them or that there was a duty to account to them in respect of any damages that might be recovered. All that remained was the argument concerning agency, which was bound to fail. The pursuer's argument only sought to explain why the pursuer contended it could sue for the loss incurred in relation to those parts of the estate owned by CFW.

[15] In that regard, the only evidence in relation to the verbal agreement with CFW was to be found in the witness statements of Dr Urbach and Dr Kohli. The evidence of the former was of little assistance: he became a director of Agro only long after the events in question and evidently relied on what he was told by Dr Kohli. No evidence was led as to why Swiss law was relevant. No evidence was led that CFW had raised proceedings against Agro. The existence of any such proceedings was not averred in the pleadings. No evidence was led that Agro had acknowledged the subsistence of the alleged liability to CFW.

[16] It was accepted in principle that the general basis for the claim advanced by the pursuer could be relevant in law. If the pursuer had an extant liability to the true owners which had arisen through breach of contract by the defender, in principle the pursuer may be able to pass on that liability to the defender. On the evidence, however, the pursuer had

not made a relevant case for liability of this kind. The available evidence was either of very poor quality, or irrelevant, or incompetent, or indeed suffered from all of these deficiencies.

[17] In particular, there was no evidence about who made the agreement; where they did so; the precise terms of the agreement; or the applicable law. Both witnesses stated in their witness statements that the agreement was not documented in writing. In his evidence in chief, however, Dr Kohli stated that clarifications of the oral agreement were recorded in a written memorandum of understanding ("MOU"). He did not explain why, or when, this was done. The discrepancy between his written and oral evidence raised serious doubts as to the reliability of his evidence as a whole. It appeared that the best evidence of the terms of the agreement between Agro and CFW would be the MOU. But that had not been produced to the court.

[18] The question of whether Agro remained liable in contract to CFW was a question of law for the court. The views of witnesses about this question of law were entirely irrelevant. Furthermore, in view of the passage of time between the allegedly defective work being done and the date of the preliminary proof, any liability as between the pursuer and CFW no longer subsisted, it having been extinguished by prescription. There were no averments that the period had been interrupted by a claim or an acknowledgement, and so there was no loss in respect of which the pursuer ought to be indemnified. The suggestion made on behalf of Agro in oral submissions that there was a relevant acknowledgement as a result of the raising of the actions against SMG and Morgan by Agro stretched the concept of reasonable acknowledgement beyond its proper scope. The submissions made on behalf of Morgan were adopted by SMG. The pursuer had failed to make a case for any recoverable loss.

Submissions for Morgan

[19] The submissions for Morgan on this issue can be summarised as follows. Agro had failed to prove on the balance of probabilities that it had title and interest (a sufficient legal standing) to pursue a claim for the cost of repairing defects in the leisure centre. Put another way, Agro had failed to prove loss. Agro had failed to establish the specific terms of the alleged oral agreement. On the evidence, it was not open to the court to find that Agro owed any liability to CFW. The evidence of the pursuer's witnesses that Agro remained liable was irrelevant. Their beliefs did not establish the terms of the oral agreement, and did not provide a sufficient basis for a finding by the court that, pursuant to the agreement, Agro remained liable. There was a lack of any proof of CFW making a relevant claim, or Agro acknowledging that claim.

[20] While it was accepted that both witnesses were credible and reliable, Dr Kohli's evidence left open the possibility that he did not actually participate in the oral agreement or was not present when the discussions took place, and so could not speak to what was allegedly agreed. This significantly reduced the weight of his evidence. Dr Kohli's evidence as to the terms of the agreement clearly only reflected his stated belief. It was not an attempt by him to recall the terms of the oral contract, but an attempt to explain his view of the effect of the agreement. It seemed likely that this belief about the pursuer remaining liable had been steered by unconscious bias (*Gestmin SGPS SA* v *Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm)) which meant that less weight should be given to it. Further, many ambiguities were left on key matters and this also substantially reduced the weight to be given to this evidence.

[21] In the circumstances of this case where the oral agreement is alleged to have occurred approximately eleven years before the proof started, there was much to be said for the approach that documentary material is the principal source of evidence (*Gestmin*, *supra*). Agro had failed to lodge the MOU and this severely impacted upon the weight which should be given to the witness evidence led about the oral agreement. The comments of Arden LJ in *Wetton (as Liquidator of Mumtaz Properties) v Ahmed and others* [2011] EWCA Civ 610, to the effect that contemporaneous written documentation is of the very greatest importance in assessing credibility, were of significance. Applying that principle to the position in this case, it was appropriate to infer from the fact the MOU was missing from the proof, having not been lodged, that it did not support Agro's case and that there was no clause in it making Agro liable to CFW for the cost of repair.

[22] It was clear from the witness statement of Dr Urbach that he relied on what Dr Kohli told him. He was not an officer of the company in 2006. His evidence added nothing to what Dr Kohli said. His evidence should carry no weight at all.

[23] Much, if not all, of the evidence as to the terms of the oral agreement was hearsay evidence. Hearsay evidence is admissible, but the task facing the court is to decide how much weight to give it in all the circumstances (*Polanski* v *Conde Naste Publications Limited* 2005 UKHL 10 at 74; *Welsh* v *Stokes* 2008 1 WLR 1224; *TSB Scotland plc* v *James Mills Montrose Limited (in receivership)* 1992 SLT 519; *Lynch v Lynch* 1998 SLT 672). In any event, the evidence was vague and also wholly unreliable, and should carry no weight.

[24] It was a surprising feature of this case that not only did Agro not lead evidence about which of their own officers agreed things in 2006,but they also did not lead evidence from any witness from the fellow subsidiary CFW to speak to the entering into of the oral

agreement or its terms. This also affected the weight of the evidence. Agro had also failed to prove what choice of law applied in respect of the oral agreement and the claim should therefore simply be rejected.

[25] Turning to the question of whether Agro remained liable, as a matter of law, the hurdle which Agro required to overcome in order to discharge the onus of proof, in respect of prescription, was to demonstrate that its obligation to indemnify CFW, as at the date that company sustained loss, injury and damage, had not been extinguished. To do that Agro required to prove when CFW's loss, injury and damage occurred, and be able to demonstrate that either a relevant claim by CFW was made, or that the obligation was relevantly acknowledged within the five year period or that the running of prescription was postponed or interrupted. The issue of the starting date for prescription of CFW's claim against Agro turned on section 11(1) of the 1973 Act, and on when CFW suffered loss, injury or damage.

[26] Reference was made to: *David T Morrison & Co Ltd t/a Gael Home Interiors* v *ICL Plastics Ltd* 2014 SC (UKSC) 222; *Strathclyde Regional Council* v *W A Fairhurst & Partners* 1997 SLT 658; *Pelagic Freezing (Scotland) Limited* v *Lovie Construction Limited* [2010] CSOH 145; *Stewart Milne Westhill Limited* v *Halliday Fraser Munro* [2016] CSOH 76; Johnston, *Prescription and Limitation* (2nd ed, at 4.23 to 4.26); Scottish Law Commission, Discussion Paper on Prescription (no 140, paragraph 5.8); and *Homberg Houtimport BV* v *Agrosin Private Ltd* [2004] 1 AC 715.

[27] Against this background, the date of CFW's loss, injury or damage could be either the date when: (a) the building was practically completed and handed over to CFW; or (b) physical damage first took place. *Duke of Portland* v *Wood's Trustees* 1926 SLT 321

demonstrated that, in this case, it was appropriate to treat loss, injury and damage as having been sustained by CFW when it took possession of the property, as the value of CFW's asset at that point was not what it should have been but for the latent defects. It would not be a sensible construction of the oral agreement (if it was found to exist and to be in the terms stated in evidence) to conclude that Agro became liable to CFW at some earlier point in time. CFW therefore suffered material loss, injury and damage on one of the following dates, and the obligation owed by Agro to CFW would be extinguished by prescription after the five year period following thereon: 31 July 2009, being the date of practical completion; which failing, 25 November 2009, being the date of physical damage; which failing, 31 March 2010, being the date of completion of the fit out works; which failing, 4 April 2010, being the date of physical possession by the estate owners; which failing, 28 October 2010, being the date of further physical damage; which failing, 2 December 2010, being the apparent date for the commencement of the defects liability period; which failing, 31 July 2011, being the estimated date of further water ingress and damage and the date of installation of the pumps.

[28] If the court were to find that an oral agreement in the terms stated in the evidence had indeed been entered into, the sensible interpretation of it would be that any loss suffered by CFW and hence by Agro would arise on practical completion. Whatever date was found to be the date of practical completion, none of the means of avoiding CFW's claim being extinguished by prescription had been established. Accordingly, any liability Agro ever had to CFW had been extinguished by prescription and Agro therefore had suffered no loss and had no interest in pursuing the present action.

Submissions for Agro

[29] It was to be noted at the outset that the title to sue issue only arose in relation to the leisure centre, breakfast room and the north tower extension. It did not extend to the chapel and beach turret (in respect of which the pursuer has an interest as heritable proprietor). No such issue was identified in the pleadings of any of the defenders relative to the chapel and beach turret. It should also be noted that the pursuer, as a party to contracts with each of SMG and Morgan, plainly had title to sue. On the unchallenged evidence of Dr Kohli and Dr Urbach, the pursuer had title and interest to sue and had itself suffered loss as a result of the breaches of contract by SMG and Morgan. For the avoidance of doubt, the pursuer did not seek to rely on Swiss law; Scots law applied.

[30] The unchallenged evidence of Dr Kohli and Dr Urbach was that the pursuer entered into a verbal agreement with CFW at some time in 2006, in terms of which it was agreed that the pursuer would be the party liable to meet the costs of the repair of any defective work to the leisure centre, breakfast room and north tower. Importantly, the unchallenged evidence was also that the pursuer "remain[s] liable" to CFW for any and all damage in and defects to the works, and that the pursuer is the party that has and will continue to suffer loss flowing from any breach of contract on the part of the defenders. SMG and Morgan argued that any obligation on the pursuer to make reparation to the true owner has prescribed. Curiously, however, these defenders did not challenge the evidence that the pursuer remained liable to CFW. Nor did these defenders even seek to establish in evidence that any cause of action had arisen under the agreement between CFW and the pursuer as the result of some failure on the part of the pursuer to abide by the terms of that contract. In these circumstances the evidence of Dr Kohli and Dr Urbach should be accepted by the court *in toto*. There was no

basis upon which their evidence should be rejected. Before the court could properly hold that the pursuer did not remain liable to CFW as a matter of law, it would require a factual basis upon which that conclusion could properly be reached. No such factual basis existed. Separately, and in any event, the raising of the present proceedings by the pursuer against the defenders constituted a relevant acknowledgement by the pursuer of its obligation to CFW. On that basis, even if the court was not minded to accept the evidence of Dr Kohli and Dr Urbach that the pursuer remains liable to CFW, the question of the pursuer's title and interest stood or fell along with its case on prescription in these proceedings. If these proceedings have been brought timeously, it followed that the relevant acknowledgement to CFW was made timeously. In relation to relevant acknowledgement, SMG's point that there was no evidence of CFW being aware of any such acknowledgment was irrelevant. In terms of section 10(1)(a), if a party accepted an obligation and acted to get on with it, there was no need to constantly apprise the creditor of this conduct. The only reason for raising the action was the liability to CFW. The pleadings made reference to that liability.

[31] Both SMG and Morgan had mischaracterised the basis on which the pursuer claimed it has suffered loss. Agro was not claiming on behalf of CFW, nor on the basis that Agro was to indemnify CFW. Agro was the party which was, and remained, liable to meet the costs of the repair to any defective works. The pursuer was suing for its own loss; the pursuer was the party which had contracted with the defenders, was liable for their fees and was the party that will have to carry out and bear the costs of the repairs arising from the defenders' breaches. That had always been the position of the pursuer. The obligation of Agro to meet the cost of repair was plainly an ongoing obligation. No clear position was

advanced by the defenders as to when the prescriptive period started in respect of that obligation.

Issue 1: Decision and Reasons

[32] The thrust of the submissions made by SMG and Morgan was that the pursuer had failed to establish that the liability it claimed to have under the oral agreement with CFW continued to subsist. I accept that it is a matter for the pursuer to establish that the liability continues to subsist, for the primary reason that the pursuer is claiming to have suffered a loss, but also because the defenders raise in their pleadings the contention that any obligation on the part of the pursuer to CFW has been extinguished by prescription. Before turning to deal with this point, the pursuer avers, as noted, that eight other individuals together own a 25% *pro indiviso* share of the chapel. The pursuer's right to seek recovery of all of the losses in respect of that part of the property was not the subject of specific challenge in the averments of SMG or Morgan. On a fair reading of the defences, SMG raises issues concerning CFW's claim, as does Morgan. This is therefore not an issue which falls within the title and interest to sue/no loss point that is within the ambit of matters remitted for the preliminary proof and so I make no decision on it.

[33] It was not suggested that Agro acted as an agent for CFW in the sense of binding CFW in a contract with SMG or with Morgan. In fact, Agro contracted directly with SMG and Morgan and, on Agro's averments, it was to Agro that these parties owed the contractual (and, in the case of Morgan, delictual) duties founded upon by Agro in the actions. No issues as to the law of agency therefore arise. I also reject Morgan's contention that the absence of any pleadings as to choice of law must mean that Agro's liability to CFW

has not been established. The general rule set out in *Bonnor* v *Balfour Kilpatrick* 1974 SC 223 falls to be applied, with the result that, in the absence of any pleadings as to foreign law, the matter is governed by Scots law.

