OUTER HOUSE, COURT OF SESSION

[2022] CSOH 47

CA11/22

OPINION OF LORD BRAID

In the cause

THE FIRM OF C&L MAIR

Pursuer

against

MIKE DEWIS FARM SYSTEMS LIMITED

Defender

Pursuer: J Brown; DAC Beachcroft Scotland LLP
Defender: M Steel; Pollock & McLean

1 July 2022

[1] The pursuer is the proprietor of (and carries on business from) Townhead Farm, Dumfries. In 2011 it commenced a project to improve the facilities at the farm, which included the installation of a slurry tank to sit on a large area of level ground, beyond which was an embankment. The pursuer contracted with the defender for the supply and installation of the slurry tank. The work was completed in February 2012, and was paid for by the pursuer at around that time.

[2] In September 2016 a circle slip of the embankment occurred, causing the ground at the base of the embankment to move, which the pursuer avers caused such damage to the slurry tank that it will have to be demolished and built elsewhere. The pursuer sues the

defender for the loss which it avers flowed from the defender's breach of contractual obligation and breach of duty. In particular, the pursuer avers that the defender failed to give any consideration to the risks posed by the embankment or to advise that engineering advice be taken.

[3] The defender denies that any breach on its part caused the pursuer any loss, and a proof before answer on the merits of the action has been fixed for 19 July 2022. The defender also pleads that in any event, any obligation owed by it has been extinguished through the operation of prescription by virtue of section 6 of the Prescription and Limitation (Scotland) Act 1973, having subsisted for a continuous period of 5 years from the date when it became enforceable without any relevant claim having been made. The pursuer disputes that prescription has occurred, and the case called before me for debate on the defender's plea of prescription. Although Johnston, *Prescription and Limitation* (2nd edition), expresses the view at paragraph 4.42 that it is undesirable that in anything other than the clearest cases decisions about prescription should be made solely on the pleadings, parties were agreed that the relevancy of the defender's averments about prescription could usefully be discussed at debate. It was common ground that if those averments were held to be irrelevant, the court could dispose of the defender's prescription plea at this stage, allowing parties and the court to focus exclusively on the merits of the action at proof, with some saving in time. That advantage was tempered to some extent by the fact that it was also common ground that if the defender's averments were held to be relevant, the issue of whether the pursuer's claim had in fact prescribed would require to be held over until the proof, for inquiry into the pursuer's averments that prescription had not in fact operated, through the operation of section 11(3) and section 6(4) of the 1973 Act.

[4] I did raise with counsel for the pursuer whether, in light of the authorities referred to below, there might have to be inquiry into the likelihood of the embankment slipping and whether it might have been inevitable; but he pointed out (without contradiction by counsel for the defender) that it is not the defender's position on record that the slip was inevitable. Accordingly, the debate was conducted on the footing that while there was a risk of a slip, it was not inevitable that such a risk would ever be purified.

The issue

[5] It is settled law that prescription begins to run when there is concurrence of injuria and damnum: *Dunlop* v *McGowans* 1980 SC (HL) 73. This requires both a wrongful act, usually a breach of contract or breach of duty (injuria), and loss caused by that act (damnum). Necessarily, the loss must occur either contemporaneously with, or at some time after, the wrongful act. Section 11(1) of the 1973 Act provides that an obligation to pay damages arising from a breach of contract or duty "shall be regarded [for the purposes of the short negative prescriptive period of five years] as having become enforceable on the date when the loss, injury or damage occurred". In ascertaining the date when prescription began to run the first task is to establish when loss, injury or damage occurred. The issue which falls to be determined in this case is whether the pursuer suffered loss injury or damage in (or by) February 2012, when the installation was completed and paid for, as the defender contends; or whether, as the pursuer contends, it did not suffer loss until the slip occurred in September 2016. If the former, any obligation owed by the defender had prescribed before the action was raised. If the latter, the action was raised within the prescriptive period.

