OUTER HOUSE, COURT OF SESSION

[2020] CSOH 31

CA52/19

OPINION OF LORD DOHERTY

in the cause

W M MORRISON SUPERMARKETS PLC

Pursuer

against

(FIRST) LEM ESTATES LIMITED (IN LIQUIDATION) and KEITH ANDERSON, the liquidator thereof; (SECOND) STRUER CONSULTING ENGINEERS LIMITED; (THIRD) MUIR CONSTRUCTION LIMITED

Defender

Pursuer: Young; MacRoberts LLP
Second Defender: Morton (solicitor advocate); BTO Solicitors LLP
Third Defender: Jones QC (solicitor advocate); Brodies LLP

11 March 2020

Introduction

[1] The pursuer is a supermarket operator. It is the tenant of a supermarket at 295-301 Gallowgate, Glasgow. In 2010 the first defender was a developer. In July 2010 the pursuer and the first defender entered into an Agreement for Lease in terms of which the first defender agreed to develop a supermarket at that address and the pursuer agreed that it would lease the supermarket once it had been completed. The second defender carries on

business as consulting civil and structural engineers. The third defender carries on business as building contractors.

[2] On 28 and 29 June 2011 the first defender and the third defender entered into a building contract ("the Contract") to design and construct the supermarket ("the Works"). The form of contract used was the Design and Build Contract for Use in Scotland (2005 Edition) (Revised October 2009). The Contract incorporated the amendments in Part 9 of the Schedule.

[3] On 31 May 2011 the first defender and second defender had entered into an Appointment Agreement in terms of which the second defender agreed to provide certain civil and structural engineering services ("the Services") in connection with the Works.

[4] In terms of a Novation Agreement between the defenders the rights, obligations and liabilities of the first defenders under the Appointment Agreement were transferred to and assumed by the third defender, and the second defender obliged itself to undertake and complete the performance of the Services under the Appointment Agreement to and in favour of the third defender.

[5] The second defender and the pursuer executed a collateral warranty undertaking ("the Struer Collateral Warranty") dated 31 May 2011 and 25 August 2011 in terms of which the second defender undertook certain obligations to the pursuer in respect of the Services provided under the Appointment Agreement. The third defender and the pursuer also executed a collateral warranty undertaking ("the Muir Collateral Warranty") dated 24 June 2011 and 25 August 2011 in terms of which the third defender undertook certain obligations to the pursuer in respect of the Works carried out under the Contract.

[6] Practical completion of the Works occurred on 22 December 2012. The pursuer entered into a lease of the premises with the proprietors. The term of the lease was for at least 20 years from 23 December 2011. The pursuer commenced trading at the premises. In December 2013 significant ponding of water in the car park of the premises occurred. Isolated damaged areas of the car park surface also became apparent. The pursuer maintains that these problems have been caused by the first defender's breach of the Agreement for Lease; by the second defender's breach of the Struer Collateral Warranty; and by the third defender 's breach of the Muir Collateral Warranty. The pursuer seeks redress for the loss and damage which it maintains it has sustained by reason of those breaches.

[7] On 20 December 2016 the present action was raised as an ordinary action. The summons was not called until December 2017, almost a year later. In January 2018 the action was sisted. The sist expired in February 2019, and the defenders lodged defences. On 12 March 2019 the action was transferred to the commercial roll. Between March and May 2019 the parties adjusted their pleadings. I allowed a debate on issues raised by the pursuer, the second defender and the third defender in their notes of argument (20, 22 and 25 of process). Only the pursuer, the second defender, and the third defender participated in the debate. The pursuer argued that certain of the averments of the second defender and the third defender relating to design responsibility for the surface course of the car park were irrelevant and ought not to be admitted to probation. It also maintained that the third defender's averments of personal bar were irrelevant and ought not to be admitted to probation. In addition to defending the relevancy of their averments, the second and third defenders argued that some of the obligations upon which the pursuer founded had been

extinguished by the short negative prescription (Prescription and Limitation (Scotland) Act 1973 (the "1973 Act"), section 6).

[8] I propose firstly to set out the relevant terms of the Appointment Agreement, the Contract, and the collateral warranties. After that I will consider the pursuer's attack on the relevancy of the second and third defenders' averments. Finally, I will turn to the prescription issues.

The Appointment Agreement, the Contract, and the collateral warranties

The Appointment Agreement

[9] In terms of clause 3.1 of the Appointment Agreement the second defender was "the Consultants". It undertook to provide "the Services … subject to and in accordance with the provisions of this Agreement". The Services were to be provided to the Clients, who were the first defender prior to novation of the Appointment Agreement and the third defender after novation. In the Appointment Agreement the first defender was also referred to as the Developer and the third defender was referred to as the Contractor. Clauses 4, 12, 15, 21 and 26 provided:

> "**4 Duty of Care**
>
> 4.1 The Consultants undertake that they have exercised and will continue to exercise, in the performance of the Services to the Clients, the reasonable skill, care and diligence expected of a competent professional civil and structural engineer in the performance of the services who is experienced in carrying out such services in relation to works of a similar size, scope and nature to the Works.
>
> …

4.3 The Consultants shall notify the Clients in writing as soon as reasonably practicable in the event of becoming aware of any matter which might materially prejudice the interests of the Client in connection with the Project.

…

12. Liaison

12.1 The Consultants shall:-

1. liaise with the Clients, the Other Consultants, the Developer and their professional advisers, and any other party appointed in connection with the Project under the Third Party Agreements, to facilitate the proper flow of information, its integration into the existing structure and services and co-ordination within the overall design of the Project

2. check that all of the design produced by them complies with the Employer's Requirements and that all of the 'as-built' drawings produced by them are correct

…

12.3 Notwithstanding the foregoing terms of this Clause 12, the Consultants shall remain fully responsible for all of the Services.

…

15 Variations to the Services

15.1 Any variations to the Services and/or additional services provided by the Consultants shall not vitiate this Agreement but the scope and extent of each such additional and/or varied service and the basis upon which the Consultants shall be paid for rendering such services shall be agreed in writing between the Clients and the Consultants (except in the case of emergency where the health and safety of persons is at risk or damage to or loss of property is threatened) prior to being carried out.

…

15.3 Any services provided pursuant to this Clause shall be provided subject to and in accordance with the terms and conditions of this Agreement and the Consultants shall enter into a formal minute of variation of the Agreement in order to document the additional and/or varied services within fourteen days of a written request from the clients to do so.

…

26 Entire agreement

26.1 This Agreement constitutes the entire contract between the parties and may be varied or modified only by a deed duly executed by the parties in accordance with the provisions of Section 3 of the Requirements of Writing (Scotland) Act 1995."

Part 1 of the Schedule listed the Other Consultants, which included: "Specialist Tenant Requirements Adviser: STUART McTAGGART LIMITED"

[10] Part 3 of the Schedule provided:

"PART 3

THE CIVIL & STRUCTURAL ENGINEERING SERVICES

The Consultants shall carry out the following Services.

Stage 1 – Pre-Novation

1 Assist in formulation of the requirements of the Employer (for the purposes of this Part 3 of the Schedule, references to 'the Employer' shall be construed as references to the Developer) in respect of the Works, what they are intended to achieve, the cost and programme.

…

9 Liaise with the Other Consultants in seeking from the Employer any further information needed so that they can perform their services under their various agreements with the Employer.

10 Liaise with the Other Consultants in making initial recommendations to the Employer on the technical viability of the Works …

…

12 Provide sufficient preliminary information in relation to the Works in the form of advice, data schedules, sketches, drawings, reports or outline specifications for inclusion in the Employer's Requirements …

…

14 Attend meetings as required with other members of the Professional Team to progress the Employer's Requirements.

…

16 Prepare drawings sufficiently detailed for a tender of a Design and Build construction contract …

Stage 2 - Post Novation

…

7 Develop the Contractor's requirements into a definitive brief for the structural elements of the Works …

…

14 Collaborate with the Professional Team and seek from the Contractor any further information needed so that they can perform their services under their various agreements with the Contractor.

