SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN

[2024] SC ABE 19

ABE-A120-22

JUDGMENT AFTER DEBATE OF SHERIFF IAN H L MILLER

in the cause

A C MORRISON & RICHARDS LLP

Pursuers

against

GEORGE SOUTER

Defenders

Pursuers: Manson, advocate
Defenders: Watt, advocate

Aberdeen, 22 January 2024

The Sheriff, having heard counsel in debate and having resumed consideration of the cause: Sustains the pursuers' fifth plea-in-law in their Answers to the defender's Counterclaim; Repels the pursuers' first and second pleas-in-law in their Answers to the defender's Counterclaim; Repels the defender's plea-in-law in the Counterclaim; Assoilzies the pursuers from the crave of the Counterclaim; Appoints the cause to a procedural hearing to determine further procedure in the principal action and to hear counsel on all live questions of expenses including those arising from the debate; and Assigns that hearing to take place on 19 February 2024 at 10.00am by Webex.

Ian H L Miller

NOTE

[1] This case was appointed to debate to determine the question of whether the legal ground of the defender's counterclaim had prescribed by the time that it was first presented by way of adjustment to his defence to the principal action on an unstated day during July 2022. The pursuers plead that it had and the defender submits in response that it had not. He has not tabled a plea-in-law addressing that challenge to his counterclaim. The dispute raises the issue of at what date did *injuria* and *damnum* concur because that will determine whether the legal ground of the counterclaim had prescribed before it was raised.

[2] The pursuers raised the principal action for payment to them of professional fees and outlays incurred by them and their predecessor firm while acting as the defenders' solicitors. His response was to counterclaim for payment by them to him for his averred loss and damage flowing from a breach of contract caused by Mr John Koss. He is described as being then of the pursuer but in fact was then of the predecessor firm of the pursuers and while that predecessor firm was in existence. He is averred to have failed to exercise the knowledge, skill and care of a reasonably competent solicitor. The sum counterclaimed for is almost four times the sum that the pursuers seek from him.

[3] The pleas-in-law sent to debate were the pursuers' first, second and fifth in their answers to the counterclaim. The first and second are general challenges to the relevancy and specification of the defender's averments, the first seeking dismissal of the counterclaim, the second that that they should not be admitted to probation. The fifth proceeds on the *esto* basis that the defender has suffered loss and damage through the breach of contract on the part of the pursuers. It asserts that any such obligation to make reparation to the defender has been extinguished by the operation of the short negative prescription thereby entitling the pursuers to be assoilzied from the crave of the counterclaim.

[4] The subject matter of the counterclaim arises out of at least part of the subject matter of the principal action which is concerned with three pieces of work undertaken by the pursuers on behalf of and as instructed by the defender; in October 2012, 2016 and 2017 respectively. The first of these was in respect of the proposed transfer of a piece of ground at Nostra Casa, Bucklerburn Road, Peterculter, Aberdeen. The second arises out of the defender's instruction to them in connection with the raising of proceedings before the Lands Tribunal for Scotland in respect of two questions arising from the wish of the defender to build houses on an area of land adjacent to Malcolm Road, Peterculter, Aberdeen. They were (1) the accuracy of the Land Register in respect of that area; and (2) what was needed to rectify any inaccuracy. The third was concerned with the defender's later instruction in connection with a proposed acquisition of a section of Bucklerburn Road.

The facts averred in the counterclaim

[5] The pursuers' challenge to the facts averred in the counterclaim is, by virtue of the pleas and the submissions made in support of them, a general one. For that reason it is appropriate to set out the defender's averments in detail. They fall into four elements which are said to rest upon a contract between the parties although it is neither expressed in terms in the defender's averments nor incorporated into them in whole or in part in an appropriate way.

[6] The first element started slightly over six years earlier than the first piece of work founded upon by the pursuers and is expressed in statement of facts 2.

> "At a meeting on about 8 June 2006 the defender advised Mr John Koss of the pursuers as they were then constituted that Churchill Homes Limited had submitted a planning application to develop an area of land which appeared to include part of the land that belonged to him. Mr Koss assured the defender that there was nothing to worry about and that he need not take any further action. Mr Koss did not carry

> out an examination of title or make any further investigations during or shortly after this meeting. The defender avers that he reasonably believed that this advice was correct."

The defender goes on to aver that he refers to his Affidavit dated 24 June 2022. Although described as produced he does not found upon it or incorporate it into his pleadings and therefore I take no account of it for the purposes of the debate.