[34] I accept that certain criticisms can be advanced in relation to the quality of the evidence as to the oral agreement, including the lack of written documentation such as the MOU and the lack of detail as to how, when and by whom the terms are said to have been agreed. However, at the end of the day, I have the wholly unchallenged evidence of two witnesses whose evidence I found to be credible and reliable. I therefore accept that evidence, including insofar as it articulates the terms of the oral agreement. However, I also accept the submissions on behalf of SMG and Morgan to the effect that it is a matter for the court as to whether Agro's obligation to CFW subsisted at the date of the preliminary proof. That is not something which can be dealt with merely by subjective factual evidence from the two witnesses. It is a matter of law which requires an objective assessment, involving construction of the terms of the contract, taking into account the relevant facts and circumstances. Evidence consisting of, in effect, opinions or expressions of understanding that Agro remains liable, is of no real assistance and indeed is irrelevant on that issue. Its relevance is confined to establishing that Agro has not yet met the liability it may have to CFW.

[35] The contractual obligation was expressed in the evidence as follows:

> "The terms of that agreement are that Agro Invest Overseas Limited are the party who were and are liable to meet the cost of the repair to any defective work to the Works to the Underground Leisure centre, Breakfast Room and North Tower at the Estate."

Plainly, caution is required in seeking to construe contractual terms if the precise language used is not absolutely clear. However, I am dealing with an oral agreement and it was not suggested to the witnesses at any point that any other language from that spoken to in their evidence was used in entering into that agreement, or that anything else was said. On the undisputed evidence, I take the terms stated in the evidence as an accurate expression of the relevant terms of the oral agreement. No arguments were however advanced by any of the parties about the correct construction of the terms of the oral agreement and in particular about when, on that correct construction, the obligation of Agro to CFW arose for performance. It is clear that CFW's loss, caused by a breach of contract on the part of Agro, could not arise until the date of performance of that obligation and the resulting non-performance. It is obvious that, in seeking to determine that date, there must in the first place be defective work. In respect of the locations covered by the oral agreement, that must mean defective work arising from a breach of contract by SMG or from a breach of contract or fault on the part of Morgan.

[36] However, Agro does not say that it will suffer a loss only when the existence of the defective work is admitted or established. On the contrary, Agro proceeds upon the basis that it has already suffered such a loss, by incurring liability to CFW. As is discussed further below, Agro contends that the loss arose at practical completion but also relies upon the provisions of the 1973 Act which deal with postponement or interruption of the prescriptive period in respect of the obligations of the present defenders. Agro has put forward various starting dates for that prescriptive period, all within five years before the present actions were raised. For example, it is suggested that Agro could not, with reasonable diligence, have discovered the existence of the defects until March 2011, at the earliest. However, no

submission was made of there being any other date when Agro's obligation to CFW arose for performance, but which was less than five years before the commencement of the preliminary proof. Moreover, there was no suggestion that CFW had made a relevant claim or that there was any basis for postponing or interrupting the prescriptive period in respect of Agro's obligation to CFW, other than the contention that there was a relevant acknowledgment on the part of Agro by raising the present proceedings.

[37] In relation to the question of relevant acknowledgement, in terms of section 10(1)(a) of the 1973 Act, there requires to be

> "…such performance by or on behalf of the debtor towards implement of the obligation as clearly indicates that the obligation still subsists..."

Performance towards implement must be clearly referable to the particular obligation, the subsistence of which is clearly indicated (*Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Limited & Ors* [2017] CSOH 57 at [100]; *Richardson* v *Quercus Ltd* 1999 SC 278; *Gibson* v *Carson* 1980 SC 356).

[38] In my opinion, Agro's submission that the raising of proceedings against SMG and Morgan constituted a relevant acknowledgement, under section 10(1)(a), of its obligation to CFW is well-founded. At first blush, there is some force in the contention that simply raising these proceedings is not itself actual performance of Agro's obligation. But in fact the proceedings are plainly for the purposes of seeking to establish that the works were defective, and to show the nature and extent of the defects and the resulting costs which Agro will require to meet. There was no other reason to raise the actions against SMG and Morgan. The pleadings expressly refer to the liability of Agro to CFW under the oral agreement. The averments include that "Pursuant to that agreement, the pursuer is liable to

meet the cost of repairing any defects in such works". There was no suggestion that any of the sums which may be recovered could be used for anything other than to meet that liability. The references in the evidence to the pursuer remaining liable plainly indicate that the pursuer has not yet met the cost of repair, as is also implicit in the pleadings. The sums sued for are calculated as being the costs of repair. For these reasons, I conclude that the raising by Agro of the proceedings for these purposes constitutes performance towards implement of its obligation to CFW. The absence of any averment by Agro on the matter of reasonable acknowledgement is not in my opinion of any significance. It is a legal issue, the only relevant evidence being the fact that the actions had been raised and the purpose of so doing. The parties were fully able to deal with the issue in their submissions. In all of the circumstances, I accept Agro's case on relevant acknowledgement and reject the contentions of SMG and Morgan on that matter. For that reason, Agro's obligation to CFW has not been extinguished by the operation of prescription.

Issue 2: have the obligations to make reparation allegedly owed by the defenders been extinguished by the operation of prescription?

[39] In a preliminary proof on prescription, it is plainly of crucial importance to understand the basis of the claim made by the pursuer and in particular the nature and cause of any alleged loss. Those matters are directly relevant to the issue of concurrence of *damnum* and *injuria* and indeed to issues relating to actual or constructive knowledge under section 11(3), induced error under section 6(4) and relevant acknowledgement under section 10(1) of the 1973 Act. Among other things, the claim being made is the comparator for the purposes of matters such as whether loss, injury or damage which arose earlier was

separate and distinct. This exercise of understanding the nature and basis of the pursuer's claim of course involves a consideration of the pleadings of the pursuer, which for this purpose are taken *pro veritate.* It is also legitimate, having regard to issues of fair notice and the importance of expert reports in commercial actions, to consider the views expressed by the pursuer's expert in his reports.

[40] In the present case, there was some evidence and some reference in submissions about precisely how the water ingress which forms the basis of the claims is said to have occurred. Conflicting views were expressed and some expert evidence was inconclusive. In my view, it would be quite inappropriate for the court to seek to reach a finding on the actual cause of water ingress which forms the current complaint. That is not an issue which falls within the scope of the matters referred for preliminary proof and indeed it is one of the main points to be dealt with should there be any further proof before answer in this case. The question at the preliminary proof is whether, having regard to the nature and cause of the loss claimed to have been suffered by Agro, and taking those pleadings *pro veritate* and as amplified in any export report, the obligations said to be owed by the defenders had been extinguished by the operation of prescription at the time when the present actions were raised.

Agro's claim against SMG

[41] Agro's position is that it has suffered loss and damage as a direct and natural result of SMG's breaches of its obligations under the building contract. While there are, in the pleadings, occasional references to a delictual case against SMG, the case is ultimately based only upon breach of contract. In summary, Agro's claim is as follows. After the carrying

out of the works by the defenders, a number of defects had emerged in the leisure centre and breakfast room, the north tower, and the chapel and the turret (although, in respect of prescription, the issues relating to the north tower and the turret were not directly relevant). The underground leisure centre had suffered from significant water ingress because it had not been adequately waterproofed. It had been subject to pools of standing water in various areas. This water ingress had been continuous with numerous pools of standing water even after SMG had installed two pumps, operating full time. Based upon leaks, staining and damage observed in or around March 2015 water ingress had taken place in the wine cellar, wine stores, the gym, stair area, changing rooms, shower rooms, WCs, sauna and massage room. The water was entering predominantly through the floor but also through the walls. The higher the water level of the adjacent loch, the greater was the severity of the water ingress. While deficient design was a contributory cause in respect of the leaks suffered, deficient workmanship (for which SMG was responsible and liable) was also a material contributing factor.

[42] Mr Clarkson, the expert witness for Agro, made reference in his report dated 6 October 2015 to failures of the tanking/membrane system at the leisure centre, due to design and workmanship failures. Some further detail is given, for example at paragraph 8.31 in the report, where he states:

> "I consider that the most likely mechanism for the water ingress is through the membrane at the failed joints or details, then into the slab along weak paths, where it can then move through the slab construction joints or micro-cracking to appear on the inside surface".

Accordingly, it can in my view be taken to be the pursuer's position that the water ingress to the leisure centre is a result of failings in the Rawmat tanking, arising from design and workmanship failures.

[43] It is further averred that the chapel has suffered water penetration and water damage to its masonry and the internal finishes of walls and floors. It had also suffered from calcite leaching and mortar damage. Pointing was poor and weep holes had not been properly used. There were also problems with the cavity walls. Further, stonework was insecure (for example in respect of skew copes and finials).

[44] Next, it was said that the breakfast room had suffered water penetration and water damage. Pointing was again poor. There were many areas of ashlar faced cavity wall which had experienced large patches of damp on the internal face. There was an absence of wall ties with dowel pins and an absence of dowel pins/fixings in the parapet stones. Perpend joint weep holes had been constructed in a manner inconsistent with the design. Similar issues to those which were referred to in respect of cavity walls at other locations existed.

[45] Agro go on to contend, in Article 6 of Condescendence, that in the foregoing circumstances, the defenders are in breach of their obligations under the contract, by failing to carry out the works in a proper and workmanlike manner. Agro then go on to explain and aver certain further specific alleged failures on the part of SMG.

Submissions for Agro

General

[46] Practical completion was the key date for the purposes of prescription, in that time could not begin to run until that date. The evidence disclosed that practical completion

occurred on 2 December 2010. That was the primary position. In that situation, none of the issues which relate to postponement of the starting date or the interruption of the running of the prescriptive period arose. If 2 December 2010 was not accepted as the date of practical completion, Agro's first alternative position was that practical completion occurred on 1 March 2010. On this analysis too, none of the postponement/interruption issues arose. No leaks arose and no other defects became apparent after 1 March 2010 until March 2011. Rather, the common position of the factual witnesses was that, as at March 2010, all parties understood that any prior problems with water ingress had been resolved and were not recurring. No water ingress was taking place. Thus, on this hypothesis, no loss, injury or damage was suffered by the pursuer until well within the *quinquennium*, and none of the defenders sought to establish otherwise (having periled their positions on the events surrounding the emails of 25 November 2009).

[47] Agro's second alternative position, if the court did not accept either of the first two points, was that the date of practical completion should be taken as not earlier than mid-July 2009, when SMG left the site after producing the health and safety file. There was simply no evidence, or, at the very least, no satisfactory evidence, that practical completion was achieved any earlier than that date. On this hypothesis, the subsequent events required to be considered. However, the events of 2008 and the first part of 2009 involving the carrying out of waterproofing render works by Ian Anderson did not require to be considered in any detail as those works were undertaken prior to practical completion and formed part of SMG's contract works (as varied). It was SMG's obligation to carry out and complete the works.

The claim against SMG: the leisure centre

[48] The November 2009 defects were separate and distinct from those which are the subject of the present action. In any event, any loss, injury or damage in November 2009 was not material.

[49] In relation to section 11(3) of the 1973 Act, there was certainly no reason prior to March 2011, even with the exercise of all reasonable diligence, for the pursuer to be aware of any loss, injury or damage. The previous problems had been dealt with and raised no issues for the pursuer to investigate. Separately and in any event, the requirements of section 6(4) of the 1973 Act were met because SMG carried out remedial works and represented that the defects had been remedied. The reasonable diligence part of the section 6(4) test was also met. *Esto* any of the alleged defects referred to in November 2009 were the same as the defects currently complained of, the evidence was that SMG had relevantly acknowledged their obligations to make reparation by attending on site and carrying out remedial works in respect of them.

The claim against SMG: the breakfast room

[50] Approaching matters on the same pragmatic basis as outlined above, the nature, location and scale of the defect affecting the breakfast room (the failure of the window sill extension pieces) in the November 2009 time period, as well as the nature of the defaults by which such defect was caused, were such that this defect was separate and distinct from the matters now complained of, which are that the breakfast room has suffered water penetration and water damage as a result of defects within the building fabric. In November 2009, SMG attributed water ingress into the breakfast room to a failure of window sill

extension pieces (despite having identified earlier that the breakfast room windows had "no weep vents as per design"). That was a quite different failure to those now complained of by Agro.

[51] Furthermore, in terms of section 11(3), the pursuer had exercised reasonable diligence in relation to the breakfast room in November 2009. The pursuer did what a person of ordinary prudence would have done if placed in the particular circumstances in which the pursuer found itself. That is to say, the pursuer obtained SMG's views on the cause of the problem, and on the appropriate remedial works; the remedial works were then carried out, and the problem bore to disappear. Nothing occurred to suggest that the cause of the problem had not been correctly identified and the remedial works had not been correctly carried out. The pursuer reasonably relied upon specialist action rather than, as a lay client, seeking to second-guess matters. Separately, and in any event, in carrying out the remedial works and representing to the pursuer that the defect had been remedied, SMG induced the pursuer erroneously to refrain from making any claim in relation to the November 2009 defect, such that the test in section 6(4) was met. The period of error lasted from at least the end of 2009 until March 2011 at the earliest, a period of at least 14 months. That period fell to be ignored in calculating the prescriptive period, with the result that the pursuer's action against SMG was raised comfortably within the *quinquennium* in respect of this defect.