The pursuer's submissions

[6] Counsel for the pursuer submitted that there was no loss until the circle slip occurred and the slurry store was damaged as a result. A loss which might or might not be suffered, dependent on a future contingency, was not damnum sufficient to commence the prescriptive period: Johnston, *Prescription and Limitation*, at paragraph 4.41; cf *Law Society* v *Sephton & Co (A Firm)* [2006] 2AC 543, Lord Hoffman at paragraphs 22 and 30. While that was an English case concerned with the application of the conceptually different regime of limitation, the analysis had been recognised as being applicable in Scots law: *Khosrowpour* v *Taylor* [2018] CSOH 64, per Lord Doherty at [26]. Further support for the proposition that a merely contingent loss did not amount to damnum came from Lord President Carloway in *Kennedy* v *Royal Bank of Scotland plc* 2019 SC 168 at [20].

[7] It was not always easy to identify on which side of the divide an individual case lay. Clear examples of cases where the loss was inevitable were *Midlothian Council* v *Raeburn Drilling and Geotechnical Limited* 2019 SLT 1327; *WPH Developments Limited* v *Young & Gault LLP* 2022 SC 28 (in which the First Division upheld the correctness of *Midlothian Council* and Kennedy); *Beard* v *Beveridge Herd and Sandilands* WS 1990 SLT 609; and *Khosrowpour*. By contrast, *Kusz* v *Buchanan Burton* 2010 SCLR 27, was an example of a case where loss was held not to have occurred.

[8] In the final analysis, the circle slip was not an event that was certain to occur. It might never have occurred, in which event there would never have been any loss. The matter could be tested by asking whether the pursuer could have raised proceedings in advance of the circle slip on the basis that if it were to occur at some future date, loss would have been suffered. It could not. It followed that the prescriptive period did not commence until the circle slip actually occurred.

The defender's submissions

[9] While counsel for the defender appeared initially not to take issue with the pursuer's overarching submission that where a loss was merely contingent, no damnum had occurred, his analysis of the law appeared to leave no room for that proposition to have any practical effect, since his submission came to be that damnum always occurred when wasted expenditure was incurred, no matter the circumstances (subject to there being a causal link between the wrongful act and the loss). When pressed, he conceded that he had been unable to think of a single hypothetical example where the occurrence of damnum was postponed until the purification of a contingency.

[10] The defender's submission was mainly predicated on *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287, per Lord Hodge, from which the following factors could be derived. "Loss, injury or damage" meant physical damage or financial loss as an objective fact (paragraphs 18 and 19). Hindsight must be applied in determining when loss had occurred (paragraphs 22 and 24), the corollary of which was that the creditor did not have to know, at the time, that he or she had a head of loss (paragraph 21). It was sufficient if the creditor was aware that "he or she has not obtained something which [he or she] had sought or that he or she has incurred expenditure" (paragraphs 19 and 22). Section 11(3) did not postpone the start of the prescriptive period until a creditor was actually or constructively aware that he or she had suffered a detriment in the sense that something had gone awry; the creditor did not have to know that he or she had a head of loss (paragraph 21). A causal link between the wrongful act, and the loss, was required. So, in *Midlothian Council*, above, Lord Doherty had held that loss had occurred as soon as the pursuer incurred wasted expenditure acting in reliance on the defender's advice. Likewise

the need for causation was emphasised in *WPH Developments*. In that case, the court also endorsed the focus on knowledge of objective facts which constituted the loss or detriment.

[11] Applying that approach to the facts of the present case, the defender's position was that injuria had occurred by February 2012 at the latest; and that, with the benefit of hindsight, damnum occurred when the pursuer incurred (what turned out to be) wasted expenditure which failed to achieve its purpose. As a matter of objective fact, loss was therefore sustained at that time – February 2012 - both when the pursuer paid a third party to construct the slurry tank and when it paid the defender for the advice it had tendered.

