FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 39
XA45/20

Lord President
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LORD MALCOLM

in the appeal

WPH DEVELOPMENTS LIMITED

Pursuers and Respondents

against

YOUNG & GAULT LLP (IN LIQUIDATION)

Defenders and Appellants

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Pursuers and Respondents: Johnston, QC; Mitchells Roberton, Solicitors
Defenders and Appellants: Manson; DWF LLP, Solicitors

29 July 2021

Introduction

[1] This action concerns a claim for damages based on allegedly negligent architectural services which caused the pursuers to build on land they did not own. The sheriff heard a debate limited to the question of whether any claim had been extinguished by the operation of the five year short negative prescription. It was submitted that the alleged breach of duty (*injuria*) and resulting loss (*damnum*) had occurred more than five years before the commencement of the action. The sheriff held that this was correct. However the pursuers

had made relevant averments to the effect that they were not aware, and could not with reasonable diligence have become aware, of the occurrence of *damnum* until they were informed of the encroachment, all in terms of section 11(3) of the Prescription and Limitation (Scotland) Act 1973. This was said to have happened within the five years preceding the raising of the action on 21 November 2018. The sheriff ordered a proof before answer, which, since the pursuers' averments as to awareness of boundary problems were not admitted, would include determination of the prescription issue. The full decision is reported at 2020 SLT (Sh Ct) 185.

[2] The defenders appealed to the Sheriff Appeal Court, see [2020] SAC (Civ) 7. It granted an unopposed motion to remit the appeal to this court in terms of section 112 of the Courts Reform (Scotland) Act 2014. It was satisfied that the appeal raised a complex point of law in that, notwithstanding the recent decisions in the UK Supreme Court on the subject of section 11(3), "it would appear that uncertainty remains."

The 1973 Act

[3] An obligation to make reparation is subject to the five year short negative prescriptive period, after which any obligation is extinguished. It runs from the date when the obligation becomes enforceable (section 6 and schedule 1 to the 1973 Act). Section 11(1) states the general rule that an obligation "to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded … as having become enforceable on the date when the loss, injury or damage occurred." Section 11(3) qualifies the above as follows: if on the date referred to in subsection (1) "the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as

aforesaid had occurred" there shall be substituted "a reference to the date when the creditor first became aware, or could with reasonable diligence have become, so aware." Thus section 11(3) can operate to postpone the start of the prescriptive clock notwithstanding that an act, neglect or default has caused loss, injury or damage.

The pleadings

[4] In October 2012 the pursuers, who are residential property developers, instructed the defenders to provide architectural services in respect of a development in Newton Mearns. This was to include the plotting of the precise location of its boundaries. The pursuers aver that the construction drawings were erroneous in this respect thereby causing walls and garden ground to be built on land belonging to a neighbouring landowner. In the autumn of 2013 drawings of individual plots were provided by the defenders and used for the purpose of dispositions to individual house purchasers, but again they wrongly depicted the boundary of the pursuers' title. Absolute warrandice was granted to the purchasers, meaning that the pursuers were liable if the buyers did not gain title to all of the disponed property.

[5] On 20 February 2014 the neighbouring landowner's agents raised issues as to the boundary. Later that month, under reference to a surveyor's opinion, the pursuers were asked to remove the encroaching walls. In May 2014 it emerged that the Keeper of the Land Registers of Scotland was rejecting the dispositions granted by the pursuers because of boundary discrepancies. Various heads of loss resulted in the pursuers raising the current proceedings seeking damages in the sum of £300,000 plus interest. As noted above, the action commenced on 21 November 2018.

The issue before the sheriff

[6] The defenders averred that any obligation to make reparation had prescribed in that the five year prescriptive clock started before 21 November 2013. In particular, on the pursuers' pleadings any wrongdoing began in 2012 when erroneous drawings were supplied. The following month loss occurred when walls were built on the neighbour's land. Furthermore two houses were sold with warrandice in September and October 2013. In terms the pursuers stated that they had incurred wasted expenditure prior to 21 November 2013. Thus there was concurrence of *injuria* (a wrongful act) and *damnum* (loss caused thereby) at a time which meant that any claim had been enforceable for more than five years before the action commenced.