[7] The second element dated from almost four years later on about 8 March 2010 when the pursuer and defender had another meeting. This is set out in statement of facts 3 as follows.

> "The subject of the meeting was a letter received by the defender from Churchill Homes' solicitors in which they claimed they owned part of the defender's land. During the meeting Mr Koss compared the defender's title plan with that of Churchill Homes. Mr Koss noted that there was a discrepancy. However, he repeated his advice from the earlier meeting in 2006 that there was nothing to worry about as the oldest title would prevail. This advice was inaccurate since there was in fact a significant discrepancy in the titles which required further investigation."

[8] The third element occurred in late November 2015, over five and a half years later, with the event that brought that about taking place in about April 2015 when the defender instructed the pursuers in connection with the transfer of a section of the defender's land to his company, Casa Developments SCO Ltd. As expressed in statement of facts 4 that led to the following:

> "On 25 November 2015 Mr Koss wrote to the defender to inform him that the application to the Land Register to transfer the title had been rejected. The application was rejected due to the boundary issue which the defender had raised with the pursuer(s) in 2006 and again in 2010."

[9] The fourth element began the following year and as asserted in statement of facts 5 flows from this rejection:

> "[it] forced him to raise proceedings with the Lands Tribunal in 2016 in order to establish his title to his land and to have the inaccuracy in the Land Register rectified.

> The defender was successful in these proceedings. However, the defender incurred £45,511.36 in unrecoverable expenses."

[10] He goes on to aver in the same statement what the pursuers should have done:

> "Had the pursuer investigated the boundary discrepancy and contacted the defender's neighbour and Churchill Homes or their solicitors in 2006 or in 2010, the issue could have been resolved much earlier, and the Lands Tribunal proceedings would not have been necessary. Had Mr Koss taken, in 2006, the steps referred to in paragraphs 4.11 to 4.13 of Professor Brymer's report, and drawn the outcome to the attention of the parties with competing claims to and interests in the disputed land, Combined Corporation (BVI) Ltd ("CCL"), of Churchill Homes, or their solicitors, at the time they would have withdrawn the planning application. The option agreement between CCL and Churchill Homes, pertaining to promotion and conditional sale of an area of land including the disputed area, was not concluded until June 2007. Agreement in those terms, including the disputed area, would not have been concluded between CCL and Churchill. The issue affecting the title would have been resolved by agreement. There would have been no proceedings before the Lands Tribunal and the defender would not have incurred any irrecoverable expenses associated with therewith. In any event, had the pursuer taken the abovementioned steps there was a material chance (which was lost to the defender) that the issue would have been resolved much earlier and without proceedings in the Lands Tribunal being necessary and without the defender incurring liabilities for fees associated with those proceedings. CCL's claim to the disputed area of ground rested on a disposition which had been granted to it on 5 February 2006."

He further avers that,

> "having sought a copy of the neighbours' title from their solicitors, and having provided them with a copy of Mr Souter's title in 2010, Mr Koss received no reply, and then simply assumed that the dispute had been resolved and that there was no need to follow it up. Para 4.13 of Professor Brymer's report is referred to."

Professor Brymer's report is not incorporated into the pleadings.

[11] In statement of facts 6 the defender turns to the term of the contract upon which he founds. It is an implied term expressed as being that in acting on the defender's behalf, the pursuer would use the knowledge, skill and care of a reasonably competent solicitor. He then proceeds to state the duty on the pursuers that flowed from that term. It is that

> "In the exercise of such knowledge, skill and care it was the pursuer's duty to:
> - a. Review the defender's title with particular reference to the boundary with the defender's neighbour and where there was conflict with the Churchill Homes

> development plan; b. Order a P16 Report in order to compare the boundaries of the defender's property with the Ordnance Survey map; c. Instruct a measurement survey by a specialist land surveyor; and d. Having carried out an examination of title and obtained a P16 Report and measurement survey, Mr Koss should have opened up a dialogue with Churchill Homes or their solicitors."

The defender avers next that the pursuers failed to carry out their duty to investigate the defender's title and to communicate with the defender's neighbour and Churchill Homes or their solicitors in 2006 or in 2010 and that no reasonably competent solicitor exercising such knowledge, skill and care would have failed to do so. The defender then refers to the Opinion of Stewart Brymer, Solicitor, Brymer Legal Ltd, 8 Rutland Square, Edinburgh EH1 2AS, which is incorporated into his pleadings *brevitatis causa*.