<u>The claim against SMG: the chapel</u>

[52] The water ingress through the ambulatory windows and high level windows in the chapel was, on the evidence, caused by obvious mastic failure. It was treated as an entirely

normal snagging issue and was remediated as such by SMG's sub-contractors. There was no evidence that this water ingress caused any damage, far less material or non-negligible damage. Similarly, the water ingress at the belfry louvres had obvious causes. It was also treated as an entirely normal snagging issue and was remediated as such by SMG's sub-contractors by the installation of a screen behind the louvres and the repair and re-sealing of lead flashing at the belfry floor. There was again no evidence that this water ingress caused any damage, far less material or non-negligible damage. While water ingress into a building which is supposed to be watertight is of course capable of being a serious matter, that was plainly not so where the cause is easily identified and easily fixed. Accordingly, in respect of the water ingress through the chapel windows and the belfry louvres in November 2009, the pursuer had not suffered material damage.

[53] In relation to section 11(3), there was no evidence that the pursuer had actual knowledge of any physical manifestation of the defects in the chapel which the pursuer now sues in respect of, outside the *quinquennium*. On the evidence, the pursuer exercised reasonable diligence in relation to the two instances of water ingress into the chapel in November 2009 and yet did not discover the defects complained of in the present action. The pursuer did what a person of ordinary prudence would have done if placed in the particular circumstances in which the pursuer found itself. That is to say, the pursuer obtained SMG's views on the causes of the problems, which were in each case obvious, and on the appropriate remedial works; the remedial works were then carried out, and the problems then bore to disappear, at least for a considerable period of time. Nothing occurred to suggest that the cause of the problems had not been correctly identified and the remedial works had not been correctly carried out.

[54] Furthermore, it was plain from the extensive and detailed documentation produced by Mr Trembath himself in relation to snagging at the chapel that he did not see anything that gave rise to any concern on his part as to water ingress at the windows and the belfry. It was notable that Mr Trembath was not called as a witness to speak to what he saw and what conclusions he drew from it at the time (in 2009 and 2010).

[55] In relation to relevant acknowledgement, the following evidence supported the pursuer's position: (i) the meeting at site on 23 July 2014 between William Lindsay and David Fyfe during which the chapel and beach turret defects were discussed, being defects which Mr Fyfe appeared to accept that SMG had a responsibility to remediate; (ii) Mr Fyfe's email of 4 September 2014 undertaking to look at the issues at the turret and chapel; (iii) SMG's attendance at the meeting on 21 October 2014 to discuss *inter alia* the defects at the turret and chapel, during which SMG agreed to open up areas of the turret to investigate.

Submissions for SMG

General

[56] In relation to the appropriate date for the purposes of section 6(1) of the 1973 Act and the enforceability of an obligation for the purposes of section 11(1), *prima facie*, an obligation on a builder to pay damages to his employer in relation to defects in a building arising from workmanship failings (such as those alleged by the pursuer against SMG) generally became enforceable as soon as the defective work was installed. From that time, or very shortly thereafter, if the defect was significant and was in permanent work but was not corrected swiftly, the employer could sue to enforce an obligation requiring the builder to pay damages for breach of the building contract.

[57] Here, viewed at the most general level, the pursuer sustained loss, injury or damage for the purposes of section 11(1) when works which in terms of the contract were intended to be watertight, but in fact were not, were installed. For the purposes of prescription, that was a loss: *David T Morrison* v *ICL Plastics Ltd* [2014] UKSC 48.

[58] A number of judicial opinions suggested that the earliest date from which prescription of such claims can begin to run is the date of practical completion of the works, or even the end of the making good of defects period (which will only begin to run from practical completion and will normally end on the issuing of a certificate of making good of defects). These included *ANM Group Ltd* v *Gilcomston North Ltd* 2008 SLT 835 at [35], in which Lord Emslie referred with apparent approval to what was said by Lord Diplock in a dissenting speech in *P & M Kaye Ltd* v *Hosier & Dickinson Ltd* [1972] 1 WLR 146, at 165. It had been thought, wrongly, by some that Lord Diplock had in mind a general rule preventing an owner from suing in all circumstance for defects until practical completion. In *Keating on Construction Contracts* (10th ed, para 11-035), that view was stated (see also *Strathclyde Regional Council* v *Border Engineering Contractors Ltd* 1998 SLT 175).

[59] This approach had been the subject of judicial and academic criticism (see for example: *Hudson on Building and Engineering Contracts* (13th ed, paras 7-074 – 7-075)). According to *Hudson*, the so called temporary disconformity theory is not applied

> "…where the Contractor has refused to put the work right at the proper time, is covering up or building on unsatisfactory work, or where the defects are already serious or numerous enough to cause substantial delay or loss."

Support for that approach could be found in the cases cited by *Hudson* including: *Lintest Builders Ltd* v *Roberts* (1980) 13 BLR 38, 44 (CA); *W. Tomlinson* v *Parochial Church Council of St*

Michael (1990) 6 Const LJ 319; and *Guinness plc* v *CMD Property Developments Ltd* (1995) 76 BLR 40.

[60] More recently, the temporary disconformity principle had been discredited in *Pelagic Freezing Ltd* v *Lovie Construction Ltd* [2010] CSOH 145 (at para [106]). Lord Doherty appeared to endorse the approach suggested by *Hudson* in *Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Ltd* [2017] CSOH 57 (at para [54]). There had also been numerous academic articles to the same effect.

[61] The prevailing view was that suggested by *Hudson* and most recently by Lord Doherty. Accordingly, *prima facie* an obligation to pay damages for breaches of a building contract which give rise to the incorporation into the permanent works of defects which are not of a genuinely temporary nature, or which are covered up, or which are numerous and serious, becomes enforceable when the work is carried out. If the defect is very quickly admitted and corrected then it may well be the case that the employer would lose the right to sue. However, that latter qualification did not arise in the present case.

[62] Applying that to the facts of this case, on the pursuer's own pleaded case, the defects now complained of are serious, numerous, permanent and, in some cases exist in covered up work. Accordingly, *prima facie*, any obligation to pay damages for the alleged defects became enforceable prior to handover.

[63] The main waterproofing solution designed for the waterproof box, that the basement was supposed to become, was Rawmat. It was Mr Clarkson's opinion that the Rawmat had deteriorated over time, and water had penetrated it. This view was rejected by both Mr Clark and Mr Reid. On the balance of probabilities, the water ingress was occurring not through the Rawmat but at places (not exhaustively identified in the evidence) where the

Rawmat adjoined other buildings or other waterproofing solutions. This was consistent with the evidence as to the lack of a complete waterproof design and the evidence that Rawmat, if it failed, would fail immediately. Accordingly, the defects in the waterproofing in relation to which the pursuer's claim proceeds were present by the time of the handover of the works. As the evidence demonstrated, the works were handed over some considerable time before the critical date, for prescription purposes, of April 2010. There was substantial evidence from numerous witnesses to indicate that SMG left the site in June or July 2009, if not earlier, and so the *quinquennium* ended in June or July 2014, with the result that the pursuer's claim had prescribed.

The leisure centre, breakfast room and chapel - knowledge and section 11(3)

[64] On the authorities it was clear that the onus rested on the pursuer to bring itself within section 11(3) by demonstrating that until a date within five years of raising proceedings it neither knew nor could with reasonable diligence have known that it had sustained loss, injury or damage. The pleadings did not attempt to identify the date on which the pursuer had actual knowledge of loss, or to address the issue of constructive knowledge.

[65] However, if the pursuer sought to argue that it did not know, and could not with reasonable diligence have known, that the buildings in issue were not waterproof, that argument must fail. On the evidence, the pursuer knew of the loss, injury or damage during 2008 or in any event 2009, since remedial works were instructed at that time. That was enough to satisfy the 'discoverability' provisions of section 11(3). The question arose as to whether there was any reason why prescription should run from a later date. Mr Clark's

report set out the basis for his opinion that any reasonably prudent building owner faced with the number and frequency of leaks (including leaks that required the application, at the pursuer's cost, of waterproof render to try to stem water ingress) would have instructed further detailed investigations and consideration of the design of the works. He explained that, had that been done, the pursuer would have identified the design defects which the pursuer itself avers have contributed to the problems it now faces.

[66] In relation to the pursuer's actual or constructive knowledge, an important part of the context was that the employer's representative, Mr McKay, was an experienced construction professional. There were repeated episodes of water ingress into the leisure centre during 2008 and 2009. These episodes were such, on the evidence, as to put the pursuer on notice that the basement was not a waterproof box and to put it on inquiry as to what was causing the water ingress. The pursuer, however, approached the episodes as matters of snagging with which it requested the defender to deal. Any remediation carried out was of a superficial nature. There was a substantial body of expert evidence to the effect that the pursuer ought in 2008 and 2009 to have taken steps to involve members of the professional team in order to investigate why the water ingress was occurring. In relation to the leisure centre the evidence established that problems of water ingress were not, as Mr Clarkson maintained, confined to one specific area of underpinning to which waterproof render required to be applied. Mr Clark had set out the steps which Agro could have followed: contacting the design team to identify potential reasons for water ingress, leading to identification of shortcomings in the waterproofing design, itself leading to identification of specific locations for disruptive investigation. A similar analysis applied to the breakfast room and to the defects in the chapel.

[67] Accordingly, in the exercise of reasonable diligence the pursuer could have become aware during the course of 2008 or at latest 2009 that problems of water ingress went beyond mere snagging issues. That being so, the pursuer could not bring itself within section 11(3).

[68] Mr Clarkson, in seeking to address the issues that arose under section 11(3), had applied the wrong test. The section 11(3) question was not concerned with what the pursuer reasonably believed but with what the pursuer could have known had it acted with reasonable diligence.

[69] As regards the breakfast room windows, the documentary evidence showed that in November 2009 it had already been identified that there were no weep holes at these windows, and that this was because of the design. At that time the pursuer's agent (Mr McKenna) noted that the architect's window sill designs were being partly blamed for the water ingress. Mr Welsh had noted that 'there must be either no cavity tray in the walls or the sealing of cavity tray ends/joints has not been done'. Accordingly, the pursuer was actually aware of the issues relating to the breakfast room windows well over five years before raising the present proceedings. If that submission was not accepted, in any event in the exercise of reasonable diligence the pursuer could have become aware of these issues well outwith the five year period.

[70] Turning to the chapel, the first defect of which the pursuer complained was water ingress through the ambulatory windows. According to Mr Clarkson, in 2009 the failure was simply of mastic seals and was localised. By contrast, the defects complained of in the present proceedings relate to the masonry and the proper waterproof detailing within the cavity walls. On the evidence, the only remedial steps taken in 2009 related to the mastic.

The pursuer took no steps to involve the architect of the chapel in considering any investigation or discussion of remediation. Nor did the evidence suggest that any consideration was given to the drawings, which did not show installation of cavity drains and trays at the windows. The defects now complained of were present from the time the chapel was constructed. If the pursuer was unaware of them, nonetheless in the exercise of reasonable diligence it could have become aware of them well over five years before raising the present proceedings.

[71] The second defect complained of in relation to the chapel was water ingress through the walls and belfry. According to Mr Clarkson, prior to April 2010 water ingress occurred through a defect in leadwork, which was repaired. Mr Clarkson stated that the leaks then repaired were not associated with the current complaint. Again, the pursuer took no steps to involve the architect of the chapel in considering any investigation or discussion of remediation. The evidence indicated that the precise source of the water ingress in 2009 and in 2016 had not been identified. Indeed, Mr Clarkson observed that 'the exact nature of the defect in the belfry is unrecorded'. That being so, it was not open to him at the same time to maintain that the previous leaks are not associated with the current complaint. The defects now complained of were present from the time the chapel was constructed. If the pursuer was unaware of them, nonetheless in the exercise of reasonable diligence it could have become aware of them well over five years before raising the present proceedings.

Agro's reliance on section 6(4)

[72] In relation to section 6(4)(a)(ii), the test for what amounts to a relevant error for the purposes of that provision had been stated in *BP Exploration Operating Company Limited* v

Chevron Transport (Scotland) 2002 SC (HL) 19 and in *Heather Capital & Duffy* v *Burness Paull* [2017] SLT 376. The pursuer in the present case relied on a number of acts and statements allegedly made by SMG as having induced error on the pursuer's part which, in turn, induced it not to sue. These appeared to relate only to the leisure centre; error did not seem to be relied on in relation to any of the other building elements. A statement that a specific defect had been remedied could not be equiparated with a representation that the contract works were free from all defects or watertight in all respects. Far less could it be construed as a representation inducing the pursuer not to make a claim against SMG. There were no relevant averments of, or evidence as to, error on the part of the pursuer; or that any error was induced by SMG; or that any error induced by SMG led the pursuer to refrain from making a claim against SMG.

[73] In any event, the proviso to section 6(4) has the effect that no time is deducted from the prescriptive period after the creditor could with reasonable diligence have discovered the error. If the pursuer was (contrary to these submissions) labouring under any error induced by SMG, by 2008 or 2009 in the exercise of reasonable diligence the pursuer could have disabused itself of that error. Engagement with the professional team or an investigation going beyond the superficial could have dispelled any such error.