15 Collaborate with the Professional Team and make recommendations to the Contractor on the technical viability of the Works or any part thereof.

…

18 Develop the design of the Works and collaborate with the Professional Team.

…

23 Develop the structural elements of the design of the Works in collaboration with the Contractor and prepare sufficient calculations, drawings, schedules and specifications to enable the Contractor to construct the Works …

…

32 Assist any consultants appointed and examine the Contractor's sub-contractors, and other specialists' proposals as may be required for the Works and in the consideration of alternative designs for the Works submitted by sub-contractors and specialists, or proposed by the Contractor.

…

General

1. The Consultants shall advise the Clients of any mistake, inaccuracy, discrepancy or omission of which it becomes aware in the Contract.

2. As the design element of the Works for which the Consultants is (*sic*) responsible in terms of this Agreement progresses the Consultants shall consult with the Clients on a regular basis and shall keep the Clients fully informed.

…

6. The Consultants shall attend or be represented at all principal site meetings and at all meetings convened by the Clients relating to the design of the works, if so required by the Clients, and shall advise and assist on all matters arising at such meetings which relate to or affect the Services.

…"

The Contract

Articles of Agreement

[11] The Third Recital in the Articles of Agreement stated:

"the Contractor has checked and is satisfied as to the feasibility of the Employer's Requirements and subject to the Conditions has agreed to accept full responsibility for any design incorporated in them …"

Article 1 provided:

"Article 1: Contractor's obligations

The Contractor, for the Contract Sum, shall both design the Works and shall carry out and complete the Works in accordance with, and the rights and duties of the Employer and the Contractor shall be regulated by, these Articles of Agreement together with the contract particulars forming part of this Agreement (the 'Contract Particulars') and the Schedule annexed hereto (the 'Schedule') including, without limitation, the Contract Documents as defined in the conditions bound in with this Agreement at pages 19 to 66 (inclusive) (the 'Conditions') and listed in the Schedule Part 8 all of which Contract Documents are hereby incorporated in and form part of this Agreement and which ((*sic*) in the case of the documents referred to in (i) to (iv) of the Schedule are amended by Part 9 of the Schedule.

…"

Contract documents

[12] The Contract Documents listed in the Schedule Part 8 were (i) the Agreement consisting of the recitals, the Articles and the Contract Particulars along with the Schedule annexed; (ii) The Conditions; (iii) the Employer's Requirements (including Contract Drawings and Specification); (iv) the Contractor's Proposals; (v) the Contract Sum Analysis; (vi) the Schedule of Amendments.

Employer's Requirements

[13] The Employer's Requirements included Section B: Preliminaries and Appendix 1 (Drawing List) and Section H: Structural Drawings. Clause A10/240 of the Preliminaries stated:

> "DESIGN RESPONSIBILITY: The design responsibility for the complete works rests with the Contractor.
>
> The drawings and information issued with the Employer's Requirements are for the purposes of assisting in clarifying those Requirements and do not attract design responsibility. The Contractor may vary the details included within the Employer's Requirements provided the Employer's Requirements are not compromised and any change is in accordance with the Conditions of Contract.
>
> The Contractor is also responsible for designing suitable foundations, structures, services, drainage based on site investigation reports prepared by the Contractor …"

Clause A11/120 provided that the Contract Drawings were listed in Appendix 1. One of the listed drawings was the second defender's drawing no 2548/0101B Proposed Drainage Layout. That drawing detailed the use of TarmacDry for the car park surface course.

Contractor's Proposals

[14] The Contractor's Proposals consisted of a letter by the second defender to the first defender dated 28 June 2011 which confirmed that its proposals for the Works were as set out in or referred to in the Employer's Requirements.

Conditions

[15] Clause 1.12.1 of the Conditions provided:

> "**The Appointments and Novation**
>
> 1.12.1 The Contractor acknowledges that the Employer has appointed the Novated Consultants upon the terms of the Appointments to carry out the initial design of the Works and such design is included in the Employer's Requirements. The Contractor acknowledges that he is entirely satisfied with the terms of the Appointments and subject to these Conditions accepts full responsibility for the work of the Novated Consultants (and for any negligence, omission or default on their part under the terms of the Appointments whether before or after the date of this Contract)."

In terms of clause 1.1 the term "Novated Consultants" was defined as meaning the second defender and the Architect.

[16] Clause 2.1.1 provided:

> "**Contractor's Obligations**
>
> **General obligations**
>
> 2.1.1 The Contractor shall carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents, the Construction Phase Plan and the Statutory Requirements and for that purpose shall complete the design of the Works including the selection of any specifications for the kinds and standards of the materials, goods and workmanship to be used in the construction of the Works so far as not described or stated in the Employer's Requirements or the Contractor's Proposals …"

Clauses 2.11 and 2.12 of the standard conditions were deleted and not used. Clause 2.14 of the standard conditions was deleted and a new clause 2.14 was substituted:

> "**Discrepancies in documents**
>
> …
>
> 2.14.3 The Contractor accepts entire responsibility for the Contractor's Proposals or any mistake, inaccuracy, discrepancy or omission contained therein and the contractor warrants that he has carefully checked the Employer's Requirements and accepts full responsibility for the design contained therein as if such design had been carried out by the Contractor."

[17] Clause 2.17 of the standard conditions was deleted and a bespoke clause 2.17 was substituted:

> "**Design Work – liabilities and limitation**
>
> …
>
> 2.17.2 The Contractor shall, subject to Clause 2.17.3.1, be responsible in all respects for the design of the Works and shall adopt and take responsibility for all design work in relation thereto including that which may have been carried out before the date of this contract by any one of the Novated Consultants. The Contractor accepts responsibility for any mistake, inaccuracy, discrepancy or omission contained in the design comprised in the Employer's Requirements, or in any change thereon, and in the Contractor's Proposals …
>
> 2.17.3 The Contractor warrants and undertakes to the Employer that:-
>
> 2.17.3.1 the design of the Works (including any design carried out by any Sub-Contractor) has been and will be carried out using the reasonable skill, care and attention expected of a properly qualified and competent designer who is experienced in carrying out such design services in relation to works of a similar size, scope and nature to the Works.
>
> …"

The collateral warranties

The Struer Collateral Warranty

[18] Clause 1 of the Struer Collateral Warranty provided:

> "1 Duty of Care
>
> 1.1 We warrant and undertake that we have exercised and will continue to exercise, in the performance of our services under the Appointment, the reasonable skill, care and diligence expected of a competent civil & structural engineer in the performance of the Services who is experienced in carrying out such services in relation to works of a similar size, scope and nature to the Works.
>
> 1.2 We shall notify the Company in writing as soon as practicable in the event of becoming aware of any matter which might materially prejudice the interests of the Company in connection with the Works."

The Muir Collateral Warranty

[19] Clause 1 of the Muir Collateral Warranty stated:

> "**1 Duty of Care**
>
> 1.1 We warrant and undertake to the [pursuer] that:
>
> 1.1.1 we have executed and will continue to execute the Works in conformity with the Contract using workmanship and materials of the quality and standards specified in the Contract and if not specified appropriate to the Works;
>
> 1.1.2 we have exercised and will continue to exercise, in the performance of our services under the Contract with a design element, the reasonable skill, care and attention expected of a properly qualified and competent designer of the relevant discipline who is experienced in carrying out such design services in relation to works of a similar size, scope and nature to the Works.
>
> 1.2 We shall notify the [pursuer] in writing as soon as reasonably practicable in the event of becoming aware of any matter which might materially prejudice the interests of the [pursuer] in connection with the Works.

1.3 We acknowledge that the [pursuer] shall be entitled to rely upon our performance of our duties and obligations arising under the Building Contract, and upon the undertakings and warranties contained in this Agreement."