[12] The defender characterises the pursuer's failure in duty as amounting to a material breach of the implied term on which he founds, states that breach has caused him to sustain loss and damage and that but for the pursuers' breach of contract the defender would not have sustained that loss and damage. He goes on to specify the consequences of the breach as follows.

> "The defender relied upon Mr Koss' advice which he assumed to be correct. Accordingly, no further action was taken in relation to the title. Thereafter the pursuer continued to act as the defender's solicitor. That included acting in relation to the transfer of land in April 2015, and in relation to the proceedings, which turned out to be necessary, before the Lands Tribunal, in 2016 and thereafter. While the defender remained a client of the pursuer, he was being advised by the party against whom he now advances a claim for damages. The pursuer continued to act for the defender in relation to the proceedings before the Lands Tribunal until about 17 April 2018. The defender instructed new agents, Messrs Burness Paul, in April 2018 because the pursuer was not equipped to handle the appeal to the Court of Session against the decision of the Lands Tribunal. The defender's liability for fees as a result of the pursuer's breaches of duty was contingent on proceedings in the Lands Tribunal being required, and on their extent and duration. The defender became liable to pay fees to his advisers when they were issued, or shortly thereafter. The pursuer's fee relative to the proceedings in the Lands Tribunal, dated 4 January 2018, and the pursuer's terms of business, are referred to for their terms which are held as incorporated herein brevitatis causa. The fees issued by Burness Paul, relative to the appeal to the Court of Session, were issued after the firm was instructed in April 2018. The defender's loss and damage in respect of the

> irrecoverable element of his liability for fees was contingent on the outcome of the proceedings, expenses being awarded, the outcome of taxation, and the extent of the recovery of fees from the paying party. The Lands Tribunal for Scotland issued its decision on 15 February 2018. The Opinion of the First Division in relation to the appeal was issued on 19 December 2019. The Lands Tribunal's award of expenses was dated 8 March 2019. Accounts of expenses were prepared in relation to the awards of expenses relative to the tribunal and to the appeal. Thereafter the paying party settled its liability to the defender. The counterclaim was raised in July 2022."

[13] In statement of facts 7 the defender states two consequences for him of the alleged breach of contract, the one financial and the other personal. The financial is the irrecoverable expenses he incurred as a result of having to conduct proceedings before the Lands Tribunal in 2016 and thereafter, and in the Court of Session. He specifies that in the sum of £45,511.36. He avers that but for the pursuers' breaches of duty he would not have incurred those expenses because proceedings in the Lands Tribunal would not have been necessary. In the alternative he avers that as a consequence of the pursuers' breaches of duty he lost the opportunity of avoiding incurring the irrecoverable expenses associated with the proceedings in the Lands Tribunal. The defender's total expenditure on professional fees was £89,492.86. £43,981.50 was recovered from the paying party. The personal consequence is the averred significant distress and inconvenience which he (not the pursuers as averred, which is evidently a clerical mistake) during the course of the Lands Tribunal case. He describes that head of loss as comprising

> "significant stress related illness as a result of anxiety over the case and, in particular, having to attend hospital to have his gall bladder removed, an operation associated with stress. He could not eat and sleep properly. His son and daughter had been interested in developing the land in question, but because of the dispute over ownership they did not progress this. This added to the pursuer's stress and anxiety. The pursuer is entitled to be compensated for all such distress and inconvenience."

The submissions for the pursuers

[14] Counsel for the pursuers presented his submissions by adopting the entire text of the pursuers' note of preliminary pleas, number 27 of process, and then expanding upon it orally. In the course of his submissions he referred to subsections 6(4), 11(1) and 11(3) of the Prescription and Limitation (Scotland) Act 1973 (the 1973 Act) and to the decisions in five cases: *Pelagic Freezing (Scotland) Limited* v *(First) Lovie Construction Limited* and *(Second) Grontmij Group Limited* [2010] CSOH 145; *Gordon's Trustees* v *Campbell Riddell Breeze Paterson LLP* [2017] UKSC 75, 2017 S.L.T. 1287; *Kennedy* v *Royal Bank of Scotland plc* [2018] CSIH 70, 2019 SC 168 and *WPH Developments Ltd* v *Young and Gault LLP (in liquidation)* [2021] CSIH 39, 2022 SC 28; and *Pert* v *McAffrey* 2020 CSIH 5, 2022 SC 259. He mentioned in passing features of *Dunlop* v *McGowans* 1980 SC (HL) 73 and *Beard* v *Beveridge, Herd and Sandilands WS* 1990 S.L.T. 609.