Agro's reliance on section 10(1)

[74] On the question of relevant acknowledgement under section 10(1), as a preliminary observation, even if a relevant acknowledgment to attend to a breach of one obligation had occurred, that would not prevent prescription of any obligation to make reparation for breach of another obligation. So, for example, performance towards implement of an

obligation to construct a window sill in a good and workmanlike manner could not be "clearly referable" to the subsistence of an obligation to install a wall tie. It did not matter that not installing the wall tie was a breach of the broad obligation to execute works in a good and workmanlike manner. In relation to the first class of conduct, attending to the minor snagging defects noted in the 25 November 2009 email, there was no dispute between parties that these were indeed minor workmanship defects which are not linked to the ongoing water ingress. All parties understood that these were minor snagging defects and that they were being corrected in accordance with the defender's contractual obligation to attend to defects. The remedial work had dealt with them and they had not recurred. That being so, carrying out these works could not amount to a relevant acknowledgment of any subsisting obligation to carry out work to correct whatever is causing the ongoing problems of water ingress.

[75] As to the installation of pumps, whether installed as a temporary or permanent solution, this could not amount to a relevant acknowledgment of a subsisting obligation to prevent water ingress. On the contrary, installing pumps recognised that water will continue to enter the building.

[76] Turning to the evidence of visits by the defender to site, the carrying out of investigations and the carrying out of further remedial work (beyond the work discussed in the 25 November 2009 email), the evidence was sparse and there was no compelling evidence that SMG's conduct in this regard amounted to a relevant acknowledgment of any ongoing obligation to attend to anything that was now the subject of complaint (namely a fundamental problem with the waterproofing of the basement). Where a contractor was contacted about a job he had completed and where the employer had some concern, merely

returning to site, investigating the issue causing concern and proposing work that might be carried out could not sensibly be seen as relevantly acknowledging an obligation to pay for work that is required to deal with a problem, the cause of which is not even known. Even if one were to figure the same example where, unknown to all parties, the leaks were actually caused by defective workmanship (for which the contractor was contractually liable) the conduct described would still not amount to a relevant acknowledgment by the contractor of a subsisting obligation to pay for the cost of remedial work. In other words, without something more, the prescriptive period would still run despite the contractor returning to site, investigating and proposing solutions. Furthermore, in the present case, the evidence indicated that SMG was paid for remedial work, in particular, the application of waterproof render which was applied as a remedial measure to try to stop water ingress in the basement. In circumstances where the employer pays for the remedial work, he cannot contend that the contractor has made a relevant acknowledgement of an extant obligation to pay for that remedial work.

Agro's claim against Morgan

[77] The services to be provided by Morgan included engineering design advice in relation to the waterproofing of the underground spa and leisure centre. It was a provision of the contract that Morgan was to exercise the skill and care reasonably to be expected of structural engineers of ordinary competence. Following upon the carrying out of the development work, a number of defects had emerged. The leisure centre had suffered from significant water ingress and had not been adequately waterproofed. These defects had arisen as a result of, *inter alia*, defects in the design. The details of the occurrence of water

ingress were as set out in the action directed against SMG. Morgan's design for the leisure centre was not robust. The reinforced concrete walls and floor were not designed to the appropriate standard. An engineer exercising the skill and care reasonably to be expected of structural engineers of ordinary competence would not have used such a design. The particular failures in design were as averred. Loss and damage had also been suffered as a result of Morgan's fault. It was Morgan's delictual duty, in providing services to Agro, to exercise the skill and care reasonably to be expected of structural engineers of ordinary competence in providing services under the appointment. For the same reasons as given in relation to the contract, Morgan had failed to act to such a standard.

Submissions for Agro

[78] Again applying the pragmatic approach called for in *Musselburgh & Fisherrow Co-operative Society Limited* v *Mowlem Scotland Limited* 2004 SCLR 412, the nature, location and scale of each of the defects affecting the leisure centre in the November 2009 time period, as well as the nature of the defaults by which such defects were caused, was such that those defects were all separate and distinct from the matters now complained of (that the basement had not been adequately waterproofed as a result of failures of the Rawmat tanking).

[79] *Esto* any of the defects noted in November 2009 were the same as the defects currently complained of, these were not material and also, in terms of section 11(3), reasonable diligence was exercised. The building was not passed to the pursuer until 2010 and there was no manifestation of problems prior to March 2011. Moreover, Morgan relevantly acknowledged their obligations in July 2011 by attending on site to consider the

water ingress in the leisure centre, checking their design and subsequently emailing Mr McKenna to say that they were convinced the design was robust and that any issues must be due to workmanship. They thereby interrupted the prescriptive period relative to the November 2009 defects and commenced a new *quinquennium* in relation thereto. The same facts were relied upon for the purposes of induced error under section 6(4). Morgan's conduct and representations in July 2011 induced a period of error between July 2011 and November 2014 (40 months). In relation to the question of "reasonable diligence", for the purposes of section 6(4), the pursuer did what a person of ordinary prudence would have done if placed in the particular circumstances in which the pursuer found itself. It asked the designer (Morgan) to check its design and received the answer that the design was robust. Thereafter the pursuer concentrated on having the defects rectified by SMG. Morgan did not say to the pursuer that further or other investigations should be carried out in relation to the design. Morgan also relevantly acknowledged its obligations through its actions in attending the meeting on 21 October 2014 and subsequently checking the design and confirming (again) that the tanking details and specifications were robust.

Submissions for Morgan

[80] Much of Morgan's submissions related to the question of whether Agro had suffered any loss which allowed it to sue in the present action. These are detailed above.

[81] Reference was made to provisions in the building contract between Agro and SMG, including those dealing with practical completion of the sections of the works. Based on the evidence, the court should make the following findings. Practical completion took place in July 2009 when the works were practically complete with the exception of the filling in of a

hole which needed to be left open for the fit out works to be done. If that was incorrect, then it took place on 31 March 2010 when the fit out works were complete. Failing that, the date of practical completion was 4 April 2010, when family members of those involved in ownership of the site attended. If that was not accepted, then 2 December 2010, when the defects liability period for the whole of the works started, was the date of practical completion. Morgan did not agree with the submissions on behalf of SMG about the date of the occurrence of loss, injury and damage.

[82] The court had heard evidence from a number of factual witnesses as regards water ingress and physical damage after completion of the development works, including the matters arising in November 2009. Such defects represented immediately apparent material loss, injury and damage (for the building owners), in the form of water ingress to supposedly wind and watertight structures, and that while it was possible that isolated leaks in particular locations could have been resolved over the years, the underlying problem causing the ingress remained to this day.

[83] Agro appeared to argue in this case that they were not aware, and could not with reasonable diligence have been aware, that the issues highlighted in the email of 25 November 2009 represented loss, injury or damage caused by an act, neglect or default. The evidence contradicted any such claim, including evidence that the water ingress noted in November 2009 was "severe" and "serious". The evidence supported the contention that the water ingress in and before November 2009 was caused by the same cause as that which is the subject of the present claim and was not properly investigated.

[84] The court's findings in fact in relation to when water ingress at the leisure centre took place after completion of the building, and hence when loss, injury and damage occurred to

the property, should be as follows. In August 2009 damp patches became evident in the leisure centre at high level after a period of heavy rain. In November 2009, again when the rainfall was heavy, severe water ingress was experienced in a number of locations, including the leisure centre, the breakfast room and the chapel, causing damage to buildings and finishes. In November 2009, representatives of Agro indicated that there may be other areas where water ingress problems existed, and the extent of the flooding in November 2009 suggested that it is perfectly possible water was ingressing into the area below the stair in the leisure centre from somewhere else. Physical damage had occurred or is likely to have occurred by November 2009. In October 2010, further workmanship and snagging defects, including outstanding water ingress events, were identified, and further remedial works were instructed in relation to the leisure centre and chapel in accordance with snagging lists which had been prepared. Further water ingress occurred in the spring of 2011 and in July 2011, leading to the installation of a pump system. Further damage was caused as a result of a defect identified in January 2012, affecting the leisure centre gym, and steps were taken to install sump pumps at the leisure centre to control the ingress being experienced. Further significant ingress of water affected various areas of the leisure centre in January 2014.

[85] Accordingly, material loss, injury and damage had been suffered by CFW on the dates as noted above (at paragraph [27]).

[86] Turning to section 11(3), in connection with Agro's obligation to CFW, a lot of the expert evidence at the preliminary proof had involved views on what the experts thought a reasonable person in the position of the building owner should have done, with particular reference to events noted in November 2009. There was a sharp dispute about the extent to which a person in the shoes of a building owner could, with reasonable diligence, have

known there was a material problem at that time. Mr Reid believed a reasonable building owner should have carried out tests after repair works were completed. Whilst it might be thought that was a counsel of perfection at the relevant point in time (25 November 2009), it was in fact a view borne from practical experience. Mr Reid was the most experienced of the experts, and experience had taught him not to assume the problem is the obvious one, and that fixing it will address the underlying issue. What Mr Canavan said in his evidence in relation to the water ingress in the chapel resonated with Mr Reid's views. If the evidence of Mr Reid was not accepted, Mr Clark had given an alternative approach. That approach was adopted. Given all the instances of water ingress it was necessary to investigate what was going on.

[87] Agro had failed to establish that the causes of the problems in 2008/2009 were separate and distinct from the current complaint. Agro was not successful in establishing that all elements of the defective work were transitory. The waterproof box was not watertight. The court should focus on whether that problem was remedied. It was not remedied.

[88] It was accepted that Morgan was asked to check the design and stated that it was robust. However, an act of a person agreeing to check the design and confirming this to be robust was not performance towards implement of an obligation to pay damages and so could not be a relevant acknowledgement.

Agro's claim against Mr Trembath

[89] Mr Trembath was appointed as architect in relation to the design and construction of, *inter alia*, the chapel and turret. The terms of the appointment were formalised in a

Memorandum of Agreement dated 2 March 2007, incorporating the RIBA Conditions of Engagement CE/95 (including the associated Schedule of Services and Conditions of Appointment). Mr Trembath was lead consultant. He was to coordinate and integrate the services of all Specialists (as defined in the Conditions of Appointment) into the overall design. Mr Trembath was obliged, in providing the Services, to make such visits to the works as he reasonably expected to be necessary. The Services which Mr Trembath was to provide included: developing the design; preparing production drawings and a specification; coordinating production information; at intervals appropriate to the stage of construction, visiting the site to observe and comment on the contractor's site supervision and examples of his work relevant to the provisions of the building contract; and, as appropriate, instructing the opening up of completed work to determine that it was generally in accordance with the documents forming the building contract. It was a term of Mr Trembath's appointment that he would exercise reasonable skill and care in conformity with the normal standards of the architect's profession in providing his Services.

[90] Following upon the carrying out of the development work, a number of defects had emerged with the chapel and turret. They suffer from water penetration and water damage to their masonry (and, for the avoidance of any doubt, the internal finishes of walls and floors), with calcite leaching and mortar damage, poor pointing, absence of dowel pins/fixings in the parapet stones in the beach turret and the incorrect use of weep holes. These defects had arisen as a result of, *inter alia*, defects in the design of the chapel and turret.

[91] In the foregoing circumstances, Mr Trembath had failed to exercise reasonable skill and care in conformity with the normal standards of the architect's profession in providing

his services under his appointment and, in particular, in carrying out his design of the chapel and turret. This failure has given rise to the defects condescended upon. None of these defects would have been present had Mr Trembath met his obligations under the appointment. Without prejudice to that generality, various specific breaches were identified.

Submissions for Agro

[92] Breaches of contract by Mr Trembath had led to: (i) water penetration and damage to the masonry of the chapel and turret; (ii) calcite leaching and mortar damage; (iii) poor pointing; (iv) the absence of dowel pins and fixings in the parapet stones; and (v) the incorrect use of weep holes. On Mr Trembath's pleadings, and on the evidence before the court, it was not suggested that Mr Trembath's obligation to make reparation to the pursuer in respect of the calcite leaching and the absence of dowel pins and fixings in the parapet stones had prescribed. Therefore, on any view Mr Trembath's prescription plea should be repelled to that extent, and a proof before answer should be allowed in respect of these matters. In respect of the remaining defects in the chapel and beach turret, the pursuer made the same submissions, *mutatis mutandis*, as those made in respect of the claim against SMG, noted above, on materiality of the issues identified in November 2009 and on constructive awareness under section 11(3).

[93] Furthermore, the evidence of Donald Canavan (the expert witness on behalf of Mr Trembath) in relation to reasonable diligence came to little more than saying that if further investigations had been carried out in November 2009, as they might have been had Mr Trembath been informed of the water ingress, evidence of the other defects now

complained about might have been discovered at that time. He was unable to say positively that another source of water ingress would have been discovered at the time, and accepted that he did not know what the true cause of the water ingress in November 2009 actually was, far less that the cause of that ingress was any of the defects now complained of by the pursuer. He accepted that the matters now complained of were separate and distinct.

[94] His evidence was simply beside the point, for the reasons articulated by Lord Eassie in *Musselburgh & Fisherrow Co-operative Society Limited* v *Mowlem Scotland Limited* 2004 SCLR 412, at [53]: in the absence of a physical manifestation giving actual knowledge of defect B or making its existence ascertainable with reasonable diligence, failure to diligently investigate defect A does not amount to a failure to diligently investigate defect B.

[95] In any event, Mr Trembath's actions in responding to Mr Lindsay's email of 30 September 2013 (in which Mr Lindsay explained the current issues at the turret and chapel and sought Mr Trembath's comments), attending a meeting on site on 21 October 2014 (at which he made it clear that he was willing to co-operate in relation to the problems at the chapel and beach turret) and thereafter providing a detailed report on 3 November 2014 (in which he *inter alia* confirmed that the dressed stone elements and the antique stones and detailing were suitable for construction) amounted to a relevant acknowledgement for the purposes of section 10(1) of the 1973 Act.