Decision

[12] The first question is whether, as the pursuer submits, it is correct that in Scots law loss which is wholly dependent on a contingency which may or may not occur does not amount to damnum until the contingency in fact materialises. Putting that in a slightly different way, does *Gordon's Trustees* (and the earlier case of *David T Morrison & Co Ltd (t/a Gael Home Interiors)* v *ICL Plastics Ltd* 2014 SC (UKSC) 222, which was applied in *Gordon's Trustees)* leave any room for the operation of such a rule? And, if it does, was the pursuer's loss in the present case one which was wholly dependent on a contingency which therefore did not occur until 2016; or did it occur in 2012 when the pursuer incurred expenditure which, as it transpired, was wasted?

[13] The starting point is the opinion expressed in Johnston, *Prescription and Limitation,* at paragraph 4.41 that so long as a pursuer is merely exposed to a contingent loss or liability, they sustain no loss or damage until the contingency is fulfilled and the loss becomes actual. Although Australian authority - *Wardley Australia Ltd* v *Western Australia* (1992) 109 ALOR 247 at 258 - is cited in support of that proposition, the author also derives support

from *Law Society* v *Sephton*, above, in which the House of Lords held that a purely contingent claim was not in itself damage until the contingency occurred, for the purposes of the limitation regime in England. At paragraph 22, Lord Hoffman drew a distinction between "bilateral transaction cases" where the plaintiff's failure to get what it should have got from a bilateral transaction was quantifiable damage even though further damage might result; and cases (such as that one) in which a purely contingent obligation had been incurred, concluding at paragraph 30 that a contingent liability which stands alone is not damage until the contingency occurs. The facts in *Sephton* were that the defendants had negligently certified that they had examined a solicitor's accounts and that they were compliant with the Solicitors' Accounts Rules 1991. In fact, the accounts were not compliant, and the solicitor subsequently misappropriated funds from clients, which the Law Society eventually had to make good out of its Compensation Fund. An issue arose as to whether damage occurred, and the limitation period began, when the solicitor misappropriated money, or only when a claim was made on the fund. The House of Lords held that it was the latter. Until then, there was the possibility of a liability to pay a grant out of the fund, but until a claim was actually made, no loss or damage was sustained by the fund: Lord Hoffman at paragraph 18.

[14] Lord Doherty in *Khosrowpour*, above, described "some of the discussion" in *Law Society* v *Sephton* as persuasive, although it should be noted for completeness that in saying that, he was not referring to the paragraphs mentioned above (other than paragraph 22). In *Khosrowpour*, the pursuer had given £8,000 to his mother-in-law to assist with the purchase of a council house at a discount on the basis of an informal agreement that she would leave the house to him in her will. While in her first will she did bequeath the house to him, she subsequently revoked that bequest in a second will. The pursuer sued his solicitor, averring

that the failure to advise the pursuer to enter into an agreement with his mother-in-law whereby she was bound to leave him the house was negligent. An issue arose as to prescription, and although it was argued that there had merely been a contingent loss until the second will had been executed, Lord Doherty held that damnum had occurred immediately the pursuer had parted with the £8,000: it was self-evident that what he got in return for payment was less than he ought to have got and that all he had was a precarious expectancy which could be defeated at any time.

[15] Earlier, in *Kusz* above, the Inner House also referred with approval to *Law Society* v *Sephton* in holding that, where a solicitor had negligently failed to raise an action and inhibit a builder on the dependence of an action, no immediate loss had occurred and there was no damnum until the pursuer obtained a decree but was unable to enforce it because the builder had alienated his assets and left the country; only then could the claim against the builder be said to have a value, the court stating that there was then "perfection of the contingency by the obtaining of decree for a substantial sum": paragraph [22].

[16] Finally, in *Kennedy*, above, Lord Carloway stated that "where loss is inevitable, as a matter of law, in almost all cases, loss will have already occurred", which suggests that he had in mind that there may be a small category of cases where even future inevitable loss does not amount to loss; from which it must follow that where loss is contingent on an uncertain future event (or is not inevitable), it has not already occurred.