[7] The pursuers averred that the plots were sold for full value. It was contended that no loss occurred till 2014 when they required to purchase extra land and relocate certain boundary walls. If this was wrong and loss was sustained before 21 November 2013, the pursuers were not aware, and could not with reasonable diligence have become aware, that loss, injury or damage had occurred before February 2014 when boundary issues were raised by the nearby landowner's agents. It followed that the pursuers had presented a relevant case which, if it could be established at proof, would have the result that section 11(3) postponed the start of the five year period till the pursuers were aware of the problem, with the effect that the action was raised timeously. (The pursuers placed no reliance on section 6(4) of the Act.)

[8] The defenders submitted that even if the pursuers established that they first knew of the difficulty in early 2014, nonetheless section 11(3) did not operate to postpone the start of

the prescriptive clock. At the time the pursuers knew that the walls had been built and that the houses had been sold. On the admitted facts it was clear that any claim had prescribed.

The sheriff's decision

[9] The sheriff held that *injuria* occurred when the defenders supplied the faulty construction drawings and again when erroneous plot plans were provided. *Damnum* is when someone suffers a detriment or is worse off, whether physically or economically, because of wrongdoing. The pursuers sustained loss before 21 November 2013 when, in reliance on the drawings, walls were built on land they did not own. Thereafter they were under a legal liability to remove them. Furthermore the expenditure incurred in constructing the walls was wasted in that they would require to be demolished and relocated (paragraph 82 of his judgment). The sheriff rejected an argument that the *damnum* was uncertain or contingent. No cross appeal has been taken against these parts of his judgment.

[10] The sheriff then addressed the defence under section 11(3). He asked himself: when did the pursuers become aware of the *damnum*? He noted that the effect of section 11(3) was to postpone the start of the five year period if and for so long as the pursuers were not aware, and could not with reasonable diligence have become aware, that loss, injury or damage had occurred.

[11] In pleading that any claim was extinguished the defenders had relied on the decisions of the UK Supreme Court in *David T Morrison & Co Ltd* v *ICL Plastics Ltd* 2014 SC (UKSC) 222 and *Gordon's Trustees* v *Campbell Riddell Breeze Paterson* 2017 SLT 1287. They also relied upon the opinion of Lord Doherty sitting in the Outer House in *Midlothian Council* v

Raeburn Drilling and Geotechnical Ltd 2019 SLT 1327. At paragraph 103 the sheriff recorded the submission as being that, with the benefit of hindsight, and as a matter of objective fact, the pursuers had the requisite degree of knowledge of the occurrence of *damnum* prior to 21 November 2013. The sheriff understood the defenders' position to be that throughout section 11 *damnum* is an objective fact "to be determined with the benefit of hindsight".

[12] Hindsight is a concept which plainly influenced the sheriff's thinking when rejecting the defenders' submission. He considered that if hindsight is to be applied to ascertain the state of the creditor's awareness, the date of *damnum* and the date of knowledge of its occurrence will always coincide. Section 11(3) would be made redundant. Viewed with the benefit of hindsight, no damage could ever be said to be latent, concealed, or unknown.

[13] At paragraph 106 the sheriff considered it a key fallacy of the defenders' approach that it applied hindsight to ascertain the pursuers' actual or constructive knowledge of the occurrence of *damnum*. Another fallacy was the equiparation of the "awareness of the mere *incurring* of expenditure with awareness of the *occurrence* of *damnum*." Further, the defenders' analysis "fails to recognise that wasted expenditure can itself be latent, for the purpose of section 11(3) of the 1973 Act".

[14] The sheriff elaborated on his reasoning in paragraphs 107-116. At 114 he observed that it cannot be correct that mere awareness that expenditure has been incurred (which turns out, with hindsight, to have been wasted) is sufficient to start the prescriptive clock; and this because it wrongly assumes that all expenditure by a creditor is manifest detriment. Later he noted that that there will be times when a creditor is well aware that expenditure amounts to a detriment, but this was not such a case. In paragraph 117 he summarised his thinking as follows:

> " … awareness of the *incurring* of expenditure is not necessarily the same as awareness of the *occurrence* of *damnum*, for the purpose of section 11(3). *Damnum* (the 'detriment suffered by the creditor' or the state of 'being worse off') may have occurred, but the creditor may be entirely unaware of the occurrence of any such detriment or of being worse off. It is in this sense that *damnum* is latent. Why? Because the detriment (the wasted expenditure) is concealed or disguised as expenditure to the benefit of the creditor, not to its detriment; it is masquerading as due and proper payment for a valuable consideration; it has the appearance of being a *quid pro quo* for a sought-after return. The creditor is obviously aware of the incurring of expenditure but is wholly unaware of the occurrence of *damnum*, because the detriment suffered by the creditor (the wasted expenditure) is latent, being concealed, disguised or masquerading as something other than 'detriment'."