Submissions for Mr Trembath

[96] Certain aspects of the submissions made on behalf of SMG were adopted. These were: firstly, that an approach based upon practical completion being the starting point for the enforceability of an obligation in a building contract was incorrect and placed an

unwarranted gloss on the provisions of the 1973 Act; secondly, that the onus was on the pursuer in relation to whether the defects now complained of were the same or different from those which arose in November 2009 and the onus also lay with the pursuer in relation to section 11(3), and in each case that onus had not been discharged; thirdly, that Lord Eassie's position in *Musselburgh & Fisherrow Co-operative Society Limited* v *Mowlem Scotland Limited* was incorrect. If these submissions were accepted the preliminary plea on prescription fell to be sustained. If not, the following submissions were made.

[97] The terms of the contract with Mr Trembath were varied in certain respects, including that Mr Trembath ceased to operate as contract administrator. In relation to the date of breach of contract, on the pursuer's averments any breach would have occurred and been complete prior to the date of practical completion. The evidence indicated that the date of practical completion was May 2009. Mr Trembath did have continuing involvement in the project after May 2009 but he was not then performing the contractual obligations of which he is said to be in breach. After May 2009 it was the fitting out works that were being undertaken.

[98] The email of 25 November 2009 referred to severe water ingress in a number of locations including in the chapel, through the ambulatory windows and through the belfry louvres. This was referred to in the email as a serious matter. The loss, injury or damage was water ingress within the chapel. The damage was material. The pursuer was well aware that there was water penetration. The pursuer maintained that the water penetration which occurred in November 2009 was caused by a different cause to that which the pursuer now relies upon. However, on the opinion evidence from Mr Canavan, that was not the

case. He gave detailed reasons for that view. There was therefore actual awareness for the purposes of section 11(3).

[99] Alternatively the pursuer could with reasonable diligence have discovered in November 2009 the defects which are now founded upon. In November 2009 the concern for the pursuer was that it may have suffered a loss. This was a multi-million pound construction project and hence was different from, for example, a one-off domestic house construction. There should have been no question of water penetration in a newly constructed chapel. More should have been done than simply going back to the contractor. In a project of this size and complexity, a person able to fund such a project would not simply allow the contractor to investigate but would refer the matter to the architect for robust and complete investigation. Mr Canavan suggested this would be the normal course of investigation. On behalf of Agro it had been submitted that none of the construction professionals involved in the works suggested undertaking any of the investigations which the experts now refer to, but the whole point of Mr Trembath's position was that the architect ought to have been told of water ingress in 2009 and this would then have led to those investigations. Mr Canavan's evidence was that such investigation would have taken a short period, of a few weeks. Had thorough investigation taken place in November 2009 any defects of the kind now complained of would have been discovered. In particular, the condition of the mortar, the condition of cavity trays, the condition of weep holes, and the condition of cavity closers would have been ascertained, as Mr Clark suggested.
Mr Canavan agreed with that view and also said that adequate investigation would have established the water ingress tracking route and any missing cavity trays or damp proof courses. The weakness or friability of uncarbonated mortar should have resulted in testing

of representative samples of the mortar materials by a laboratory. The fact that water was present on the floor of a building which was supposed to be wind and watertight would result in the expectation that the designer would be involved in any investigation. The same point applied in respect of the windows in the belfry. Water inside the chapel at the chancel must have passed through multiple layers of construction and one would need to know the course of the water in order to understand how it got there.

[100] In relation to relevant acknowledgement, properly and sensibly understood it was plain that neither the events at the site meeting of 21 October 2014 nor the email of 3 November 2014 could constitute performance towards implement of an obligation to make reparation. In relation to section 6(4), should the point arise, there was no evidential basis at all for the proposition that Mr Trembath induced the pursuer at any time to refrain from making a claim for reparation.

Issue 2: Decision and reasons

The relevance or otherwise of Practical Completion

[101] It is plainly correct, as was submitted on behalf of SMG, that the concept of practical completion cannot be used to place a gloss on the language of the statutory provisions; that language expresses the law and must be applied. However, it is equally obvious that for the purposes of the statute an act, neglect or default, in a case such as the present, takes place when the breach of duty founded upon occurs. In relation to SMG, the case is based on breach of contract. The contract between Agro and SMG states, as is common in many construction contracts, that SMG were to "carry out and complete" the works in accordance with the contractual conditions. Accordingly, if the works were not completed in

accordance with the conditions there was at that point a breach of duty. The obligation may be viewed as dual, in the sense that it creates a duty both to carry out, and separately, to complete, the works in conformity with the contract: see *Guinness plc* v *CMD Property Developments Ltd* 76 BLR 40; *Hunt* v *Optima (Cambridge) Ltd* EWHC 681 (TCC); 148 Con. L.R. 27. Whether this means that there was also an earlier breach in failing to carry out the works in accordance with the conditions is for present purposes neither here nor there; a duty to complete the works in accordance with the contract conditions means that, in the contract with SMG, completion is a point in time at which breach can occur (see *The Oxford Partnership* v *The Cheltenham Ladies College* [2007] BLR 293). Thus, I reject SMG's contention that the date of practical completion is not relevant. On the contrary, it is directly relevant to the date of the alleged breach of contract by SMG.

[102] I also disagree with the submission on behalf of SMG to the effect that in *Hunthaven* (at para [54]) Lord Doherty appeared to endorse the approach suggested in *Hudson*, on which SMG relies. In that case, the issue being addressed at that point was whether the pursuer had suffered loss, injury or damage prior to the end of the defects liability period (rather than prior to practical completion). In paragraph [55], Lord Doherty explained that "By practical completion…" there was a breach, and that:

> "At practical completion the first defender was obliged to hand over to the pursuer the relevant Phase of the slab, which phase was to be in conformity with the contract requirements. If it was not, the first defender would be in breach of contract *at that time*" [emphasis added].

Read in context, Lord Doherty's observations at paragraph [54] concerned the factual issue of whether the defects complained of were transitory or temporary in nature, which was the starting point for the pursuer's reliance upon the "temporary disconformity" approach. In

concluding that they were not, he was rejecting the pursuer's submission to that effect. But the discussion thereafter is entirely consistent with practical completion being a point in time at which there will be a breach of contract if the works are not in conformity with the contractual requirements.

[103] As to the date of practical completion, in the present case it is of course correct that no certificate of practical completion was ever issued. But it is beyond argument that the stage of practical completion must have been reached. Completion is a recognised stage of building contracts. The works were handed over and on any view must have been completed. SMG and in due course its sub-contractors left the site. The remaining tranche of the retention monies was released. The issue is therefore not if, but when, practical completion occurred. There is significant force in the pursuer's contention that it should be taken as 2 December 2010. The letter from SMG to Ridett Ltd dated 5 December 2011 confirmed that the end of the defects liability period (relative to "Works at Ben Alder Estate, Chapel, North Wing Tower, Leisure Centre, Breakfast Room and Study") was 2 December 2011. In a construction contract, the contractor is likely to be keen to be paid for the work at the earliest possible point in time. Where the contract provides for a retention, as here, it is in the contractor's interests to have that released. Once practical completion has been reached and thereafter the defects liability period has run its course, with defects attended to and with no known outstanding issues, remaining retention monies can be released. There is no good reason as to why a contractor would be interested in delaying the commencement of the defects liability period, so that it started at some point well after practical completion. On the contrary, the contractor would ordinarily want the defects liability period to commence straight after practical completion. There was no evidence suggesting in any way

that the 12 month defects liability period in the present case was extended or that it commenced at a date later than practical completion. Taking that into account as part of the context, but more importantly having regard to the evidence relied upon by the pursuer (including the terms of the letter to Ridett Ltd dated 5 December 2011, and the evidence of Brendan McKenna), I conclude that practical completion took place on 2 December 2010. While it is correct that the chapel and beach turret formed a different section of the works, the letter of 5 December 2011 confirmed that the end of the defects liability period in respect of the chapel and the other areas was also 2 December 2011.

[104] If for any reason that conclusion is wrong, then in my view the only other possible date is the pursuer's alternative contention of 1 March 2010, for the reasons advanced in the pursuer's submissions. These included that this date is consistent with Mr McKenna's letter to Wellwood Leslie of 11 February 2010 in which he advised that the breakfast room and north wing were complete, but that the leisure centre was not, and the Form 5 completion certificate submission made by Wellwood Leslie on 10 March 2010 indicating that the work was completed on 1 March, and the electrical installation certificates signed on 18 and 19 March 2010.

[105] In relation to Morgan, there were limited submissions as to whether any obligation it owed to Agro had been extinguished by prescription; as is noted above, much of Morgan's submissions concentrated on Issue 1. Morgan accepted that the starting point for prescription was the date of practical completion and that this was ascertainable by inference. No real attempt was made to explain how practical completion could be relevant to the issue of prescription in respect of the claim by Agro against Morgan, other than that CFW (and by implication Agro) suffered no loss, injury or damage as a result of any breach

of contract or fault on the part of Morgan until the works were handed over, at practical completion. Plainly, Agro's claim against Morgan must depend on the contractual and delictual duties owed by Morgan, none of which related to or referred to practical completion. I conclude that Morgan's reliance upon practical completion is unfounded. In assessing the issue of concurrence of *damnum* and *injuria* in a question with Morgan, the terms of SMG's contract with Agro is of no relevance. This conclusion may be favourable to Morgan because it may be the case that *damnum* and *injuria* concurred much earlier than any date of practical completion of SMG's works. But Morgan made no argument for a date any earlier than the handover date as being the point at which loss was suffered by Agro. In relation to Mr Trembath, again, it was not suggested that there was any reference to practical completion in the contract. I therefore conclude that practical completion is irrelevant also in relation to the alleged breach of duty by Mr Trembath. On behalf of Mr Trembath, breach of duty was said to have occurred prior to practical completion, which is asserted to have taken place in May 2009.

Agro's claim against SMG: the leisure centre

[106] In terms of section 11(1) of the 1973 Act, an 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 Act as having become enforceable on the date when the loss, injury or damage occurred. I have accepted the pursuer's position in relation to 2 December 2010 being the date of practical completion. That is the date when the contract was breached and therefore is the date of *injuria*. Thus, there could have been no concurrence of *damnum* and

injuria prior to that date. On that basis, given that the action was served on SMG on 28 April 2015, SMG's plea of prescription falls to be repelled.

Concurrence of *damnum* and *injuria*

[107] In identifying the actual date of concurrence of *damnum* and *injuria*, the issue is whether *damnum* was present on the date of the breach (at practical completion) or arose at some later date. The pursuer makes general averments about failures in the Rawmat tanking but does not say when or (at least in any real detail) how these failures are alleged to have occurred. The evidence of the pursuer's expert, Mr Clarkson, did not shed any substantial light on the matter although he did indicate that the Rawmat tanking may have deteriorated over time, for example because adequate compression was not applied when it was installed. If there were, as he contends, localised workmanship failures these must have related to the installation of the Rawmat tanking. At the point of installation, it could therefore be argued that there was a defect, albeit one which might take some time for the full consequences of the defect to be manifest. So, on that approach, the water ingress relied upon by the pursuer was merely a manifestation of that existing defect. On the other hand, it seems fair to conclude that if the workmanship failures had led to immediate failures in the tanking these would have resulted in water ingress, which one would have expected to be fairly serious and very evident, at a much earlier point, if not indeed straight after installation. On the basis that widespread water ingress was not noted to have occurred at that time, taken along with what appears, after March 2011, to be a progressively increasing volume of water ingress, it could be argued on the balance of probabilities that the loss, injury or damage occurred and was manifest only from, at the earliest, March 2011.

[108] I consider that I am unable to conclude, taking *pro veritate* the pursuer's position as to the nature and cause of the defects currently complained of, that *damnum* did not occur until some point in time after practical completion. I do of course appreciate that the current defects might be said to have been latent, with *damnum* arising only when there was physical manifestation of material damage. But I was simply presented with no evidence to the effect that the defects currently complained of did not give rise to physical manifestation of material damage (for example, damage within the structure, such as lack of adhesion or compression of the Rawmat tanking) until some point after practical completion. It would be unfair to SMG to give Agro the benefit of the doubt, when Agro has not made the position sufficiently clear. I therefore conclude that the date of concurrence of *damnum* and *injuria* was the date of practical completion.

[109] If I am wrong about practical completion having taken place on 2 December 2010, then as noted above I accept, for the reasons given and the evidence relied upon by the pursuer, the alternative date of 1 March 2010. That would then be the date for the concurrence of *damnum* and *injuria* and in that situation the issues of postponement and/or interruption of the prescriptive period fall to be considered, which I deal with below. If practical completion did not occur on 1 March 2010, the only other candidate as the date for practical completion is July 2009 with concurrence of *damnum* and *injuria* at that date, and the questions relating to postponement/interruption would again arise.

[110] If, against the view that I have reached, SMG are correct that there was a concurrence of *damnum* and *injuria* at an earlier point than practical completion, it is again only if Agro can rely upon one or other of the grounds for postponement or interruption that the obligation of SMG will not have been extinguished by prescription. No precise date for that

concurrence was given on behalf of SMG, but there is a reference in SMG's submissions to June or July 2009.