The relevancy attack

The second and third defenders' pleadings: design responsibility and personal bar

[20] In Answer 9 the second defender avers:

"9. … The Appointment does not make the Second Defenders responsible for designing every aspect of the Works. The Pursuer appointed Rex Proctor and Partners to prepare a Developer's Shell Specification. This document provided an outline of the Pursuer's requirements for the car parking area. The Second Defender went on to prepare an initial drainage design on that basis. Stuart McTaggart were the Pursuer's specialist requirements adviser for the works. They were responsible for reviewing all drawings on behalf of the Pursuer, including the drainage design drawings for the car park. As part of that review, in or around September 2010, Stuart McTaggart requested that the traditional drainage system proposed for the car park be re-considered. They proposed that TarmacDry be used in place of the traditional system using gulleys or linear/slot drains (the traditional system) … Revised drainage design drawings were prepared to specify the TarmacDry system for use in the car parking bays only. Following the Appointment of the Second Defender in May 2011, a meeting took place on or around 13 June 2011 among representatives of the Second and Third Defenders and a representative from Tarmac. At that meeting, Tarmac advised that the TarmacDry system was about to be installed at the Pursuer's store in Bathgate. Tarmac also advised that they design the system to suit specific requirements and site constraints … Following that meeting, the Third Defender was to confirm if they wished to proceed with the TarmacDry system for the car park. On or around 18 July 2011 the Third Defenders confirmed that they intended to proceed with the TarmacDry system for the car park. The use of TarmacDry was specified in the Employer's Requirements … The Second Defenders' duties did not extend to the (*sic*) doing design work in respect of the TarmacDry system. Having selected the TarmacDry system following receipt of advice from Stuart McTaggart Limited, the Pursuer made it clear that they not did not require the surface water drainage system for the car park to be designed by anyone to the extent that they wanted a TarmacDry system which was already a designed system … With reference to the Third Defenders answers admitted the pursuers engaged Stuart McTaggart, Consulting Engineers, to act on their behalf in relation to the construction of the premises; the second defenders had provided drawing number 2548/0101A as part of the proposed Employer's Requirements for the construction of the car park; drawing number 2548/0101A prescribed that hot rolled asphalt was to be used throughout the carpark; Stuart McTaggart on behalf of

the pursuers directed that the second defender should revise their drawing to prescribe the use of the TarmacDry system; the pursuers had previously installed the same TarmacDry system at their store in Bathgate and subsequently did so at stores in Dalkeith and Kirkcaldy; consequently the second defenders produced drawing 2548/0101B incorporating the TarmacDry system; this drawing was included in the final Employer's Requirements and incorporated into the Building Contract between the first defender and the third defender dated 28 and 29 June 2011; the third defender was obliged to comply with the Employer's Requirements …"

[21] In Answer 9 the third defender avers:

"9. … Admitted that the third defender was the design and build main contractor for the whole of the Works under the Building Contract. Admitted, under explanation to follow, that they agreed that they would accept full responsibility for all design aspects of the Works … The pursuer engaged Stuart McTaggart, Consulting Engineers, to act on their behalf in relation to the construction of the premises. The second defenders had provided drawing number 2548/0101A as part of the proposed Employer's Requirements for the construction of the carpark. Drawing number 2548/0101A prescribed that hot rolled asphalt was to be used throughout the carpark. Stuart McTaggart on behalf of the pursuers directed that the second defender should revise their drawing to prescribe the use of the TarmacDry system. The pursuer's insistence that the Employer's Requirements included TarmacDry did not fall within the design of the Works in accordance with the Employer's Requirements undertaken by the third defender … Consequently the second defenders produced drawing 2548/0101B incorporating the TarmacDry system. This drawing was included in the final Employer's Requirements and incorporated into the Building Contract between the first defender and the third defender dated 28 and 29 June 2011. The third defender was obliged to comply with the Employer's Requirements … *Separatim* the pursuer through their agent, Stuart McTaggart Ltd, having selected TarmacDry as a building material and represented to the third defenders that the selection of the TarmacDry product was suitable for use at the *locus* and the third defenders having acted to their prejudice in agreeing to TarmacDry being included within the Employer's Requirements the Pursuer is personally barred from founding upon its inclusion as a breach of either the Collateral Warranty or the Building Contract. Further, and in any event, the Pursuer's agents, Stuart McTaggart Ltd, having selected the TarmacDry product the Pursuer is personally barred from asserting that the material's cleaning criteria are not in accordance with the Building Contract or Collateral Warranty."

Submissions for the pursuer

[22] Mr Young submitted that the second and third defenders' averments that they have no contractual responsibility for the selection and use of TarmacDry are irrelevant. On a proper construction of the Appointment Agreement the second defender was contractually responsible to the Clients for the design of the car park surface. On a proper construction of the Contract the third defender was contractually responsible to the first defender for that design.

[23] The Appointment Agreement obliged the second defender to liaise with Other Consultants (including Stuart McTaggart Limited) (clause 12.1), but it remained fully responsible to the Clients for all of the Services (clause 12.3). The Services included, *inter alia*, the design of all of the works necessary for completion of the Project. The second defender's averment that its obligations did not extend to designing every aspect of the Works flew in the face of the terms of the Agreement.

[24] The fact that the pursuer's consultant, Stuart McTaggart Limited, suggested the use of TarmacDry and that it should be included in the Employer's Requirements for the Contract did not assist the second and third defenders. On a proper construction of the Appointment Agreement the second defender was responsible to the Clients for that design. It was part of the Services. The Services included, *inter alia*, the design of all of the works necessary for completion of the Project. On a proper construction of the Contract the third defender was responsible to the first defender for the design. Reference was made in particular to the Third Recital to, and to article 1 of, the Articles of Agreement; to clauses 1.12.1, 2.14.3 and 2.17.2 of the Contract conditions; and to clause A10/240 of the Preliminaries.

[25] The Appointment Agreement and the Contract could not be clearer. The Appointment Agreement imposed a "one-stop shop" type of liability on the second defender to the Clients. The Contract imposed the same sort of liability on the third defender, as design and build contractor, to the first defender. Reference was made to *Hudson's Building and Engineering Contracts* (13th ed) at paragraphs 2-043 to 2-044 and 3-116 to 3-119, and *MT Højgaard A/S* v *E.ON Climate & Anor* [2017] UKSC 59, [2018] 2 All ER 22, [2017] BLR 477.

[26] The third defender's averments of personal bar were irrelevant. Any representation by Stuart McTaggart Limited pre-dated the Contract and the Muir Collateral Warranty. Personal bar requires a person to have an existing right and to act inconsistently with enforcement of that right: Reid and Blackie, *Personal Bar*, at paragraph 2-04; *Electricity Supply (Nominees) (Scotland) Limited* v *Combined Capital Limited* 1987 SC 303, per Lord Wylie at pp 305 – 306; *William Grant & Sons Limited* v *Glen Catrine Bonded Warehouse Limited* 2001 SC 901, per Lord Clarke at pp 941 – 942. Moreover, it was difficult to see how any representation on the pursuer's behalf relating to the Contract (to which it was not a party) could give rise to personal bar of rights under the Muir Collateral Warranty. In any case, there were no averments about the authority, actual or ostensible, of Stuart McTaggart Limited to make any representation on behalf of the pursuer as to design liability for aspects of the Works: Reid and Blackie, *supra,* at paragraphs 13-18 to 13-22.; and the timing, terms, and nature of any representation were not specified. Against the background of the contractual scheme between the parties, the third defender cannot reasonably have relied on a representation from Stuart McTaggart Limited to discharge it from its obligations under the Muir Contractual Warranty for design of the car park surface course: cf *Ben Cleuch*

Estates Limited v *Scottish Enterprise* [2006] CSOH 35, per Lord Reed at paragraphs 149 – 151, and 2008 SC 252, per the Opinion of the Court delivered by Lord Macfadyen at paragraph 87.