In short, the conclusion was that the defenders' submissions failed to recognise that, even if caused by a wrongful act, expenditure might not present as a manifest detriment, and could constitute latent damage which engaged the section 11(3) defence.

[15] The sheriff recognised that certain sections of the judgment of the UK Supreme Court in *Gordon's Trs* contradicted his analysis, but he considered those passages to be erroneous *obiter dicta*, see paragraphs 145-158. (*Obiter dicta* are judicial observations not directly bearing on the court's decision and therefore not establishing legal precedent.) The sheriff considered that the defenders' submission was not supported by *Gordon's Trs'* true *ratio decidendi* (literally, the rationale of the decision – the legal principle upon which the decision is based), nor by that in *Morrison* (or other binding authority), see paragraph 133.

[16] In the sheriff's view both *Morrison* and *Gordon's Trs* concerned *damnum* that was manifest and patent from the moment it occurred. In those decisions it was held that section 11(3) had no application because the *damnum* was never latent. *Morrison* involved an explosion causing extensive damage to a shop, and *Gordon's Trs* turned on a known problem, namely the failure to recover vacant possession of two fields, something which

was apparent more than five years before the action was commenced. At paragraph 142 the sheriff stated:

> "Further, importantly, the issue in *Gordon's Trustees* was not whether, for the purpose of section 11(3), the landlords' awareness of the occurrence of *damnum* (the manifest failure to recover possession of the fields) was to be determined with the benefit of hindsight … the landlords had *actual* awareness of the occurrence of the *damnum*".

They knew this "on the day it occurred."

[17] In the final section of his judgment the sheriff addressed other decisions, including *Midlothian Council*. He explained why he considered that on the issue of the creditor's awareness of the occurrence of *damnum* under section 11(3) it had been wrongly decided, see paragraphs 167-168. The Council did not know (actually or constructively) that the expenditure had been wasted or that they had suffered a detriment. The Lord Ordinary erred in applying hindsight to both the occurrence of loss and the creditor's knowledge of it. Such was legitimate for the former, but not for the latter. The wasted expenditure should have been treated as latent damage.

The submissions to this court

The defenders' submissions

[18] While we intend no disrespect to counsel's full and detailed presentation, the defenders' submissions can be summarised in brief terms. The essence of the defenders' position was that the sheriff failed to understand and apply authority that was binding upon him, principally *Gordon's Trs* (to be discussed in detail below). There can be no real doubt as to its *ratio decidendi*, not least given that the leading judgment in the Inner House clearly specified the question posed in the case and in any subsequent appeal. If the law as laid

down by the UK Supreme Court had been applied, the plea of prescription would have succeeded. In the absence of a cross appeal on the points decided adverse to the pursuers, the only issue is whether the sheriff was mistaken in his approach to section 11(3) of the Act. Once *Gordon's Trs* is properly understood it is apparent that the sheriff erred and that the appeal should be upheld.

The pursuers' submissions

[19] The pursuers' note of argument states that losses were sustained when expenditure was wasted by building on land belonging to another and by incurring a liability to remove the encroachment, and that both occurred more than five years before the action was commenced. However the pursuers did not know of the losses till February 2014. The sheriff was correct to reject the defenders' submission based on the use of hindsight, which has no role to play in the operation of the statutory provisions. Section 11(3) is concerned with the creditor's awareness or otherwise of the occurrence of loss, which is a subjective matter. Economic loss can be latent if and when it is not recognised as such. It would be unjust if a claim could be lost before the creditor was aware of its existence.

[20] The pursuers supported the sheriff's reasoning, including his analysis of the UK Supreme Court decision in *Gordon's Trs*. Its *ratio decedendi* related to loss arising from the inability to recover possession of the fields, not to expenditure incurred by the pursuers. The trustees were aware that the tenant had not quit, thus section 11(3) did not postpone the start of the five year period. The decision does not require the court to regard knowledge of expenditure caused by a wrongful act as awareness of a loss for the purposes of section 11(3). Passages to that effect were non-binding *obiter dicta*.