[111] In his reply to the oral submissions of the other parties, Senior Counsel for Agro contended that, separately and in any event, in terms of paragraph 4 of Schedule 2 of the 1973 Act, when work was executed by instalments, the key date is when the last instalment is paid. In the present case, that was when the building was handed over at practical completion. This point was made only at that stage in the submissions; as it was not mentioned in the pleadings or in the written submissions advanced by Agro, SMG had no opportunity to deal with it. Significantly, I was not referred to any evidence of precisely when and on what basis instalment payments were made under the contract. Further, there was no submission to the effect that, on a proper construction of the contract, it did not mean that the obligation was to carry out and complete a particular instalment of the works, in return for payment for that instalment. If that had been the position, that could result in prescription starting to run separately at that point on each instalment of works. In short, I was not given any sound basis upon which to reach the conclusion that the statutory provision relied upon by Agro in this alternative submission had any relevance. I therefore do not accept that submission.

Materiality

[112] If I am wrong about practical completion being the starting point for the running of the prescriptive period, then the issue of materiality in relation to the incidents in 2008 and 2009 falls to be considered. In order for, as it were, the clock to start ticking on prescription in relation to a right to sue on any particular defect, the defect in question must represent

material, as opposed to negligible or insignificant or trivial, damage (*Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Limited & Ors* [2017] CSOH 57 at [45]; *Strathclyde Regional Council* v *WA Fairhurst & Partners* 1997 SLT 658 at 662B; *Pelagic Freezing (Scotland) Ltd* v *Lovie Construction Limited* [2010] CSOH 145 at [102], [105] and [110]; *Stewart Milne Westhill Limited* v *Halliday Fraser Munro* [2016] CSOH 76 at [67]; *Homberg Houtimport BV* v *Agrosin Private Ltd* [2004] 1 AC 715 at [39]-[40], [64], [90] and [139]).

[113] SMG contends that, according to the evidence, there were various incidences of water ingress into the leisure centre in 2008 and through to August 2009, including leaks that required, at the pursuer's own cost, the application of waterproof render. SMG founds upon these as being occasions of loss, injury or damage which were material and which occurred more than five years prior to the action being raised. On this issue, Agro submits that Ian Anderson, the waterproofing contractor, was employed by SMG to apply waterproof render at the leisure centre during that period and the works were carried out in August, September and December 2008 and then into 2009. Agro contends that the evidence indicates that the waterproof rendering works were carried out to provide waterproofing where there was no Rawmat tanking in use. Agro contends that the best interpretation of the evidence is that the material render work was all done in the same area, that being the area of underpinning below the stairs. There were no water ingress problems to the rendered area by mid-2009, so these were said to have been transitory problems.

[114] SMG's expert, Mr Clark, stated in his report dated 30 June 2017:

> "5.6.2.14 I do not know the circumstances that led to the application of waterproof render to the inside of the waterproof box on five occasions including one to the underpinning below the stair. In my experience, waterproof render is normally associated with remediating a known problem of water ingress. I consider it to provide a lower standard of waterproofing than would be provided by the

> Rawmat bentonite membrane. I have not seen evidence of a design of waterproof render on the drawings or any instruction for this work."

SMG further contends that the evidence in the case did not support the view that the render was applied only to the area of underpinning, because the method statements provided by Mr Anderson refer to rendering work being carried out at "various locations" and there was also oral evidence about render being applied at the wall and junction, where a jacuzzi was located.

[115] Agro's expert, Mr Clarkson, in his report dated 2 August 2017, concludes (at para 2.9):

> "I have reviewed these emails and consider that they refer to only five instances of render being applied, as opposed to eight, indeed this appears to be accepted by Mr Clark later at para 5.6.2.1 of his report. Further they refer to one specific known area adjacent to the underpinning under the stair. My opinions provided in my original report remain. This area of underpinning beneath the stairs does not use Rawmat. Indeed render would have been applied to deal with the absence of Rawmat in this area where the old and new buildings meet. As such it would not have been indicative of a wider problem with the Rawmat waterproof membrane, such that a reasonably prudent building owner should have investigated further."

[116] The locations of the applications of the waterproof render are not absolutely clear. To a large extent the experts were seeking to construe the terms of emails in order to reach a view. However, in reaching his conclusion Mr Clarkson set out what I consider to be convincing reasons as to why the "various locations" should be understood as being at the area of the underpinning. He had regard to what the contemporaneous documents indicated about the separate stages of application of the render to the area of underpinning, and he also considered the volumes of materials which were used. On balance, I am persuaded that his position is correct and I accept his evidence on the matter. I therefore

conclude that the incidents in 2008 and in the first part of 2009 relied upon by SMG do not amount to material damage.

[117] In relation to the events in November 2009, SMG does not rely upon these as constituting *damnum* for the purposes of its arguments on prescription. For that reason, I need not consider the question of materiality of these matters in relation to Agro's claim against SMG.

Were the incidents in 2008 and 2009 separate and distinct from the currently pled complaints?

[118] If my conclusions on the relevance of practical completion are incorrect, it becomes necessary to consider in this context SMG's arguments relating to the events of water ingress in 2008 and 2009. It is only loss, injury or damage and the correlative act, neglect or default that can properly be relied upon in support of a plea of prescription; prior losses and defaults which are distinct, discrete and unrelated will fall to be left out of account (*ANM Group Limited* v *Gilcomston North Limited* 2008 SLT 835 at [29]). In reaching a view as to whether loss, injury or damage, and the correlative act, neglect or default, are truly separate and distinct (as opposed to being a development or a further emerging example of an existing known loss, injury or damage and its correlative default) I accept (and this was not disputed by parties) that a pragmatic approach is appropriate (*Musselburgh & Fisherrow Co-operative Society Limited* v *Mowlem Scotland Limited* 2004 SCLR 412, at [50]-[51]; Johnston, *Prescription and Limitation* (2nd ed), at 2.26). In taking that pragmatic approach, it is relevant to have regard to the nature, location and scale of the loss, injury or damage, as well as to the nature of the default or breach of duty by which such loss, injury or damage was caused

(*Musselburgh & Fisherrow Co-operative Society Limited* v *Mowlem Scotland Limited* 2004 SCLR 412, at [51]; *ANM Group Limited* v *Gilcomston North Limited* 2008 SLT 835 at [25]-[27]).

[119] SMG contended that there was a single defect: the intended "waterproof box" was not waterproof. In light of the statutory provisions and the authorities, this is a generalisation and over-simplification of the issues. SMG further contended that the evidence as to the cause of the current problems upon which the pursuer founds was inconclusive and therefore that the pursuer had not made out its case on the earlier incidents in 2008 and the first part of 2009 being separate and distinct. However, as I have noted above, at this stage in this preliminary proof the pursuer's averments as to the cause of the current problems must be taken *pro veritate*. In short, these are said to be failures in the Rawmat tanking. For the purposes of considering whether the earlier incidents were separate and distinct, that is the comparator. On the basis of the evidence of Mr Clarkson, noted above, which I have accepted, these earlier incidents related to the waterproof render at the area of underpinning and in any event did not recur and appeared to have been remedied and resolved. Accordingly, these do not relate at all to failures in the Rawmat tanking.

[120] In relation to the matters raised concerning the leisure centre in the email of 25 November 2009, SMG accept that these were minor workmanship failures, resulting in snagging issues and are unrelated to the matter currently complained of in the action against them.

[121] I therefore conclude that any issues of water ingress in 2008 and 2009 at the leisure centre were separate and distinct from the currently pled problems.

Actual or constructive awareness: section 11 (3)

[122] Section 11(3) of the 1973 Act provides that where a creditor in an obligation was, on the date that obligation became enforceable, not aware (and could not with reasonable diligence have been aware) that it had suffered loss, injury or damage, prescription will start to run when the creditor first became aware (or could with reasonable diligence have become aware) of the loss, injury or damage. For the purposes of section 11(3), the creditor need only be actually or constructively aware of the occurrence of loss, injury or damage which had, as a matter of fact, been caused by the breach of contract or breach of delictual duty complained of (*David T Morrison & Co. Limited (t/a/ Gael Home Interiors)* v *ICL Plastics Limited* 2014 SC (UKSC) 222, per the decision of the majority and in particular Lord Reed at [16]-[19] and [25] and Lord Neuberger at [47] ; *Gordon* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287 at [17]). The creditor's lack of actual or constructive awareness of the factual cause of the loss, injury or damage is not sufficient to postpone the commencement of the prescriptive period under section 11(3) (*Gordon* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287 at [20] and [21].) 'Reasonable diligence', for the purposes of section 11(3) and section 6(4) of the 1973 Act, means the taking of those steps that a person of ordinary prudence would have taken if placed in the circumstances in which the pursuer found itself (*Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Limited & Ors* [2017] CSOH 57 at [79]; *Glasper* v *Rodger* 1996 SLT 44 at 48, applying *Peco Arts Inc* v *Hazlitt* [1983] 1 WLR 1315 (at 1323); *Adams* v *Thorntons* 2005 1 SC 30 at [23]-[24]; *Heather Capital Limited (In Liquidation) and Duffy* v *Levy & McRae; Heather Capital Limited (In Liquidation) and Duffy* v *Burness Paull LLP* 2017 SLT 376 (at [72]); Johnston, *Prescription and Limitation* (2nd ed) at 6.100-6.103 and 6.127).

[123] If necessary, Agro seek to rely upon the terms of section 11(3). SMG relies, in contesting Agro's submissions on this point, not only on the events in 2008 and the first part of 2009, but also upon the events of November 2009. SMG contends that even although these November 2009 matters were not linked to the ongoing water ingress which is the subject of the present action, nonetheless they should, when taken along with the other problems, have prompted investigation. As is noted above, SMG relies upon Mr Clark's evidence to the effect that because of the number and frequency of the leaks (including leaks which apparently required the application of waterproof render at the pursuer's cost) a reasonably prudent employer would have instructed further detailed investigations and consideration of the design. SMG also relies upon the evidence of other witnesses, including the expert witnesses of the other defenders, to say that in the exercise of reasonable diligence such investigations ought to have been commenced.

[124] In my view, in relation to the matters which pre-date November 2009, the factual basis for this contention as to the reasonably prudent person commencing further investigations is not well founded, as I have accepted the evidence of Mr Clarkson about these events. On the evidence, I do not accept that the events involved any material issues of water ingress that merited further investigation. The incidents of water ingress did not result in remedial repair works being carried out to areas which should have been waterproof because of the use of Rawmat tanking. In fact, they arose at another area. There was therefore no basis in the evidence for any suggestion that these incidents of water ingress resulted from failures in the Rawmat tanking caused by workmanship failures.

[125] In relation to the matters that arose in November 2009, the contention of SMG is that even though these were minor snagging issues caused by workmanship defects unrelated to

the things now complained of by Agro, an ordinarily prudent person should have conducted investigation, including into the underlying design, which would have led to discovery of the issues which are currently the subject of complaint. There was, it was said, a single defect: the intended "waterproof box" was not waterproof. SMG also contended that, if there were separate defects, the point made by Lord Eassie in *Musselburgh & Fisherrow Co-operative Society Limited* v *Mowlem Scotland Limited*, to the effect that not diligently investigating matter A, where that would have revealed the presence of matter B, does not mean that the pursuer has failed diligently to investigate matter B, is incorrect. SMG argued that if the pursuer should have investigated defect A, which would revealed defect B, then that is a single exercise of reasonable diligence which ought to have been carried out.

[126] As Lord Eassie explained in the examples he gave, he was referring to distinct matters or defects. Where there are such distinct defects, Lord Eassie concluded that "the necessary physical manifestation must be relevant to the particular defect in question" before investigation is required. On this point, I agree with Lord Eassie's reasoning. However, I do not consider that in the present case the question arises in the first place. SMG's proposition founds upon the investigation of the November 2009 problems, said by Mr Clark to be appropriate, as being a step which a person of ordinary prudence would have taken if placed in the circumstances in which the pursuer found itself. I reject that contention. The problems in November 2009 were not things that the pursuer decided to do nothing about; on the contrary, the issues were discussed with SMG and the causes were then identified and the problems rectified. They were minor snagging defects. The contention for SMG that further investigations into design ought to have been made is

unsound. There is no doubt that the basement was intended to be waterproof but that cannot mean that any ingress of water, even if caused by an issue that had been identified as a minor workmanship failure, and then addressed and apparently resolved, required further investigations into the design.

[127] There were a number of construction professionals engaged in the project and nobody suggested at the time that further investigation into the design should take place. On the contrary, the impression plainly given was that any problems had been resolved. I have weighed up the various strands of the expert evidence and it seems to me that the actings said to be required in the exercise of reasonable diligence by the expert witnesses for the defenders in fact goes beyond what is reasonable in all the circumstances.

[128] I conclude that Agro was not aware in 2008 or 2009 that loss, injury or damage caused by the act, neglect or default now relied upon had occurred and could not, with reasonable diligence, have become so aware, at least until March 2011.