[17] For completeness, I should mention that counsel for the pursuer founded upon Lord Drummond Young's observation at paragraph [42] of *Kennedy* that apprehended damage is different from actual damage and is not sufficient by itself to justify a claim for compensation. However, reading on, Lord Drummond Young appears to state that even in the case of apprehended damage where there is no quantifiable loss, there might be

sufficient "loss, injury and damage" for the customer to vindicate his or her rights, and therefore for damnum to have occurred; so that passage does not entirely support the pursuer's case.

[18] Ultimately, however, each case must turn on its own facts, and the authorities show that Scots law at least admits of the possibility that there are situations where damnum will not be held to have occurred where loss is wholly dependent upon a future event which may or may not occur, or is otherwise merely contingent. As I have said, counsel for the defender did not dispute that proposition as such, but his approach appeared to leave little, if any, room for its operation, leading on to the next question, which is whether the decision in *Gordon's Trustees* leaves any room for such a rule. The first point to note is that *Kennedy* was decided after *Gordon's Trustees* and the dicta of the Lord President and Lord Drummond Young referred to above leave open the possibility, at least, that there may be cases where any loss is merely contingent and where damnum has not yet occurred. Second, the issue in *Gordon's Trustees* was not whether the loss was merely contingent upon a future event, and none of the cases mentioned above was cited or referred to. Turning to consider *Gordon's Trustees* in more detail, the facts in that case were that the defenders had served defective notices to quit, and, on an objective assessment, loss was held to have occurred on the date of the expiry of the leases in question, when the tenants had not removed from the subjects. The high point of the defender's argument is the reference by Lord Hodge to damnum occurring when (among other things) expenditure is incurred. However, I respectfully agree with Lord Doherty's observation in *Khosrowpour* at [26] that Lord Hodge was not making an exhaustive statement of the circumstances in which loss, injury or damage might occur, so much as providing examples to illustrate the principle he was elucidating. While Lord Doherty's point was that there may be other instances where loss can be said to have

occurred, equally it can be said that Lord Hodge was not expressing the view that in every case where expenditure has been incurred, loss must necessarily be held to have occurred since, as I have observed, he was not addressing his mind to the issue of purely contingent losses.

[19] As Lord Hodge made clear at [19] of *Gordon's Trustees*, the starting point is to ask, under reference to section 11(1), when loss, injury or damage, caused by a breach of contract (or as the case may be) first existed as a matter of objective fact. That is the date when the prescriptive clock begins ticking, unless it is postponed by the operation of section 11(2) or 11(3). It is section 11(3) which deals with awareness of the creditor, and what the Supreme Court held in *Gordon's Trustees* was that what the creditor must be aware of is the same loss, injury or damage of which section 11(1) speaks - viz, that he or she has not obtained something which he or she had sought, or had incurred expenditure, there being no need for awareness that it had been caused by a breach of duty or something going wrong. Lord Hodge made a reference at [24] to the failure to obtain vacant possession in that case being seen as having caused loss "with the benefit of hindsight". That (and other) references to hindsight was the subject of discussion by the Inner House in *WPH Developments*. The Inner House eschewed any notion that the approach to section 11(3) in *Gordon's Trustees* was based on the use of hindsight knowledge; rather, it had been mentioned simply 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": paragraph [33]. Finally, it should be observed that in *WPH Developments*, the sheriff had rejected an argument that the damnum was uncertain or contingent, and that part of his judgment was not challenged, but there was no suggestion in the Inner House that it was no longer part of the law of Scotland that contingent loss did not amount to damnum.

[20] Drawing all of this together, there is nothing in the ratio of *Gordon's Trustees*, or in Lord Hodge's reasoning, or in the reasoning of the Inner House in *Kennedy* or *WPH Developments* which requires the prescriptive clock to begin running where any loss is purely contingent. In accordance with *Gordon's Trustees* the starting point in all cases must be to ask when, objectively assessed, loss first occurred, but there remains a distinction between loss which has occurred (even though not appreciated as such at the time) and loss which has not yet occurred (but may do so in the future), the latter being purely contingent and not amounting to damnum.