[21] *Midlothian Council* was wrongly decided. The loss was the fact that the building works were inherently defective because of the missing gas membrane. This was made up of various heads of loss, such as decanting tenants; demolition and rebuilding; and professional fees. The Council knew it paid for the original works, but at that time it was unaware of the claim. Why should that trigger the five year period? For section 11(3) the true question was – when did the pursuers know that the works were defective? Similarly, in the present case, why should the five year period begin simply because a wall was paid for and built on someone else's land? Section 11(3) was designed to give relief in such circumstances.

[22] The loss here was the liability arising from an unauthorised encroachment. One then applies the statutory test to that loss. In both *Dunlop* v *McGowans* 1980 SC (HL) 73 and *Gordon's Trs* the loss occurred when, because of defective notices to quit, vacant possession of the lands concerned could not be obtained. In the former case Lord Russell identified the loss as that arising from the inability to obtain vacant possession and pursue development plans (see page 79). The equivalent here was the liability arising from the encroachment. That liability is particularised in the heads of loss set out in the claim, namely the cost of demolishing and relocating the walls; compensating purchasers in respect of the diminution in the value of their property; and associated legal and professional fees. All of that occurred less than five years before the action began.

[23] For these purposes expenditure is relevant only if caused by a wrongful act. The costs of building the walls and marketing the development were not caused by the alleged negligence. They would have been incurred even if the advice had been correct. Knowledge of these matters cannot amount to awareness of loss. What was required was

knowledge of the encroachment, which the pursuers offer to prove was not obtained until February 2014. Only then were they aware of something being amiss with the development.

[24] Senior counsel elaborated upon this argument which, if we understood it properly, differs from anything said to or by the sheriff. Counsel accepted that, as is made clear in *Dunlop*, the loss caused by a wrongful act is single and indivisible. The prescriptive clock starts only once. However for present purposes the loss to be identified is "the global loss" arising from the wrong. Here the "relevant loss" was the liability arising from the encroachment on the neighbour's land which is particularised in the various heads of loss set out in the initial writ.

[25] While the encroachment occurred more than five years before the action was raised, the question is when did the pursuers become aware of the loss? At paragraph 18 of *Gordon's Trs* Lord Hodge identified the fundamental issue as "whether in s. 11(3) the creditor must be able to recognise that he has suffered some form of detriment before the prescriptive period begins." This was a subtle distinction; "detriment" goes beyond the statutory wording of "loss". To comprise loss for these purposes, expenditure must be wasted in the light of the detriment suffered. Thus, for example, awareness of the price paid for defective goods or services is not awareness for the purposes of section 11(3). One would need to know that the money had not bought the desired object. In similar fashion, money applied to the building of the encroaching walls was not incurred as a result of the breach of contract. It would have happened if the advice was correct. The pursuers were first aware of the liability for encroachment in February 2014. The subsequent costs were incurred to correct the consequences of the alleged negligence. Accordingly a relevant case under the subsection had been pled

The case law and discussion

Gordon's Trustees in the Inner House

[26] It is helpful to begin with the Extra Division's decision in *Gordon's Trs* 2016 SC 548. In that case the submission for the defenders was that the prescriptive clock began when the pursuers knew they were incurring legal fees even if at the time they were unaware that the notices to quit were invalid and that but for a breach of duty the costs would not have been incurred. In the leading judgment I described the question raised in the appeal as follows: does expenditure on services bought and paid for start the clock even if at the time it was not ascertainable that they were or might have been caused by a legal wrong? The matter was put this way at paragraph 15:

> "What is meant by 'discovery of loss, injury or damage'? Did the prescriptive period begin when the pursuers knew they had incurred a liability in fees to solicitors, or was it postponed until they were aware, or should have been aware, of the background facts which demonstrate that the costs may be recoverable from the solicitors? Can it be said that only then were the pursuers actually or constructively aware of having suffered 'loss, injury or damage'?"