Induced error: section 6(4)

[129] Agro also relies, if it is necessary to do so, upon section 6(4) of the 1973 Act. A creditor seeking to rely on section 6(4) in order to interrupt prescription on the basis of induced error must prove three matters: (a) an error induced by the words or conduct of the debtor (or someone acting on the debtor's behalf); (b) that the error induced the creditor to refrain from making a relevant claim in relation to the obligation in question; and (c) the period during which the creditor was so induced (*BP Exploration Operating Co. Ltd* v *Chevron* 2002 SC (HL) 19 at [29]-[33] and [65]-[67]; *Adams* v *Thorntons* 2005 1 SC 30 at [66].) The onus is on the debtor to prove the proviso in section 6(4) i.e. the point at which the creditor could

with reasonable diligence have discovered the error (after which point, time will not be excluded from the prescriptive period) (*Heather Capital Limited (In Liquidation) and Duffy* v *Levy & McRae; Heather Capital Limited (In Liquidation) and Duffy* v *Burness Paull LLP* 2017 SLT 376 at [77]; *Heather Capital Limited (In Liquidation) and Duffy* v *Levy & McRae* 2017 SCLR 317 at [47]-[56]; *BP Exploration Operating Co. Ltd* v *Chevron* 2002 SC (HL) 19 at [110] and [33]; *United Central Bakeries Ltd* v *Spooner Industries Ltd* [2013] CSOH 150 at [117]). In relation to the word 'induced', the debtor may have been acting entirely innocently and in good faith: his conduct may not have been deliberate, blameworthy or careless or carried out with any particular motive such as deception or concealment, but nevertheless it may have led the creditor to believe something different from the truth (*BP Exploration Operating Co. Ltd* v *Chevron* 2002 SC (HL) 19 at [65]; *Heather Capital Limited (In Liquidation) and Duffy* v *Levy & McRae; Heather Capital Limited (In Liquidation) and Duffy* v *Burness Paull LLP* 2017 SLT 376 (at [63]); *ANM Group Limited* v *Gilcomston North Limited* 2008 SLT 835 at [75]).

[130] Agro contends that in carrying out the remedial works (related to the matters raised in November 2009) and representing that the defects had been remedied, SMG induced Agro erroneously to refrain from making "any claim in relation to the November 2009 defects". Later instances of SMG carrying out remedial works are also founded upon. In view of the fact that the November 2009 defects are accepted by SMG to be minor snagging issues that were resolved (and hence were separate and distinct matters) the actings of SMG in respect of these issues is of no relevance: these actings cannot be founded upon as inducing an error on the part of Agro not to sue in respect of the matters which are the subject of the current complaint.

[131] There was evidence of SMG carrying out remedial works in 2011 and 2012. The leaks which appeared in 2011 were generally in areas other than the leisure centre, with one apparent exception: the void under the staircase accessed from the gym plant room in the leisure centre. From the email correspondence, it is clear that SMG attended the site to view the defects and to take the necessary measures to rectify them. By August 2011 the remedial works were completed and there were no outstanding issues as at December 2011, when release of the remaining tranche of the retention monies to SMG was authorised. In early January 2012 there was further water ingress. By 20 March 2012, SMG had undertaken remedial works by the installation of a sump and pump arrangement.

[132] I am satisfied that the remedial works completed in August 2011 led Agro to the erroneous belief that the cause of the water ingress identified earlier in 2011 had been addressed, with the result that Agro refrained from making any claim against SMG. That error lasted until December 2011, further problems becoming evident in January 2012. I am satisfied that having regard to the whole circumstances, in the exercise of reasonable diligence Agro could not have discovered that error prior to the end of December 2011. The implicit representation was that the issue had been addressed and resolved and I am not persuaded that an ordinarily prudent person in the position of Agro would have taken any further steps to investigate the matter during the period from August to December 2011. The result is that the period of error in this regard is four months.

[133] However, I am not satisfied that the events of early 2012 induced Agro into any erroneous belief. There was nothing in SMG's words or conduct which could be taken as SMG investigating the cause of the problems and proposing to carry out, or actually carrying out, remedial works. On the contrary, the principal work done was the installation

of the sump and pump mechanism, which plainly dealt with the symptoms and not the cause. In any event, standing the more serious nature of the water ingress in early 2012, I am satisfied that an ordinarily prudent person would have carried out further investigations into the cause of the water ingress, given that no cause had properly been identified. Accordingly, I do not accept that Agro was induced by the words or conduct of SMG to refrain from making a relevant claim for any period after December 2011.

[134] As a result, the period of four months from August to December 2011 should not be reckoned as part of the prescriptive period in the claim against SMG in respect of the leisure centre.

Relevant acknowledgement: section 10(1)

[135] In the context of building contract cases, the carrying out of remedial work is capable of constituting performance towards implement of an obligation to make reparation for failures which have caused defects in the contract works, for the purposes of section 10(1)(a) of the 1973 Act. The question is whether in doing what it did with regard to the remedial work there was such performance by the debtor towards implement of an obligation to make reparation as clearly indicated that the obligation still subsisted (*Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Limited & Ors* [2017] CSOH 57 at [102]-[103]). As I have noted above, performance towards implementation must be clearly referable to the particular obligation.

[136] On this matter, I accept the submissions of SMG. The minor snagging problems in November 2009 were not linked to the ongoing water ingress which forms the basis of the present claim. Remedial works as to these minor snagging problems cannot amount to a

relevant acknowledgement of a subsisting obligation to correct whatever is the cause of the ongoing water ingress problems. The installation of pumps was, as I have noted, addressing the symptoms rather than the cause. While SMG attended on site, carried out investigations and proposed solutions, in my opinion this was dealing with issues on an *ad hoc* basis rather than acknowledging an actual liability. What is required is such performance towards implement of the obligation (in this case, to make reparation for defective workmanship relative to the Rawmat tanking) as clearly indicates that the obligation still subsists. No such performance occurred.

Agro's claim against SMG: the breakfast room

The incidents in November 2009 – separate and distinct?

[137] As is noted above, Agro contended that the matter noted in November 2009 in respect of the breakfast room (the failure of the window sill extension pieces) was separate and distinct from the matters now complained of in the present action. SMG says that is incorrect and points to the fact that in November 2009 it had already been identified that there were no weep holes at the windows and that there must be problems with the absence or the sealing of cavity trays, matters which are raised in the present action. In my opinion, there is plainly a sufficient degree of overlap between the matters now complained of and the matter raised in November 2009. For that reason, I do not consider that the issues are separate and distinct.

Actual or constructive awareness: section 11(3)

[138] The parties are also at issue as to whether there was actual and/or constructive awareness of the issues now complained of by Agro. While the possible existence of these issues was at least partly the subject of comment at the time, the fact is that SMG's views on the cause of the problem and on the appropriate remedial works were obtained. SMG then carried out remedial works and the problem then bore to disappear. Given that Mr Welsh of SMG stated in his emails that the cause of the problem was the window sill extension pieces and that remedial works to the extended window sill would eliminate the problem, it cannot be concluded that Agro was actually aware of the problems now relied upon. Moreover, I am not satisfied that, having been advised by the contractor of the cause and means of remedying the problem, in the exercise of reasonable diligence the pursuer should have carried out any further investigations or enquiries. For these reasons, Agro could not, in the exercise of reasonable diligence, have become aware of the issues which are now complained about prior to at least March 2011.

Induced error: section 6(4)

[139] On the facts as outlined above, SMG's attention to the window sill extension in the breakfast room and its clear representation that the problem had been remedied constitute words and conduct which induced Agro not to make a relevant claim in respect of the obligation. No persuasive reason was offered as to why an ordinarily prudent person would have taken any further steps to investigate matters. I accept Agro's contention that the period of error lasted from at least the end of 2009 until March 2011, which is a period of at least 14 months.

Agro's claim against SMG: the chapel

[140] As I have noted above, my conclusions as to practical completion apply also to the chapel. It is appropriate that, in any event, I also address the other issues raised by the parties in this regard.

The events of November 2009 – materiality

[141] Agro contends that the issues identified in November 2009 about the ambulatory windows were caused by obvious mastic failures, treated as an entirely normal snagging issue and remedied by SMG. No damage is said to have been caused. Similar points are made regarding water ingress at the walls and the belfry louvres. As such, it is argued that these matters were not material. Applying the test in the authorities, and having regard to the nature and scope of the defects (the mastic failures at the ambulatory windows and high level windows, and the absence of a screen behind the belfry louvres and the need for repair and resealing of the lead flashing on the belfry floor) it cannot, in my opinion, be concluded that the loss was negligible, insignificant or trivial. I therefore conclude that it was material.

The events of November 2009 - separate and distinct?

[142] The evidence of Mr Clarkson was to the effect that the matter that arose in November 2009 about the ambulatory windows was a localised issue relating to mastic sealant, in contrast with the current claim, in which the defects complained of relate to masonry and proper waterproof detailing within the cavity walls. While it is correct that Mr Clarkson did not identify the exact nature of the defect in the belfry, his evidence was that the previous water ingress is not associated with the current complaint. Having regard to the fact that

there was not, in my opinion, any cogent evidence to the effect that the defects were the same, I am satisfied that Agro's position, that the issues that arose in November 2009 relating to the chapel were separate and distinct, is correct. Accordingly, these are irrelevant to the question of prescription.

Actual or constructive awareness: section 11(3)

[143] In relation to section 11(3), SMG says that with the exercise of reasonable diligence Agro could have become aware of the currently pled defects. The gist of SMG's position is again that steps should have been taken to involve the architect in considering any investigation or discussion of remediation. Weighing up the expert evidence, this again seems to me plainly to exceed what a person of ordinary prudence would have done if placed in the circumstances in which the pursuer found itself. At the time, Agro again sought and relied upon SMG's advice on the causes of the problems, and on the appropriate remedial works. Once these were carried out the problems seemed to disappear. Once again, no experienced construction professional on site suggested the involvement of the architect. In my opinion, a person of ordinary prudence would not have made enquiries of the architect but would simply have acted in the same manner as Agro acted. Standing that conclusion, Lord Eassie's approach in *Musselburgh & Fisherrow Co-operative Society Limited* v *Mowlem Scotland Limited* does not arise, but had it been necessary to consider the point I would have agreed with that approach and would find that any failure to diligently investigate the problems then manifest (which I have concluded were indeed separate and distinct) does not amount to a failure to diligently investigate the defect which is the subject of the current complaint.

Relevant acknowledgement: section 10(1)

[144] Agro contends that there was discussion at a site meeting on 23 July 2014 involving SMG's representative, Mr Fyfe, during which Mr Fyfe appeared to accept that SMG had a responsibility to remediate. There was also an email from Mr Fyfe on 4 September 2014 in which he undertook to look at issues relating to the chapel. There was then a meeting on 21 October 2014 at which these issues were discussed and SMG agreed to carry out certain investigations. This conduct stops well short of actually doing any remedial works. The evidence about the meeting on 23 July 2014 is not clear and in any event a general acceptance of a responsibility to remediate not directly linked to the issues in question cannot amount to a relevant acknowledgement. The facts identified do not involve any performance towards implement of an obligation to make reparation in respect of the breaches now alleged. Accordingly, I conclude that there was no relevant acknowledgement on the part of SMG in respect of the obligations currently founded upon.

Agro's claim against SMG: summary of decision

[145] In view of the number and complexity of the various issues which arise in respect of Agro's claim against SMG, it may assist if I briefly summarise my conclusions. The date of practical completion is when the concurrence of *damnum* and *injuria* occurred. Practical completion took place on 2 December 2010. If that is incorrect, the running of prescription was in any event postponed or interrupted in relation to the particular work areas in the following manner. In relation to the leisure centre, the incidences of water ingress in 2008 and prior to November 2009 were not material and in any event were separate and distinct from the current complaints. The events of November 2009 were material, but again were

separate and distinct. There was therefore no concurrence of *damnum* and *injuria* based on these events. Moreover, in relation to the events in 2008 and 2009, Agro could not with the exercise of reasonable diligence have discovered that loss, injury or damage caused by the act, neglect or default currently complained of had arisen, until March 2011 at the earliest. Agro's contentions in relation to section 6(4) are rejected (except in relation to the four month period noted above), as are its contentions about relevant acknowledgement. In relation to the breakfast room, the matters which arose in November 2009 were not separate and distinct, but in the exercise of reasonable diligence Agro could not have become aware that loss, injury or damage caused by the act, neglect or default currently complained of had arisen, until March 2011 at the earliest. Moreover, in terms of section 6(4), SMG's conduct results in a 14 month interruption in the running of prescription. In relation to the chapel, the events of November 2009 caused material loss but were also separate and distinct from those which are the subject of the current complaint. In any event, Agro could not with the exercise of reasonable diligence have discovered that loss, injury or damage caused by the act, neglect or default currently complained of had arisen, until March 2011 at the earliest. Agro's argument as to relevant acknowledgement in relation to the matters at the chapel is not accepted.

Agro's claim against Morgan

The sub-issues

Concurrence of *damnum* and *injuria*

[146] The question of the date of concurrence of *damnum* and *injuria* in relation to any obligation on the part of Morgan to make reparation to Agro was not addressed in any real

detail in the parties' submissions. Agro founded upon the date of practical completion, but gave no cogent reasons as to why this is relevant in a question with Morgan. For its part, Morgan also proceeded on the basis that practical completion was the appropriate starting point. No submissions were made as to whether, in the context of a design defect, *damnum* and/or *injuria* would arise at an earlier stage, let alone as to when that point in time occurred. In that situation, having not been provided with the necessary material in evidence or submissions, I am unable to reach a firm conclusion on the date of concurrence of *damnum* and *injuria* in respect of any obligation owed by Morgan.

The events of November 2009 – separate and distinct?

[147] As I have noted above, Agro and SMG both submit that the workmanship issues identified in the email of 25 November 2009 were minor snagging defects that were not linked to the ongoing water ingress. These workmanship issues were dealt with and have not reappeared. However, Morgan continues to rely upon 25 November 2009 as being the date when physical damage first occurred at the leisure centre. In light of the evidence, and applying the test from the case law referred to above, I accept that Agro and SMG are correct in their articulation of the position. Accordingly, the issues identified in the email of 25 November 2009 were separate and distinct from the matters now complained of in respect of ongoing water ingress. In particular, they are not related to failures of the Rawmat tanking.