[15] Counsel began his submissions by moving me to sustain the pursuers' fifth plea-in-law in their answers to the counterclaim and assoilzied the pursuers from the crave of the counterclaim by virtue of the operation of prescription in relation to the obligation sued upon, which failing to sustain the pursuers' first and second pleas-in-law in their answers to the counterclaim. He presented his submissions in support of those motions under the two heads of (1) prescription and (2) irrelevant head of loss.

(1) Prescription

[16] Counsel submitted that all of the obligations founded upon in the counterclaim had been extinguished by the operation of prescription by the time that it had been presented. He observed that the defence based on a contractual obligation was tabled prior to recent amendment procedure at the instance of the defender and that even as amended his

averments left him unable to discharge the burden of proving that prescription had not operated to extinguish his claim. The defender asserted the existence of a legal right that the pursuers deny existed by and at the date when the counterclaim was presented during July 2022. That was a critical date. Nothing turned on the exact date during that month and he was content to work with the date being expressed as July 2022. The burden of proof that his claim had not prescribed rested with the defender as was considered and decided by Lord Menzies in the *Pelagic* case at paragraphs [86] and [94] respectively. In terms of s.11 (1) of the 1973 Act the quinquennium starts to run when the alleged breach first gives rise to loss. The trigger that starts the running of the quinquennium is the point in time at which both breach and loss concurred. An example of a case in which that was stated is *Gordon's Trustees* by Lord Hodge at para [16].

[17] On the matter of breach as expressed in the counterclaim the defender founded upon purported breaches of contract which took place in 2006 and 2010 as narrated in statement of facts 5 and 6. In statement of fact 5 the breach is said to consist of a failure by Mr Koss to take certain steps in 2006, those being described by reference to paragraphs 4.11 to 4.13 of Professor Brymer's report, but not otherwise specified. Then in statement of fact 6 the failure of Mr Koss, expressed as that of the pursuers, is said to consist of failing to carry out the duty of investigating the defender's title and to communicate with the defender's neighbour and Churchill Homes or their solicitor in 2006 or in 2010. This dual dating is of critical significance because it indicates that the defender pleads that the breach on which he founds occurred in either 2006 or in 2010. As regards loss flowing from breach of contract the defender avers in statement of fact 4 that it was the rejection of his application to the Land Register to transfer the title of a section of his land to his company, Casa Developments SCO Ltd, and that the reason for the rejection was due to the boundary issue

which he had raised with the pursuers in 2006 and again in 2010. The defender was made aware of that decision by letter from Mr Koss to him dated 25 November 2015. Counsel submitted that that was the date that triggered the start of the quinquennium.

[18] What this rejection meant for the defender's case is set out in statement of facts 5 at lines 1 to 20. He avers that he was forced to raise proceedings before the Land Tribunal and that he was successful in those proceedings (lines 1 to 3). He then avers in lines 4 to 7 that:

> "Had the pursuer investigated the boundary discrepancy and contacted the defender's neighbour and Churchill Homes or their solicitors in 2006 or in 2010, the issue could have been resolved much earlier, and the Lands Tribunal proceedings would not have been necessary."

Counsel submitted that this averment was critical for the defender's case because he dates the breach to either 2006 or 2010. The defender goes on to aver on lines 7 to 11 that:

> "Had Mr Koss taken, in 2006, the steps referred to in paragraphs 4.11 to 4.13 of Professor Brymer's report, and drawn the outcome to the attention of the parties with competing claims to and interests in the disputed land, Combined Corporation (BVI) Ltd ("CCL"), of Churchill Homes, or their solicitors, at the time they would have withdrawn the planning application."

The proceedings were averred by the defender to be unnecessary had these steps been taken and the outcome reported to the parties. Counsel observed that the averment in lines 11 to 13 presented another head of loss, namely:

> "The option agreement between CCL and Churchill Homes, pertaining to promotion and conditional sale of an area of land including the disputed area, was not concluded until June 2007 and that agreement in those terms, including the disputed area, would not have been concluded between CCL and Churchill."

The remaining averments under scrutiny, those in lines 15 to 20 were beyond doubt the "but for" position of the defender:

> "There would have been no proceedings before the Lands Tribunal and the defender would not have incurred any irrecoverable expenses associated with therewith. In any event, had the pursuer taken the abovementioned steps there was a material chance (which was lost to the defender) that the issue would have been resolved much earlier and without proceedings in the Lands Tribunal being

> necessary and without the defender incurring liabilities for fees associated with those proceedings."