Submissions for the second defender

[27] Mr Morton submitted that the person with sole contractual responsibility for designing and building the car park was the third defender. He accepted that "as drafted" the Appointment Agreement provided that the second defender had responsibility to the Clients for the design of the car park surface. However, if I understood his submission correctly, he maintained that in the circumstances the second defender's design role responsibility had been "curtailed". Those circumstances were that the use of TarmacDry had been instructed by the first defender at the instigation of the pursuer's consultant; it had been included in the Employer's Requirements; and in July 2011 the third defender had confirmed that it intended to use it. The "practical effect" was that the Appointment Agreement had been varied to remove the second defender's design responsibility to the Clients so far as use of TarmacDry was concerned.

[28] Somewhat inconsistently with that submission, Mr Morton further submitted that it was not his position that once the pursuer's consultant suggested the use of TarmacDry as part of the Employer's Requirements that the second defender was absolved of all responsibility for defects arising from its use. Rather, the second defender's position was that it denied that it was negligent in failing to warn the Clients about the difficulties which might result from its use. In the circumstances there had been no duty to warn.

Submissions for the third defender

[29] Mr Jones submitted that not all design and build contracts involved the Contractor undertaking responsibility for every part of the design. It was a question of construction of the contract in each case (*Hudson's Building and Engineering Contracts* (13th ed), at paragraphs 3-23, 3-116). Here, clause 2.1 of the Contract conditions did not impose any design obligations on the third defender. On a proper construction of the Contract the third defender was not responsible to the Clients for design in so far as matters had been specified in the Employers' Requirements. Reference was made to *British Overseas Bank Nominees Ltd & Others* v *Stewart Milne Group Ltd* 2019 SLT 1253, [2019] PNLR 2, 186 Con L R 80, per the Opinion of the Court delivered by Lord Drummond Young at paragraphs 18-19; and to *MT Højgaard A/S* v *E.ON Climate & Anor, supra,* per Lord Neuberger of Abbotsbury PSC at paragraph 44; cf *A M Gillespie & Co* v *James Howden & Co* (1885) 12 R 800, (1885) 22 SLR 527. Mr Jones maintained that the issue of whether the third defender had contractual responsibility to the Clients for the TarmacDry aspect of the design ought to be determined after proof.

[30] At pp 3-4 of the third defender's written note of argument (no 31 of process) it had also been maintained that on a proper construction of clause 2.17 the third defender was not responsible to the Clients for design in so far as matters had been specified in the Employer's Requirements. However, Mr Jones indicated that he did not insist upon that aspect of the note, and no argument in support of it was advanced.

[31] Mr Jones submitted that the third defender's averments of personal bar were suitable for inquiry. The third defender averred that the inclusion in the Employers' Requirements of the design employing TarmacDry had been at "the direction" of Stuart McTaggart

Limited representing the pursuer's interests. In those circumstances it could not be said at this stage that the third defender's defence of personal bar was clearly irrelevant. By agreeing to the pursuer's suggestion that TarmacDry be included within the Employer's Requirements the third defender had acted to its prejudice. In those circumstances the pursuer was personally barred (i) from claiming that the inclusion of TarmacDry in the Employer's Requirements was a breach of the Contract and, consequentially, of the Muir Collateral Warranty; and (ii) from asserting that TarmacDry's cleaning criteria were not in accordance with the Contract and that they gave rise to a breach of the Muir Collateral Warranty. The classic statement of the requirements of personal bar were set out in *Gatty* v *Maclaine* 1921 SC (HL) 1, per Lord Chancellor Birkenhead at p 7. It was not essential that the words or conduct giving rise to personal bar happened after the coming into existence of the right said to have been affected by the bar. The authorities which suggested that that was a requirement were cases of waiver (eg *Electricity Supply (Nominees) (Scotland) Limited* v *Combined Capital Limited, supra*) or cases of acquiescence (eg *William Grant & Sons Limited* v *Glen Catrine Bonded Warehouse Limited, supra*). Contrary to the suggestion in McBryde, *The Law of Contract in Scotland* (3rd ed) at paragraph 25-09, pre-existence of the affected right was not a prerequisite for other types of personal bar. It was not a prerequisite here. On a proper reading of Reid and Blackie, *Personal Bar*, paragraph 2-04, the authors did not state that there had to be a pre-existing right for personal bar to operate. The observations of Lord Anderson in *Nairn* v *South-East Lancashire Insurance Co Limited* 1930 SC 606 at p 614 had to be read in context. If there had been a contractual obligation in that case it would have been antecedent to the conduct by the defenders which the pursuer said gave rise to personal bar. Lord Anderson had not been stating a principle of general application.

Neither was *Cantors Properties (Scotland) Ltd* v *Swears & Wells Ltd* 1978 SC 310 authority for the suggested principle. So far as reliance was concerned, the reasonableness or otherwise of reliance on conduct had been determined after proof in *Ben Cleuch Estates Limited* v *Scottish Enterprise, supra.* The same course should be followed here.

Decision and reasons: relevancy of the second and third defenders' averments

Responsibility of the second defender to the Clients

[32] In my opinion, whether the second defender is responsible to the Clients for the design of the car park surface course is a question of law which can be determined as a matter of interpretation of the Appointment Agreement. In relation to that issue I do not understand there to be any material matters in dispute which require probation.

[33] In my view, on a proper construction of the Appointment Agreement the second defender is responsible to the Clients for the design of the car park surface course. I reach that view having regard to the whole terms of Appointment Agreement. I think it is clear from the description of the Services in Part 3 of the Schedule that they included all civil and structural engineering aspects of the design for the Works. It is also clear that notwithstanding that the Appointment Agreement envisaged that there would be liaison and input from the Other Consultants in connection with the Project (clause 12.1), it made plain that the second defender remained fully responsible to the Clients for all of the Services (clause 12.3).

[34] The fact that the pursuer's consultant, Stuart McTaggart Limited, suggested the use of TarmacDry (and that it should be included in the Employer's Requirements for the Contract) does not assist the second defenders. On a proper construction of the

Appointment Agreement the second defender was responsible to the Clients for that design. It was part of the Services. The Services included, *inter alia*, the design of all of the works necessary for completion of the Project.

[35] I reject the suggestions that the second defender's design responsibility for the car park surface course was "curtailed" or "effectively varied". There was no formal variation of the Appointment Agreement in this regard (for the requirements of such a variation see clauses 15.1, 15.3 and 26), and in my view there is no proper basis for maintaining that there was otherwise any effective variation.

Responsibility of the third defender to the Clients

[36] In my opinion, whether the third defender is responsible to the Clients for the design of the car park surface course is a question of law which can be determined as a matter of interpretation of the Contract. In relation to that issue I am not persuaded that there is any material matter in dispute which requires probation.

[37] On a proper construction of the Contract the third defender was responsible to the first defender for the design of the car park surface course. I reach that conclusion having regard to the whole terms of the Contract, including the Third Recital to, and article 1 of, the Articles of Agreement; to clauses 1.12.1, 2.14.3 and 2.17.2 of the Contract conditions; and to clause A10/240 of the Preliminaries.

[38] In terms of the Third Recital the parties to the Contract agreed that the third defender "has checked and is satisfied as to the feasibility of the Employer's Requirements and subject to the Conditions has agreed to accept full responsibility for any design incorporated in them." In terms of article 1 the third defender obliged itself to "carry out the Works in

accordance with … these Articles of Agreement together with the Contract Particulars and the Schedule … including the Contract Documents". Clause A10/240 of the Preliminaries stated clearly that the design responsibility for the complete works rested with the third defender. In terms of clause 2.14.3 of the Conditions the Third Defender accepted "entire responsibility for the Contractor's Proposals". It also warranted that it had carefully checked the Employer's Requirements and it accepted "full responsibility for the design contained therein" as though such design had been carried out by it. That provision stands in stark contrast to clause 2.11 of the standard condition (which the parties chose not to incorporate in the Contract):

> "2.11 Subject to clause 2.15, the Contractor shall not be responsible for the contents of the employer's requirements or for verifying the accuracy of any design contained therein."