The events of November 2009 - materiality

[148] While I have accepted that it is correct that the defects identified in the email of 25 November 2009 were separate and distinct, I also require to consider whether or not they resulted in material loss, injury or damage. Again applying the test in the case law, and albeit recognising that these were snagging issues, I do not consider that I can regard them as negligible, insignificant or trivial. As is noted above the email of 25 November 2009 described them as "serious".

Actual or constructive awareness: section 11(3)

[149] Morgan correctly submits that a lot of the expert evidence at the preliminary proof involved views on what the experts thought that a reasonable person in the position of the building owner should have done, with particular reference to the matters raised on 25 November 2009. One issue raised is of course whether material loss and damage, which was caused by defects that are separate and distinct from those now complained of, required further investigation. In my opinion, given that SMG now accept that these were workmanship issues that were resolved, I do not consider that the evidence supporting the need for further investigations relied upon by Morgan can bear any weight. The contention being made is effectively that further investigations were required even though the only actual defects were minor snagging matters arising from workmanship failures, which were considered to be, and in due course demonstrated to be, remedied without any damage recurring. For that reason, and the reasons given above about the evidence I have accepted in relation to this issue, I accept Agro's position in relation to section 11(3). The consequence is that, in the exercise of reasonable diligence, the defects which are the cause of the current

problems could not have been identified until March 2011, at the earliest. On that basis, any obligation owed by Morgan to make reparation has not been extinguished by the operation of prescription.

Induced error: section 6(4)

[150] I accept the position of Agro that the attendance on site by Morgan in July 2011 to consider the water ingress in the leisure centre, coupled with the fact that they checked their design and stated by email that they were convinced that their design was robust, and that any issues must be due to workmanship, constitutes words and conduct which induced Agro not to make a relevant claim in respect of the obligation owed by Morgan. On behalf of Morgan, it was accepted that it had stated that its design was robust. Morgan did not make any submissions on the section 6(4) issues in the claim by Agro against them, preferring to focus on that provision in the context of Agro's obligation to CFW. I further accept that the period of error that was induced commenced in July 2011 but I conclude that it ended on 21 October 2014, the evidence (from William Lindsay) being that at that point it was realised that it was becoming apparent that there may be underlying design issues.

[151] Morgan also made no submission that the exercise of reasonable diligence for the purposes of section 6(4) would have resulted in discovery of the error. In particular, Morgan did not engage with Agro's contention that it had taken the steps which a person of ordinary prudence would have taken (that is, to ask the designer to check its design). In light of the answer from Morgan that its design was robust, and that any issues must be attributable to workmanship, I do not consider that a person of ordinary prudence placed in the circumstances in which the pursuer found itself would nevertheless have undertaken

further investigations in relation to the design. At the time, Morgan did not suggest any such further investigations, nor did any other party. The evidence of Mr Reid regarding steps which ought to have been taken involved significant investigative works, the costs of which were not explained. In my view, he applied too high a standard. I am accordingly persuaded that Agro exercised reasonable diligence for the purposes of section 6(4).

[152] On that separate basis, Morgan's alleged obligation founded upon by the pursuer has not been extinguished by the operation of prescription.

Relevant acknowledgement: section 10(1)

[153] In my view, Morgan's conduct in attending the meeting on 21 October 2014 and subsequently checking its design and confirming (again) that the tanking details and specifications were robust does not constitute such performance by Morgan towards implement of an obligation to make reparation as clearly indicating that the obligation still subsisted. Rather, this conduct stopped short of any form of performance towards implement and there was nothing in the conduct of Morgan which indicated that any obligation still subsisted.

Agro's case against Morgan: summary of decision

[154] Again, it may help if I summarise my conclusions. While it is not possible to identify the date of the concurrence of *damnum* and *injuria*, the defects identified in November 2009 were material but were separate and distinct from those founded upon in the current action. Agro's position in relation to section 11(3) is accepted, with the consequence that, in the exercise of reasonable diligence, the defects which are the cause of the current problems

could not have been identified until March 2011, at the earliest. Agro's contentions in relation to section 6(4) are also accepted resulting in an interruption of the period of the running of prescription by some 39 months. However, I reject Agro's position in relation to relevant acknowledgement.

Agro's claim against Mr Trembath

The sub-issues

Scope of the dispute

[155] I accept Agro's position that, in light of the pleadings on behalf of Mr Trembath, and the evidence before the court, there is no suggestion that his obligation to make reparation to the pursuer in respect of the calcite leaching and the absence of dowel pins and fixings in the parapet stones has prescribed.

Concurrence of *damnum* and *injuria*

[156] In relation to the other complaints founded upon in the action against Mr Trembath, again Agro founded upon practical completion as the starting point, but gave no reasoned basis for that approach. On behalf of Mr Trembath, given that part of the submissions for Agro were adopted, the point being taken was that the concurrence of *damnum* and *injuria* must have been at an earlier date. Once again, I am not able on the evidence and submissions made to reach a clear conclusion on this point. However, given that Mr Trembath relies upon the events of November 2009, the issues between the parties can still be resolved when one considers questions of materiality and the law on postponement or interruption of the prescriptive period.

The events of November 2009 - materiality

[157] Agro make submissions on the basis that the water ingress in November 2009 did not cause any material damage. Again applying the test in the authorities, and having regard to the nature and scope of the defects (the mastic failures at the ambulatory windows and high level windows, and the absence of a screen behind the belfry louvres and the need for repair and resealing of the lead flashing on the belfry floor) it cannot be concluded that the loss, injury or damage was negligible, insignificant or trivial. It was therefore material. In that regard, I accept the submission on behalf of Mr Trembath that the water ingress was described in the email of 25 November 2009 as "severe" and that it was "a serious matter".

The events of November 2009 - separate and distinct?

[158] I have already concluded that the matters currently complained of are separate and distinct from those which arose in November 2009 at the chapel. I do not consider that the evidence of Mr Canavan on this issue was persuasive. It related largely to the contention that further investigations in 2009 would have shown that the water ingress then was of the same origin as that seen subsequently. It did not adequately address the points raised by Mr Clarkson about the differences between the causes of ingress in November 2009 and the subsequent incidences. Accordingly, I remain of the view that the matters which arose in November 2009 were separate and distinct.

Actual or constructive awareness: section 11(3)

[159] I have identified above the alleged defects which form the basis of Agro's case against Mr Trembath. Agro contends that it did not, on the evidence, have any actual

awareness of loss, injury or damage of the type now complained of in the action. Agro also says that there is no suggestion on behalf of Mr Trembath that the matters now complained of are not separate and distinct from a design perspective. I do not accept the submission on behalf of Mr Trembath to the effect there was actual awareness of the water ingress being caused by the same defects. The evidence does not support that contention. Accordingly, the issue is one of whether a person of ordinary prudence, if placed in the circumstances in which the pursuer found itself, would have taken steps which would have resulted in the discovery of the defects now complained of in the action.

[160] Agro obtained SMG's views on the causes of the problems and on the appropriate remedial works. These were then carried out and nothing occurred for a substantial period to suggest that the remedial works had not been successful. Mr Trembath did not identify anything of concern in his own thorough and careful review of snagging issues. Moreover, Mr Trembath's expert, Mr Canavan, was in fact unable positively to conclude that the defects now complained of would have been ascertained had the investigations he suggested been undertaken. Mr Canavan's position was that more should have been done than merely referring matters back to the contractor. He refers to various steps which he says would be normal practice when water ingress of the type noted in November 2009 had occurred. When faced with defects which appear to be of workmanship and which are apparently resolved, with no-one among the construction professionals engaged in the works suggesting anything further at the time, including Mr Trembath, I conclude that the pursuer's position is correct. Thus, Agro could not have become aware, in the exercise of reasonable diligence, of the existence of the defects which form the current complaint, until March 2011 at the earliest.

[161] Again, standing that conclusion, the application of Lord Eassie's approach in *Musselburgh & Fisherrow Co-operative Society Limited* v *Mowlem Scotland Limited* does not arise, but had it been necessary to consider the point I would again have agreed with that approach and would find that any failure to diligently investigate the problems then manifest (which I have concluded were indeed separate and distinct) does not amount to a failure to diligently investigate the defect which is the subject of the current complaint.

Relevant acknowledgement: section 10(1)

[162] Agro relies upon various acts and comments by Mr Trembath in September 2013, October 2014 and November 2014. Viewed individually or collectively, these do not in my view satisfy the statutory test. Agro says that by Mr Trembath responding to an email of 30 September 2013, in which his comments were sought on the current issues at the turret and chapel, attending at a meeting on site (and making clear at the meeting that he was willing to cooperate with the problems at the chapel and beach turret) and then providing a detailed report (in which he confirmed that the dressed stone elements and the antique stones and detailing were suitable for construction) amounted to a relevant acknowledgement. This evidence stops short of doing any remedial works and it does not involve any form of performance towards implement of an obligation to make reparation in respect of the breaches now alleged. It was little more than agreeing to look into matters; indeed it seems to involve a conclusion being reached that there was nothing wrong. I therefore do not accept Agro's submission on relevant acknowledgement.

Agro's case against Mr Trembath: summary of decision

[163] By way of summary, I am not able to reach a firm conclusion on the date of concurrence of *damnum* and *injuria*, but I conclude that the events of November 2009, while material, were separate and distinct from the current complaints and that, in any event, Agro could not in the exercise of reasonable diligence have identified the defects which are the cause of the current problems until March 2011 at the earliest. Agro's position on relevant acknowledgement is again rejected.

Issue 3: waiver

Submissions for SMG

[164] There is a dispute between parties as to whether or not the installation of pumps was intended to be a permanent or temporary solution to water ingress in the basement. The pumps were installed, at cost to SMG, with the agreement of the pursuer's authorised agent and representative. The pumps were intended, and reasonably understood by SMG, to be a permanent solution to water ingress there. SMG had reasonably acted on that understanding to its cost and the pursuer was now barred from contending otherwise. Reference was made to *Armia Limited* v *Daejan Developments Limited* 1979 SC (HL) 56 and McBryde, *The Law of Contract in Scotland* (para 25-15).

[165] The evidence on this issue was that the rationale for installing the pumps was as a permanent solution and that SMG was not asked to do any further opening-up work after the pumps went in. There were simply no instructions to carry out any further investigations. The parties clearly agreed that pumps would be installed to control water ingress into the basement and that this was to be a permanent solution. The pursuer had

thus waived any right that it had to insist on the basement being a fully waterproof box. The pursuer had waived the right to complain about water ingress from precisely the same source as was intended to be dealt with by the pumps. The pursuer had waived the right to demand that SMG paid for yet further work to make the basement watertight. SMG conducted itself on the basis of the agreement and incurred expense in purchasing the pumps and installing them.

Submissions for Agro

[166] The interlocutor allowing the proof before answer was limited to allowing parties a preliminary proof before answer on the question of prescription, title and interest to sue, and "any other matter hereafter approved by the court". No other matters were approved by the court. SMG's contentions on waiver therefore did not fall within the matters remitted for the preliminary proof before answer. Such evidence as was led in relation to the installation of the pumps was unobjectionable in the context of the issues of prescription which were live before the court and it was not objected to on that basis. The court should not entertain SMG's case of waiver at the present time.

[167] However, if the court was prepared to entertain SMG's submission, SMG's case of waiver failed on the evidence. Mr McKay was quite clear that he understood the pumps to be only a temporary measure, not a permanent measure. Furthermore, the pumps were installed because of a particular concern about water percolating up the wall and causing damage to the specialist plaster finish in order to "control any water ingress to void areas around the gym and to minimise any future damage to plaster in the gym". The pumps were in no sense a solution which would prevent water from getting into the leisure centre

in the first place. It was inherently unlikely that Mr McKay would have accepted a situation in which water could continue to ingress, subject to control by the pumps, for all time coming. It would be going too far to hold that installation of the pumps, in the circumstances in which they were installed, connoted the abandonment of the pursuer's right to sue for damages in respect of a breach of contract by SMG.

Issue 3: Decision and reasons

[168] I agree with the pursuer's submission that this issue does not fall within the remit of the preliminary proof before answer. Given, however, that evidence has been led, and it has not been suggested that further evidence material to the issue could have been led, and that both parties have made submissions on the matter, I consider that I can determine it at this stage.

[169] On the submissions made, it was simply not established in the evidence that the installation of the pumps was understood by both parties, let alone agreed, to be a permanent solution to the issues of water ingress at the leisure centre. That is not surprising given that the pursuer was faced with multiple and developing issues of water ingress, the causes of which had not been resolved. There is in any event a clear leap of logic involved in taking the installation of pumps on a permanent basis to be a solution to all of the water ingress issues in the leisure centre and, further, not merely to be a means of getting rid of water that is penetrating the structure but also to result in the abandonment by Agro of its right to sue SMG in respect of the alleged causes of that water ingress. I do not find it possible on the evidence before me to conclude that Agro had, whether expressly or impliedly, as a result of the installation of the pumps, abandoned its right to sue SMG.

Conclusion

[170] For these reasons, the various pleas-in-law on title and interest to sue, the absence of loss, and prescription advanced by the defenders in the three actions will fall to be repelled. I shall put the cases out by-order, to deal with that matter and to determine further procedure. In the meantime, all questions of expenses are reserved.