It is clear that the sheriff would answer these questions on the basis that if all that is known is the fact of the expenditure, it is latent damage, and the start of the prescriptive period awaits further relevant information being made available to the creditor. However the Extra Division held, "not without hesitation", that such could not be reconciled with the majority opinions in *Morrison*. It upheld the Lord Ordinary's decision which was to the effect that the five year period began when the pursuers knew they had incurred a liability in respect of fees and outlays, "'not when they became aware that that they had sustained a compensatable loss in the reparation sense.'" At paragraph 16 I noted that there was no

finding by the Lord Ordinary that the pursuers should have realised that something had gone wrong. "The Lord Ordinary's decision rested solely on the pursuers' knowledge that legal fees were being incurred".

[27] Exactly the same can be said about my judgment, which enjoyed the agreement of the other members of the court. While Lady Paton noted that a finding of knowledge or constructive awareness of something having gone wrong might have been made, the sheriff's decision in the present case cannot be reconciled with the Extra Division's reasoning. (It is not clear whether he was referred to it.) At paragraph 22 of the Division's judgment the decision in *Morrison* was described as follows:

> "In short, in respect of sec 11(3) … the test is objective. Has the creditor suffered an injury? If so, is he aware of the facts which constitute the injury? If yes, the prescriptive period has begun."

It was appreciated that certainty was being achieved at the cost of the creation of "hard cases".

[28] At paragraph 24 it was acknowledged that if the case reached the UK Supreme Court the Justices, using their "greater insight" into their thinking in *Morrison*, might contradict all of this and opine that the creditor would have to know of an injurious event or at least "something untoward such as would prompt inquiry into the cause." It would appear that the sheriff so interprets the judgment in the subsequent appeal. It is therefore appropriate to turn to that decision.

Gordon's Trustees in the UK Supreme Court

[29] Lord Hodge delivered a judgment with which the whole court agreed. At paragraph 17 he explained the decision in the earlier case of *Morrison* as follows:

> "The focus of the court's judgment … was on the words 'caused as aforesaid' in subs. (3). They are a reference back to subs. (1) which speaks of loss, injury or damage 'caused by an act, neglect or default'. The phrase 'caused as aforesaid' thus connects the loss to the cause of action. But the phrase is adjectival; it does not require additional knowledge on the part of the creditor. The subsection falls to be read as if it said: 'the creditor was not aware … that loss, injury and damage, which had been caused as aforesaid, had occurred'; thus it, like subss. (1) and (2), focuses on the occurrence and timing of loss (*viz.* Lord Reed paras 16 and 25, Lord Neuberger para 47)."

This discussion of *Gordon's Trs* in the Supreme Court could stop here. There is nothing to suggest that the court intended any different approach to section 11(3) from that laid down in *Morrison*. If it did, it would have said so in clear terms. It can also be noted that the sheriff's analysis in the present case, and his understanding of what should be taken from *Gordon's Trs* in the Supreme Court, cannot be reconciled with the reasoning in *Morrison* as explained by the Extra Division and by the UK Supreme Court in the passage just mentioned. *Morrison* is the foundation decision from which all else followed.

[30] Lord Hodge recognised that the property damage at issue in *Morrison* was obvious from the outset, and that in the case of financial expenditure, for example that incurred in reliance on negligent professional advice, the client might be unaware of the circumstances which meant that it amounted to loss or damage. At paragraph 18 he said:

> "A question which the current appeal raises is whether s. 11(3) starts the prescriptive clock when the creditor of the obligation is aware that he or she has spent money but does not know that that expenditure will be ineffective."

There can be no real doubt that the court answered that question in the affirmative, and that this formed part of the operative decision in the case. For the purpose of illustrating the nature and the effect of the court's decision, at paragraphs 20-21 reference was made to the purchase of defective goods and to a breach of contract which caused expenditure or a failure to recover possession of property. It was noted that in section 11, subsections (1) and

(2) both refer to the same objective fact of the incurring of "loss, injury or damage". Lord Hodge continued as follows:

> "There is … no scope for reading any additional meaning into those words in subs. (3).
>
> It follows that s. 11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor has not obtained something which the creditor has sought or that he or she has incurred expenditure."

The sheriff thought that something must have gone wrong with the wording at this passage, which we note would have been carefully reviewed by the other four Justices, and in particular in respect of the last eight words. We see no basis for that proposition. In the following paragraph Lord Hodge expressly recognised that this analysis of the operation of the statute could be harsh on a creditor who incurs expenditure which turns out to be wasted or which failed to achieve its purpose. In particular he might be aware of the expenditure, but not that it entails loss.