It is worth noting that while the same standard form of contract was used in the present case and in *British Overseas Bank Nominees Ltd & Others* v *Stewart Milne Group Ltd, supra*, the amendments to the Contract terms were materially different here. In *British Overseas Bank* the standard clause 2.11 was incorporated in the Contract and there was no equivalent of clause 2.14.3. That explains the court's observations in paragraphs 18 and 19 of its Opinion.

[39] The fact that the pursuer's consultant, Stuart McTaggart Limited, suggested the use of TarmacDry (and that it should be included in the Employer's Requirements for the Contract) does not assist the third defenders. On a proper construction of the Appointment Agreement the second defender was responsible to the Clients for that design. It was part of the Services. The Services included, *inter alia*, the design of all of the works necessary for completion of the Project. In terms of clause 1.12.1 the third defender acknowledged that the

first defender had appointed the Novated Consultants to carry out the initial design of the Works and it accepted full responsibility for their work. In terms of clause 2.17.2 the third defender accepted responsibility in all respects for the design of the works including the work of the Novated Consultants. The second defender was a Novated Consultant and the work for which it was responsible under the Appointment Agreement included the design of the car park surface course. In terms of clauses 1.12.1 and 2.17.2 the third defender accepted full responsibility to the first defender for that work.

Personal bar?

[40] On a fair reading of the third defender's averments it avers that engineers instructed on the pursuer's behalf, Stuart McTaggart Limited, represented to the third defender that TarmacDry was suitable for use at the locus. For present purposes I assume, without deciding, that Stuart McTaggart Limited had authority – actual, implied, or ostensible – to make that representation on the pursuer's behalf. The third defender avers that it acted on that representation to its prejudice – the prejudice being that it agreed to the use of TarmacDry being specified in the Employer's Requirements – and that in consequence the pursuer is personally barred (i) from founding upon its inclusion in the Employer's Requirements as a breach of either the Muir Collateral Warranty or the Contract; and (ii) from asserting that TarmacDry's cleaning criteria are not in accordance with the Contract or the Muir Collateral Warranty.

[41] In my opinion the third defender's averments of personal bar are irrelevant. The rights which the third defender says have been barred are valuable ones. Bar ought not readily to be imposed (Reid and Blackie, *supra*, paragraphs 2-06, 2-60; Gloag and

Henderson, *The Law of Scotland* (14th ed), paragraph 3.07). In the whole circumstances I am not persuaded that there are good grounds for imposing it here.

[42] First, in my view the suggested representation was not a representation of fact. It was a representation of opinion. A plea of personal bar cannot be founded upon a mere statement of opinion (Rankine, *Law of Personal Bar in Scotland,* pp 3 – 5; *Gatty* v *Maclaine, supra,* per Lord Chancellor Birkenhead at p 7; Reid and Blackie, *supra*, paragraph 2-15; *Stair Memorial Encyclopaedia, The Laws of Scotland*, vol 16, Personal Bar (Sheriff A M Bell), paragraph 1612).

[43] Second, at the time the representation is said to have been made the rights which the third defender maintains the representation was inconsistent with were not yet in existence. The Contract and the Muir Collateral Warranty had not been executed. Since the pursuer's rights under the Muir Collateral Warranty were not in existence, the making of the representation was not, and could not be, a representation which was inconsistent with antecedent rights which the pursuer is now seeking to enforce (*Nairn* v *South East Lancashire Insurance Co, supra,* per Lord Anderson at p 614, Lord Ormidale at p 617; McBryde, *supra*, paragraph 25-09; Reid and Blackie, *supra*, paragraph 2-04; Gloag and Henderson, *supra*, paragraph 3-06). In my opinion *Nairn* v *South East Lancashire Insurance Co, supra*, is clear authority for the proposition that personal bar is irrelevant unless there is said to be inconsistency with a pre-existing right.

[44] Third, even if I am wrong in concluding that there has been no inconsistent conduct on the part of the pursuer, in my opinion it would have been unreasonable in the circumstances for a person in the position of the third defender to have relied upon the pursuer's representation. The context of the representation was that, albeit that the pursuer

had instructed Stuart McTaggart Limited to represent its interests as a future tenant in discussions relating to the Employer's Requirements, the ultimate decision as to what was included within the Employer's Requirements was the first defender's. In terms of the Appointment Agreement the second defender had design responsibility to the first defender for TarmacDry's inclusion in the Employer's Requirements. In terms of the Contract the third defender had design responsibility to the first defender for that matter. Neither the second defender nor the third defender required to follow Stuart McTaggart Limited's suggestion, and given their respective design responsibilities they would not be expected to have done so without satisfying themselves as to the appropriateness of the suggested design. Moreover, in my opinion the undertakings and warranties given by the third defender in clause 1 of the Muir Collateral Warranty (and in particular clause 1.3) are strong contra-indications against the reasonableness of a person in the position of the third defender relying on the representation.

[45] Fourth, I am not persuaded that the third defender has relevant averments that in the circumstances it would be unfair for the rights now allegedly barred to be exercised by the pursuer (Reid and Blackie, *supra*, paragraphs 2-03, 2-12, 2-40 to 2-61; Gloag and Henderson, *supra*, paragraphs 3.05 and 3.07). Relatively speaking, bearing in mind the respective roles of the pursuer, the first defender, the second defender, and the third defender, I do not think that the pursuer's representation was particularly blameworthy. The pursuer, through Stuart McTaggart Limited, was looking out for its interests as a prospective tenant. Moreover, in my view in the circumstances a person in the third defender's position would not reasonably have believed that the relevant rights under the Muir Collateral Warranty would not be exercised. Generally, the objective of a collateral warranty is to place a third

party to a contract in an equivalent position to a party to the Contract (*British Overseas Bank Nominees Ltd & Others* v *Stewart Milne Group Ltd, supra,* per the Opinion of the Court at paragraph 12). Broadly speaking, here the objective was to place the pursuer in an equivalent position to the Employer so far as rights under the Contract against the third defender were concerned. That objective would be thwarted if the third defender's personal bar defence was sound. The terms of the undertakings and warranties given by the third defender in clause 1 of the Muir Collateral Warranty (and in particular clause 1.3) are very hard to reconcile with the proposition that they were to be qualified by a representation made at an earlier time. Further, while the third defender asserts that there was a causal link between Stuart McTaggart Limited's representation and the third defender's design incorporating TarmacDry, any link was at best indirect. The second defender had initial design responsibility for the use of TarmacDry (in terms of the Appointment Agreement) and the Employer decided that it should be used. In entering into the Contract the third defender relied on the second defender's initial design and the third defender itself undertook design responsibility for TarmacDry.