[21] That all said and as counsel for the pursuer acknowledged, it is not always easy to decide on which side of the line an individual case lies. In some cases, the loss can clearly be seen to have been inevitable from the outset. In *Midlothian Council* the fourth defender (a firm of engineers) had failed to carry out adequate site investigations and failed to advise the pursuer on the need for a ground defence system. In reliance on the advice given by that defender, the pursuer, between December 2006 and June 2009, incurred the costs of construction of a housing development on the site, which was uninhabitable because of ground gas, and later had to be demolished. Damnum was held to have occurred by, at the latest, June 2009. The site had been uninhabitable from the outset, and it was inevitable that the expenditure incurred by the pursuer would turn out to have been wasted, even though they had not known it at the time. In *WPH Developments Limited* the pursuer property developers suffered loss as soon as they constructed walls on land they did not own, in reliance on negligent site drawings prepared by the defender architects. Again, it was inevitable that the walls would have to be moved even though that had not been known at the time. However, inevitability cannot be the sole test. In *Khsorowpour*, the pursuer's loss cannot be said to have been inevitable from the outset, since the pursuer's mother-in-law

might not have revoked her will. That is, rather, an example of a case where immediate loss was incurred because the pursuer had obtained something which was less valuable than it ought to have been, another example of which is *Beard* v *Beveridge Herd and Sandilands* in which there was a negligent failure to include a rent review clause in a lease, rendering the lease immediately less valuable.

[22] On the other hand, nor can the test be whether the pursuer was in a more precarious position, which could have been said of the creditors in both *Law Society* v *Sephton* and *Kusz*, the only cases cited in argument where the creditor's loss was held to be contingent, and the facts of which are outlined above. In *Law Society* v *Sephton,* Lord Hoffman drew a distinction between transaction cases, where some loss could be said to have occurred at the outset through the acquisition of something immediately less valuable, and those other cases where the loss was merely contingent. That seems to be the correct test to apply, rather than asking whether the loss was inevitable or whether the creditor was in a more precarious position, although doubtless these will both be relevant considerations to take into account. Putting it another way, if the creditor has suffered no more than a mere risk of future loss - as was the situation in both *Law Society* v *Sephton* and *Kusz* - then loss cannot be said to have occurred. There must be something more, such as acquisition of an asset which is immediately less valuable than it ought to have been.

[23] I turn now to the fact of the present case. Applying *Gordon's Trustees*, when can it be said that some loss, injury or damage first existed as a matter of objective fact? To hold that it occurred in 2012, more than four years before the slip occurred, is not so much to apply hindsight as to look at matters in 2012 through the prism of a hypothetical crystal ball. Even with the benefit of hindsight, it cannot be said that loss had occurred in 2012, in the sense that it had in any of the cases discussed above. In 2012, there was merely a risk that a slip

might occur in which event the pursuer would suffer loss; but until that happened the pursuer could not be said to have suffered detriment. The pursuer had not acquired something that was necessarily less valuable than it ought to have been. It was simply not known whether or not a slip would occur. The pursuer would have been unable to raise an action against the defender before the slip occurred. The situation is to be contrasted with that which would have existed if (unknown to anyone at the time) the slip had already occurred but had not yet caused the slurry tank to suffer damage; or a chain of events had been set in motion whereby it was inevitable that the embankment would slip. In both of those scenarios, it could objectively be said that the pursuer had suffered loss, albeit it did not know it; but that is not pled by the defender.

[24] It follows that the pursuer's loss was purely contingent until the slip did in fact occur in 2016. Until then, it could not be said that the pursuer had suffered any loss; there was merely a risk that it might. Accordingly, damnum did not (on the facts averred) occur until 2016, and the pursuer's claim has not prescribed.

Disposal

[25] For all of the above reasons, I have repelled the defender's fourth plea-in-law. The action will proceed to proof before answer on the remaining averments and pleas.