[31] Then came a phrase which may be partly responsible for the sheriff's analysis: "But it offers certainty, at least with the benefit of hindsight." Lord Hodge contrasted this with the pursuers' alternative approach which created uncertainty, and potentially prolonged uncertainty, which might not be resolved even by first instance litigation. As mentioned above, the sheriff had difficulty with the notion of hindsight being used to create an awareness on the part of a creditor of a detriment at a point in time when in fact he had no such knowledge. As stated, that is a wholly understandable difficulty; but it is important to make it clear that hindsight knowledge formed no part of the Supreme Court's analysis of section 11(3). It held that contemporaneous knowledge of the objective facts which

constitute the loss or detriment is sufficient to preclude reliance on the subsection. Hindsight knowledge of the circumstances which rendered it detrimental played no part in the reasoning. In its context "hindsight" was mentioned in this passage to explain that once all relevant facts are known then, unlike with the pursuers' approach to subsection (3), the proper outcome can be readily identified.

[32] There is a further reference to hindsight in paragraph 24 of the judgment. This paragraph is headed "*Application to the facts*", no doubt meaning application of the court's construction of the legislation to the circumstances of the case. The paragraph was influential in the sheriff's opinion that the *ratio* of the Supreme Court's decision can be restricted to one of excluding reliance on section 11(3) when, more than five years before the action is begun, the creditor knows that he has suffered a detriment; with much of the rest being *obiter*, and erroneous *obiter* at that. In this regard it can be recalled that in the Inner House in a short concurring opinion Lady Paton observed that the view could have been taken that the trustees knew or should have known that something was wrong as early as November 2005 when the tenant failed to remove and the solicitors then instructed withdrew from acting. However this possibility played no part in the Lord Ordinary's decision, nor in my opinion. In a sense her Ladyship was suggesting that perhaps it had been unnecessary to agonise as to whether, in itself, the payment of fees to the solicitors did or did not start the clock.

[33] In paragraph 24 of his judgment Lord Hodge made three points. First, he rejected the pursuers' argument that the prescriptive period began when they lost the Land Court action. Secondly, on an objective assessment they suffered loss in November 2005 when they did not gain vacant possession of the fields and thus could not realise their

development value. The trustees may have believed that this was because of the tenant's intransigence, but it did not matter whether this was the case or whether it was caused by someone else's acts or omissions. It was also possible that loss might have been avoided if the tenant waived his right to challenge the defective notices to quit or had otherwise surrendered possession of the fields, but he did neither,

> " … and with the benefit of hindsight the failure to obtain vacant possession on 10 November 2005 can be seen as having caused loss to the trustees. At that moment, as in *Dunlop* v *McGowans*, the prescriptive period began to run under s. 11(1), unless it was postponed by subs. (3)."

Pausing here it can be seen that hindsight is being mentioned in the context of section 11(1), not section 11(3), and for the uncontroversial proposition that loss can occur even though at the time it is not appreciated, but subsequent events allow it to be recognised as such.

[34] Thirdly, the court held that there was no postponement of the five year period. In November 2005 the trustees knew that they had not recovered the fields. As a matter of fact that was a detriment. Thus, and in accordance with the proper interpretation of the provisions, that fact and that knowledge was enough to start the clock. It was not said that knowledge, actual or constructive, of detriment was needed and was present. The judgment added that in any event the clock would have commenced by February 2006 when the trustees were incurring fees in respect of the legal proceedings, again with no need for awareness that they were caused by a breach of duty or something having gone wrong. The action having been raised in May 2012, it followed that any obligation to make reparation had prescribed.

[35] The decision on the facts of the case was entirely in line with the preceding discussion in Lord Hodge's judgment. We do not accept the sheriff's categorisation of the

ratio decidendi as being limited to a known detriment in November 2005 when vacant possession was not obtained. It is of course true that this might well have been appreciated as being a harmful event, but this was not the crux of the decision. Rather, consistently with all that had gone before, the judgment focussed on the knowledge of objective facts which amounted to loss or damage, not on any subjective understanding of loss. In any event it was made clear that the fees paid to the new solicitors would, if it was not already ticking, start the prescriptive clock without any need for actual or constructive awareness that they had been caused by a wrongful act.