Prescription

The summons

[46] In article 4 of condescendence in the summons the pursuer averred that in terms of clause 2 (*sic*) of the Appointment Agreement (in fact, the appointment provision was clause 3) the second defender was appointed to provide the Services; that the Services "were generally in respect of civil and structural engineering services in relation to" the Works; and that in terms of clause 4 it undertook that it had exercised and would continue

to exercise, in the performance of the Services to the first defender and the third defender, "the reasonable skill, care and diligence expected of a competent professional civil and structural engineer in the performance of its services who is experienced in carrying out such services in relation to works of a similar size, scope and nature to the Works." (That undertaking was the undertaking given in clause 4.1). In article 5 the pursuer narrated the execution of the Struer Collateral Warranty and further averred:

> "… In terms of Clause 1 of the Struer Collateral Warranty, under the heading of "*Duty of Care*", the second defender, among other things, warranted and undertook to the pursuer that: "*we have exercised and will continue to exercise in the performance of our services under the Appointment, the reasonable skill, care and diligence expected of a competent civil & structural engineer in the performance of the Services who is experienced in carrying out such services in relation to works of a similar size, scope and nature to the Works*"…"

In article 6 the pursuer averred:

> "6. … In terms of the Building Contract the first defender was 'the Employer' and the third defender was 'the Contractor'… In terms of Clause 2.1 … the third defender was obliged, among other things, 'to carry out and complete the Works in a workmanlike manner in accordance with the Contract Documents, the Construction Phase Plan and the Statutory Requirements and for that purpose shall complete the design of the Works …'. In terms of Clause 2.17… the third defender was, among other things, also under the following obligations:
>
> '2.17.1 … the contractor warrants and undertakes to the Employer that the Works and all workmanship comprised in them shall comply with the Employer's Requirements and that they will exercise the standard of skill and care referred to in clause 2.17.3.1 to see that the design of the Works shall comply with the Employer's Requirements.
>
> 2.17.2 The Contractor shall, subject to Clause 2.17.3.1, be responsible in all respects for the design of the works and shall adopt and take responsibility for all design work in relation thereto including that which may have been carried out prior to the date of this Contract by any one of the Novated Consultants. The Contractor accepts

responsibility for any mistake, inaccuracy, discrepancy or omission contained in the design comprised in the Employer's Requirements, or any change thereon, and in the Contractor's Proposals …

2.17.3 The Contractor warrants and undertakes to the Employer that:-

2.17.3.1 the design of the Works (including any design carried out by any Sub-Contractor) has been and will be carried out using the reasonable skill, care and attention expected of a properly qualified and competent designer of the relevant discipline who is experienced in carrying out such design services in relation to works of a similar size, scope and nature to the Works

2.17.3.2 the design of the Works will, when completed, comply with the Statutory Requirements.

…"

In article 7 the pursuer narrated the execution of the Muir Collateral Warranty and it further averred:

"… In terms of Clause 1 of the Muir Collateral Warranty, under the heading of '*Duty of Care*', the third defender, among other things, warranted and undertook to the pursuer that: '*we have exercised and will continue to exercise in the performance of our services under the [Building] Contract with a design element, the reasonable skill, care and attention expected of a properly qualified and competent designer of the relevant discipline who is experienced in carrying out such design services in relation to works of a similar size, scope and nature to the Works*'…"

In articles 9, 10 and 11 the pursuer averred:

"9. … issues have arisen with significant ponding of water on the pavement of the car park and isolated areas of failing surfacing material in the most heavily trafficked areas. The significant ponding first manifested itself in or around December 2013. The feature of the pavement which has led to both of these matters is the 120mm thickness of asphalt which comprises the uppermost part of the pavement. That asphalt is comprised of 120mm thickness of TarmacDry porous asphalt installed directly over a Course Graded Aggregate ('CGA') … The design intent is that rainfall should percolate through the voids in the TarmacDry porous asphalt and enter the CGA from which it would be discharged … As a permeable pavement there ought to be no need for a conventional surface water drainage system …

10. Following the first manifestations of significant ponding, investigations were carried out … [E]xamination revealed that the voids in the surface of the TarmacDry asphalt were completely filled with debris … [T]he TarmacDry asphalt was failing to conduct the surface water vertically downwards into the underlying CGA, thereby causing the ponding. Water carries detritus when flowing. That detritus is deposited when the water stops flowing. This has the consequence that the detritus is deposited at the low spot on the pavement. The depositing of detritus by this, or similar, means has caused the TarmacDry asphalt to lose its porosity by the detritus filling the voids … It is not unusual for porous asphalt to become blocked in this way. The TarmacDry asphalt was accordingly unsuitable for use in the pavement of the car park. Its use has caused the ponding. The use of TarmacDry asphalt has also led to the areas of failing surface material, although that is a secondary matter …

11. The said issues have been caused, or at least materially contributed to, by failures by the second and third defenders in carrying out the Appointment Agreement and the Building Contract respectively, including (without prejudice to that generality) those obligations therein condescended upon above. Those failures have placed the second and third defenders in breach of their obligations to the pursuer under the Struer Collateral Warranty and the Muir Collateral Warranty respectively, including (without prejudice to that generality) those obligations condescended upon above …"

In article 12 the pursuer averred that the loss and damage it had sustained included the carrying out of temporary repairs, but that it will require to carry out a complete repair of the car park which will involve the removal of the surface course and the installation of a suitable replacement surface.

The adjusted pleadings

[47] The pursuer's pleadings were adjusted on 26 March and 21 May 2019. For present purposes it is unnecessary to differentiate between the two sets of adjustments. In article 9, in response to averments made by the second and third defenders taking issue with their having responsibility for the design of the Works the pursuers averred:

> "… [T]he second defender agreed, in terms, that they would remain fully responsible for all of the Services. Those services included, *inter alia,* the design of all of the works necessary for the completion of the Project. This included the drainage system in the car park. Reference is made to Clauses 1, 12 and Part 3 of the Schedule to the Appointment Agreement … the third defender was the design and build main contractor for the whole of the Works under the Building Contract. They agreed, in terms that they would accept full responsibility for all design aspects of the Works. Reference is made to Clauses 2.14.3 and 2.17 of the Building Contract (as amended by part 9 of the schedule)."

Later in the same article, in response to averments by the second and third defenders that the pursuer had failed to clean and maintain the TarmacDry properly, the pursuer denied any such failure and averred:

> "*Separatim,* and in any event, the third defender was obliged to construct the Works (including the drainage system in the car park) in accordance with the Employer's Requirements. It was an express term of Para. 1.01.05 of the developer's shell specification in Section D of the Employer's Requirements that the selection of building materials must be made *'with the avoidance of regular cleaning as a criteria. This will include the normal deposit of dirt and grime …'* To the extent that the TarmacDry is said by the defenders to need regular and extensive hydro cleaning in order to maintain hydraulic conductivity, that would be a breach of the third defender's obligations to construct the Works in accordance with the Employer's Requirements. *Separatim,* any case based on breach of Clause 2.14.3 and Para. 101.05 (*sic*) is not a new or fundamentally different claim from the claim advanced at the outset of these proceedings. It is premised on breach of the same basic obligations, in the same contract, in respect of the same damages. It has not prescribed …"

The adjustments to article 11 included the following averments:

> "… no competent professional civil and structural engineer experienced in the carrying out of works such as those carried out at the Premises and exercising reasonable skill and care would have designed the drainage system in the car park to incorporate the use of TarmacDry. Further, and in any event, no competent professional civil and structural engineer experienced in the carrying out of works such as those carried out at the Premises and exercising reasonable skill and care would have failed to issue a warning of the known issues with the clogging of porous asphalt and the likely consequences in terms of ponding, failure of the general SUDS system, maintenance, and remedial work. In including porous asphalt in the design *et separatim* in failing to issue any such warning, the second and third defenders breached their various obligations hereinbefore condescended upon in the Building Contract and Appointment Agreement. Reference is made to Articles 4 and 6 of Condescendence. *Separatim,* in respect of the third defender, the third defender

> warranted that the Works and all workmanship comprised therein would comply with the Employer's Requirements. Reference is made to Article 6 of Condescendence. This included, *inter alia*, the requirements in the Developer's Shell Specification in Section D of the Employer's Requirements. This included the requirement at Para. 4.09.02 that the below ground drainage network be designed '*to accommodate a 1 in 200 year storm event…such that no ponding or temporary storage of flood water is visible at ground level.*' As constructed, the underground drainage does not comply with that specification. There is regularly ponding and temporary storage of flood water visible at ground level. Further, such ponding occurs in circumstances falling well short of a 1 in 200 year storm event. In these circumstances, the third defender is in breach of its obligations in the Building Contract. *Separatim*, there is evidence of contamination of the layers of the TarmacDry during its construction. Further, the laying of TarmacDry requires to be done very carefully such as to ensure there are sufficient voids in the material to allow downward percolation. Tarmac inspected the works in 2014. They considered the failure of the TarmacDry within such a short period of installation was due to some form of construction defect of this nature. In the circumstances, whilst the clogging hereinbefore condescended would inevitably have occurred, it is believed and averred that the failure of the TarmacDry has been materially contributed to by poor workmanship in its installation by the third defender in breach of its obligations under, *inter alia*, Clause 2.1 of the Building Contract …"

Submissions for the second defender

[48] Mr Morton's motion was that the second defender's first and fifth pleas-in-law should be sustained and that the action against the second defender should be dismissed. The first plea is a plea to the relevancy of the pursuer's averments in so far as directed against the second defender, and the fifth plea is a plea that certain of the averments in article 11 ought not to be admitted to probation on the ground that they "have prescribed".

[49] On the basis of the pursuer's averments, by December 2013 there had been the concurrence of *injuria* and *damnum* (*Dunlop* v *McGowans* 1980 SC (HL) 73 per Lord Keith of Kinkel at p 81; *David T Morrison & Co Ltd t/a Gael Home Interiors* v *ICL Plastics Ltd* 2014 SC (UKSC) 222, per Lord Reed at paragraph 11). The action had been raised within five years of that date, but the averments in the summons had been insufficiently specific to be a relevant

claim in respect of the obligations upon which the pursuer now seeks to found. The averments in the summons had founded upon breaches of the general obligations in clauses 2 and 4 of the Appointment Agreement. There had been no specification of the particular respects in which it was said that those general obligations had been breached, or any case that more specific obligations had been breached. The claim made against the second defender in the summons was not a relevant claim to enforce the obligations which the pursuer now seeks to enforce. The obligations it now seeks to enforce are (i) an obligation to make reparation for breach of the second defender's design obligations under the Appointment Agreement (the design failure being the use of TarmacDry); and (ii) an obligation to make reparation for failing to issue a warning of the known issues with the clogging of porous asphalt and the likely consequences in terms of ponding, failure of the general SUDS system, maintenance, and remedial work. The averments in the summons had not sought to enforce either of those obligations. Reference was made to *J G Martin Plant Hire ltd* v *Ballantyne Copland France & Co* 1996 SC 105, per Lord Justice Clerk Ross at p 111 A-B; *Classic House Developments Ltd* v *GD Lodge & Partners and Others*, Unreported, 30 January 1998, per Lord Macfadyen at pp 3-6; *Cole* v *Lonie* 2001 SC 610, per the Opinion of the Court delivered by Lord Dawson at paragraph 16; *Musselburgh & Fisherrow Co-operative Society Ltd* v *Mowlem Scotland Ltd* 2004 SCLR 412, per Lord Eassie at paragraph 50; *Huntaven Properties Limited* v *Hunter Construction (Aberdeen) Limited & Ors* [2017] CSOH 57, per Lord Doherty at paragraph 65; *McClure Naismith LLP, Thistle Property Holding Company Limited v Harley Haddow Partnership* 2018 SCLR 257, per Lord Doherty at paragraph 18; Johnston, *Prescription and Limitation* (2nd ed), paragraph 2.23). Accordingly, both of the claims which the pursuer now sought to advance against the second defender had

prescribed. Even if, contrary to Mr Morton's submission, the claim to enforce obligation (i) was not a new claim, the claim to enforce obligation (ii) was certainly a new claim. There had been no hint of a claim to enforce any such obligation in the averments in the summons.

Submissions for the third defender

[50] Mr Jones submitted that the pursuer's averments relating to paragraphs 1.010.05 and 4.09.02 of the Developer's Shell Specification, to the duty to warn, and to poor workmanship should be excluded from probation.

[51] The correct approach was to examine the pleadings before and after their adjustment to determine if the obligations to make reparation which the pursuer now sought to enforce were the same obligations (*J G Martin Plant Hire ltd* v *Ballantyne Copland France & Co, supra*, per Lord Justice Clerk Ross at p 111A-B; *Classic House Developments Ltd* v *GD Lodge & Partners and Others*, *supra*, per Lord Macfadyen at pp 3-6; *McClure Naismith LLP, Thistle Property Holding Company Limited* v *Harley Haddow Partnership, supra*, per Lord Doherty at paragraph 180).

[52] In the summons the obligation to make reparation which the pursuer sought to enforce, through the Muir Collateral Warranty, was the obligation to make reparation for breach of the third defender's design obligations. The case made was that TarmacDry was unsuitable and ought not to have been used, and that its use had resulted in a car park surface which was subject to ponding and failure. The pursuer now also sought to enforce obligations to make reparation for different breaches, but the averments in the summons had contained no suggestion that the pursuer was seeking to enforce obligations to make reparation for those breaches. It had been baldly averred that in using TarmacDry the third

defender had breached the Employer's Requirements, but there had been no specification of that - in particular there had been no reference to failures to comply with paragraphs 1.01.05 and 4.09.02 of the Developer's Shell Specification. There had been no suggestion that the use of TarmacDry was inappropriate because it would require regular cleaning (paragraph 1.01.05), or that it did not comply with the need to accommodate a 1 in 200 year storm event (paragraph 4.09.02). No case of poor workmanship by the third defender had been advanced. Nor had there been any case that there had been a failure to warn the pursuer or the first defender about known issues with the clogging of porous asphalt and the likely consequences in terms of ponding, failure of the general SUDS system, maintenance, and remedial work.

Submissions for the pursuer

[53] Mr Young submitted that the second and third defenders' pleas of prescription should be repelled and that the associated averments should not be admitted to probation. No new claims had been presented in the adjustments. Reference was made to *N V Devos Gebroeder* v *Sunderland Sportswear Ltd* 1990 SC 291, per Lord President Hope at p 303; *Assuranceforengingen Skuld* v *International Oil Pollution Compensation Fund (No 2)* 2000 SLT 1348, per Lord Gill at pp 1351L-1352B; and *Safdar* v *Devlin* 1995 SLT 530.

[54] Mr Young indicated that he did not quarrel with the approach which had been taken by Lord Macfadyen in *Classic House Developments Ltd* v *GD Lodge & Partners and Others, supra,* or by me in *McClure Naismith LLP, Thistle Property Holding Company Limited* v *Harley Haddow Partnership, supra.* However, the circumstances in each of those cases had been materially different from the present case. In *Classic House Developments Ltd* the obligation to

make reparation which the pursuer sought to enforce before the expiry of the *quinquennium* had been in respect of failures of inspection; but after the expiry of the *quinquennium* it had also sought for the first time to enforce an obligation to make reparation in respect of a design failure. In *McClure Naismith* the amendments after the prescriptive period had sought to enforce obligations to make reparation for breaches which were separate and distinct from the breaches which had previously been founded upon. In *Macleod* v *Sinclair* 1981 SLT (Notes) 38 the claim made before the expiry of the prescriptive period had been in respect of design failure, but after the expiry the pursuer had tried to introduce a claim based on negligent advice.

[55] The claims against the second and third defenders had always been, and remained, that TarmacDry was not suitable for use in the drainage system of the car park; that it did not meet the design intent and would always have failed; and that it had become clogged with detritus.

[56] So far as the second defender was concerned, its breaches had been said to be breaches of clause 4 of the Appointment Agreement. So far as the third defender was concerned, its breaches had been said to be breaches of clauses 2.1 and 2.17 of the Building Contract. It had been tolerably clear from the pursuer's averments that the complaint was that each of these defenders ought not to have incorporated TarmacDry in their design as it was unsuitable because it was not unusual for porous asphalt to lose its porosity because of detritus filling the voids. The averments added by adjustment to the cases against the second and third defenders merely provided some specification of the cases already made. They did not introduce a new case or new cases. In the summons the pursuer had founded upon the third defender's failure to comply with the Employer's Requirements

(clause 2.17.1). The adjustments referring to paragraphs 1.010.05 and 4.09.02 of the Developer's Shell Specification merely gave specification of the particular respects in which that provision had been breached. They were not the introduction of new claims to enforce obligations to make reparation that had not been made before.