[36] The decision in *Gordon's Trs* was discussed in *Kennedy* v *The Royal Bank of Scotland* [2018] CSIH 70. It was confirmed that the prescriptive period will commence as soon as defective goods are supplied or when, because of a breach of contract, expenditure is incurred, even if the creditor is unaware of a head of loss, see the opinion of Lord Drummond Young at paragraph 38. Mention can also be made of observations of Lord Tyre in *Glasgow City Council* v *VFS Financial Services Ltd* 2020 SLT 1227. At paragraph 104 of his opinion he took the view that to hold that section 11(3) postponed the operation of prescription until the pursuers became aware that they had suffered detriment because of wrongdoing would be "wholly inconsistent with the decisions in *Morrison* v *ICL* and *Gordon's Trs*, which are of course binding on me". He was referred to the sheriff's analysis in the present case but considered that it "fails to take account of the fact that Lord Hodge's analysis addresses both patent and latent injury." His Lordship stated that the decision in *Gordon's Trs* confirmed that the prescription clock can be started by the incurring of expenditure. As may be apparent by now, we agree with both Lord Drummond Young and Lord Tyre.

Decision

[37] We consider that the sheriff erred in understanding the approach to section 11(3) in *Gordon's Trs* to be based on the use of hindsight knowledge. In our view he should have applied section 11(3) in the manner described by the Extra Division and by the UK Supreme Court in *Gordon's Trs*, all as discussed above. Had he done so he would have been bound to uphold the submission that the pursuers' averments in reliance on section 11(3) are irrelevant, and that any claim had prescribed.

[38] At the hearing counsel for the pursuers described as "inelegantly phrased" the passage in their note of argument accepting that loss was sustained when the walls were built and also when plots were sold under absolute warrandice. He wanted the court to focus on heads of loss occurring within the five year period, such as the relocating of the walls and compensating the purchasers. He described this as the "relevant loss", as we understood it on the view that it arose from the fact of the encroachment and demonstrated an awareness on the part of the pursuers of a liability arising from a detrimental event.

[39] We consider that the concession in the note of argument could hardly have been withheld. The sheriff correctly held that as soon as the encroachment occurred the pursuers were under a legal liability to remove it. In addition, the cost of constructing the offending walls was wasted expenditure. Unless section 11(3) operated to postpone it, the five year period for any claim based on the architect's negligence began then. As explained in *Dunlop*, the fact that an accurate calculation of all consequential loss could not be made until later does not alter that position. We see no basis for interpreting the recent decisions as giving some special status to heads of loss quantified by reference to subsequent events occurring

at a time when it was clear that the creditor was out of pocket. As the Lord President, Lord Carloway, said in *Kennedy* at paragraph 20. "… where loss is inevitable, as a matter of law, in almost all cases, loss will have already occurred."

[40] We doubt that the erroneous plot drawings gave rise to a separate cause of action, but even if they did, again loss occurred more than five years before the action commenced when the pursuers sold the houses.

[41] Once it comes into force the provisions of the Prescription (Scotland) Act 2018 will supersede those of the 1973 Act. In the meantime the proper approach to section 11(3) has been authoritatively determined by the decisions in *Morrison* and *Gordon's Trs*. In short, the pursuers knew of the objective facts which amounted to "loss, injury or damage" in terms of both subsections (1) and (3) as and when they occurred. In particular it was known that the walls had been built and that houses had been sold. There is no scope for a postponement of the start of the five year prescriptive period until the pursuers were told of the problem. The decision in *Morrison* was by a narrow majority, and after it there remained doubt as to whether its reasoning should be applied to economic loss. The concern was that while known physical damage would generally be easily recognisable as harmful, the same may not apply to financial matters. Such doubts were addressed and resolved in *Gordon's Trs*.

[42] We summarised the oral submissions of counsel for the pursuers above. Although he disclaimed any challenge to the correctness of the recent Supreme Court decisions, the submissions were, in effect, an eloquent plea for a return to something similar to the pre-*Morrison* understanding of section 11(3). The same could be said of the learned sheriff's judgment. However, as was noted by the Extra Division in *Gordon's Trs*, it is a lower court's task to apply authoritative expositions of the law, not to evaluate them.

[43] For these reasons the appeal is upheld. The sheriff's interlocutor of 8 April 2020 will be recalled. We shall substitute an order sustaining the defenders' pleas in law that the averments made in reliance on section 11(3) are irrelevant and that any obligation to make reparation has been extinguished by the operation of prescription. The defenders will be granted decree of absolvitor.