Decision and reasons: Prescription

[57] In my opinion the critical issue is whether any of the pursuer's adjustments involve it seeking to enforce obligations to make reparation which are different from the obligations to make reparation which it sought to enforce in the summons (*J G Martin Plant Hire ltd* v *Ballantyne Copland France & Co, supra*, per Lord Justice Clerk Ross at p 111A-B; *Classic House Developments Ltd v GD Lodge & Partners and Others*, *supra*, per Lord Macfadyen at pp 3-6; *McClure Naismith LLP, Thistle Property Holding Company Limited* v *Harley Haddow Partnership, supra*, at paragraph 180). In my view *N V Devos Gebroeder* v *Sunderland Sportswear Ltd, supra,* does not indicate otherwise. It is common ground that to the extent that the pursuer's adjustments do advance a different case the obligation concerned would have been extinguished by prescription (because the summons would not have constituted a relevant claim which interrupted the prescriptive period in relation to it) (1973 Act, sections 6 and 11).

[58] I propose to deal first with those of the averments added by adjustment which were directed against both the second and third defenders.

[59] In my view, reading article 4 of the summons together with articles 9 and 10, and article 6 together with articles 9 and 10, it is clear that the pursuer's complaints were that TarmacDry was unsuitable and ought not to have been used in the car park; and that its

incorporation gave rise to problems of clogging with detritus, ponding, and areas of surface failure. Viewed against that background, in my opinion the added averment that "… no competent professional civil and structural engineer experienced in the carrying out of works such as those carried out at the Premises and exercising reasonable skill and care would have designed the drainage system in the car park to incorporate the use of TarmacDry" does not represent an attempt to enforce a different and additional obligation to make reparation from the obligations to make reparation which the pursuer sought to enforce in the summons.

[60] There was no averment in the summons of the second and third defenders being in breach of an obligation to warn the Clients and the Employer respectively. On the other hand, the pursuer did aver that the product was unsuitable and it flagged up the problems of clogging with detritus, loss of porosity, and ponding which had resulted from the use of TarmacDry. In my opinion the warning case is not a substantially different complaint. The essence of it is still that TarmacDry was unsuitable and ought not to have been used, and that the problems with it ought to have been pointed out. In other words, that discussion of the likely problems ought to have been part and parcel of the design conversation. In the circumstances I am not persuaded that the averment added by adjustment represents a materially different case from the case made in the summons, or that on any sensible view in relying upon it the pursuer is now seeking to enforce a different obligation to make reparation from the obligation to make reparation which it found upon in the summons.

[61] I turn then to the remaining points taken in relation to adjustments directed against the third defender alone.

[62] In the summons the pursuer averred that the third defender was in breach of clause 2.17.1 of the Building Contract conditions, but it did not specify the particular provisions of the Employer's Requirements which had not been complied with. Once again, such assistance as there was as to the nature of the breach or breaches involved was contained in articles 9 and 10, *viz* that the TarmacDry was unsuitable; and that problems with clogging, loss of porosity, ponding and surface damage were foreseeable, and had indeed occurred.

[63] In the adjustments the pursuer specified two specific aspects of the Employer's Requirements which had not been complied with, paragraphs 1.01.05 and 4.09.02 of the Developer's Shell Specification. Paragraph 1.01.05 provided that the selection of building materials must be made with the avoidance of regular cleaning as a criteria (*sic*), including the normal deposit of dirt and grime. However, the problem with the deposit of detritus was flagged up in the summons. It was not a new consideration raised for the first time in the adjustments (and it was a response by the pursuer to the criticism added by the defenders at adjustment that the pursuer failed to clean and maintain the surface properly). Paragraph 4.09.02 required that the below ground drainage network should be designed to withstand a 1 in 200 year storm event plus allowance for climate change such that no ponding or temporary storage of flood water was visible at ground level. The problems with ponding were flagged up in articles 9 and 10 of the summons. They were not introduced as a new factor in the adjustments. I think it is tolerably clear from the averments in the summons that the pursuer was complaining about a systemic problem with ponding and that the drainage system was not meeting design requirements.

[64] In my view, while the adjustments making reference to paragraphs 1.01.05 and 4.09.02 provide specification of the breaches of clause 2.17.1 which the pursuer pled in the summons, they are not material changes to the bases of those cases. In my judgement they do not involve the pursuer seeking to enforce obligations to make reparation that it had not previously sought to enforce.

[65] Finally, in the adjustments the pursuer avers that the problems with the TarmacDry were materially contributed to by poor workmanship when it was installed by the third defender, and that that was in breach of its obligations under, *inter alia*, Clause 2.1 of the Contract. In my opinion the averments in articles 9 and 10 of the summons did not flag up any workmanship failure. On the contrary, the problems were clearly attributed to the fact that the material was unsuitable for the use to which it was put. While there was said to be a breach of the general obligation in clause 2.1, in my opinion it was plain from the averments in articles 9 and 10 that the failure founded upon was a design breach rather than a breach involving poor workmanship. Accordingly, I agree with Mr Jones that this aspect of the adjustments is indeed an attempt to advance a new and different case after the expiry of the prescriptive period. In my view it involves the pursuer seeking to enforce a different obligation to make reparation from the obligations which it previously sought to enforce in the summons.

[66] Before leaving this aspect of the case I should record that at about the same time as the summons was called the pursuer intimated to the defenders an expert witness report prepared by Professor John Knapton (no 6/7 of process), a civil engineer with expertise in the design and construction of pavements such as the car park surface. In that report Professor Knapton opined that the second and third defenders ought not to have used

TarmacDry for the car park surface course because of foreseeable problems with clogging and surface wear, and that they ought to have warned the Client of the likelihood of the need for onerous maintenance if TarmacDry was used. He also concluded that during the construction phase the third defender contaminated the TarmacDry and that this would have contributed to the clogging which occurred.

[67] If the question which I had to determine had merely been whether prior to the expiry of the *quinqennium* the pursuer had given fair notice to the third defender of the poor workmanship case which it now seeks to advance I would have inclined to the view that it had. However, here the material issue is a different one, namely whether the pursuer made a relevant claim in appropriate proceedings within the *quinquennium* in respect of the obligation which it now seeks to enforce (s 9(1)(a) of the 1973 Act), *viz* the obligation to make reparation for the third defender's alleged poor workmanship. In determining that question it is the claims which were made in the pursuer's averments prior to the expiry of the *quinqennium* which are determinative. Professor Knapton's report was not incorporated in those averments. The report formed no part of those claims.

[68] In commercial actions parties are encouraged to make use of abbreviated pleadings. The court discourages unnecessarily lengthy and unwieldy pleadings. Often it is sufficient – in terms of fair notice – for the detail of a party's position to be provided in an expert report or reports. However, where issues of prescription may arise a pursuer should take care that some reference is made in his pleadings to each obligation to make reparation which he seeks to enforce. That can be done by incorporating a report *brevitatis causa* in his pleadings. By that means, claims to enforce each of the obligations will be made in appropriate proceedings. If, in response, a defender complains that he is not clear which parts of a

report are being founded upon (*cf Eadie Cairns* v *Programmed Maintenance Painting Ltd* 1987 SLT 777 and *The Royal Bank of Scotland plc* v *Holmes* 1999 SLT 563) then that fair notice point can be met by the pursuer identifying the relevant parts (either by making brief additional averments or by otherwise providing satisfactory written clarification). It is not necessary in order to satisfy the requirements of section 9(1)(a) that claims are stated at length in the pleadings.

Disposal

[69] I shall put the case out by order (i) to discuss an appropriate interlocutor to give effect to my decision; (ii) to discuss further procedure; and (iii) to consider any motions for expenses which may be made.