Counsel said that in confirming the irrelevancy of the defender's pleadings on contingency and prescription, the court need look no further than the averment in statement 5 that but for the pursuer's breaches "[t]here would have been no proceedings before the Lands Tribunal and the defender would not have incurred any irrecoverable expenses associated therewith". The defender then complains about the fact that those proceedings went on to happen and that expenditure was incurred. This, on the defender's case, amounts to loss and it is loss of which the defender was then aware.

[19] On the matter of loss, the defender offers to prove that he suffered detriment in 2006 and 2010 by reason of the conduct of Mr Koss when he says he should have enjoyed the benefit of certain steps which were not in fact taken by the pursuers and this had the result that the defender had to raise proceedings before the Land Tribunal in 2016 which caused him the loss that is the irrecoverable expenses for which he sues. On the defender's analysis, this is said to represent loss caused by the pursuers' breaches. As such and on this analysis the clock started to tick in 2006 but certainly in 2010. Moreover, the defender offers to prove that he became aware in November 2015 that an application to the Land Register had been rejected due to the boundary issue which the defender had raised with the pursuer in 2006 and again in 2010. On the defender's averments taken *pro veritate* this is a state of detriment caused by the .pursuer's breach of contract which starts the quinquennial clock. Lastly, the defender offers to prove that he was forced to raise proceedings in the Lands Tribunal in 2016 and began to incur expenditure in that connection. Again, on the defender's hypothesis, this must represent loss with the result that the clock would certainly have started to tick in 2016.

[20] The counterclaim was not presented until July 2022. Accordingly, for the purposes of section 11(1) of the 1973 Act and on the defender's pleadings, *damnum* and *injuria* concurred more than five years before the counterclaim was presented. The defender post-amendment has not invoked in his pleadings any of the relief mechanisms provided for in subsections 6(4) or 11(3) of the 1973 Act for the purpose of either postponing or leaving out of account portions of the prescriptive period. What is left is a straightforward analysis of the pleadings based on the application of subsection 11(1) and the vital question is, when did the loss to the defender occur?

[21] Counsel moved on to consider the question he posed of what the defender was trying to do in respect of establishing his loss. He said that the defender was asserting that technically he had not suffered loss until he was asked to pay the bill for the fees and outlays incurred on his behalf before the Lands Tribunal. Until then his loss was purely contingent. Counsel submitted that this was an irrelevant response. It conflated the identification of the concept of loss with how the defender wished to quantify that loss in money terms. The Lands Tribunal proceedings were not contingent on anything because he avers that they should never have existed and that he was forced to go to the Tribunal when he did not want to. That he was not presented with a bill for fees and outlays until January 2018 at the earliest was neither here nor there. It was inevitable that a person raising proceedings before the Lands Tribunal with the assistance of solicitors would be met with a bill for professional services. There was nothing in the defender's pleadings to suggest that there was any other arrangement in place. It was bogus for him to say that he suffered loss only when he was called upon to pay and he did not plead that. Moreover, the defender sought, in statements 5 and 6, artificially to divide up his loss to avoid the effects of prescription in

the very manner authoritatively rejected by the House of Lords in *Dunlop* per Lord Keith at p 81.

[22] Turning to the law, counsel for the pursuers referred for support to two decisions of the Inner House in *Kennedy* and *WPH Developments.*

[23] In *Kennedy* the defenders and respondents were a bank which by notice dated 8 February 2010 informed the pursuer and appellant Mr Kennedy, their customer, of their purported termination of three term loans and demanded repayment. Following sundry procedure he extinguished his liability to the Bank on a date subsequent to 7 April 2010. On 2 April 2015 he raised proceedings against the Bank seeking reparation for breach of contract for prematurely terminating the loans. The Bank argued that any obligation to make reparation had prescribed. That argument succeeded before the sheriff. He dismissed the cause. The Sheriff Appeal Court (SAC) allowed the appeal and appointed the cause to a preliminary proof on prescription. After proof the sheriff, the same one as had dismissed the cause, held that any obligation had prescribed and assoilzied the Bank. Mr Kennedy appealed to the SAC which on joint motion remitted the cause to the Inner House. The Inner House refused the appeal, holding that the appropriate date for the commencement of the running of the quinquennium was when the Bank refused to perform its obligations under the contract and that occurred at the initial intimation of termination on 8 February 2010.

[24] Counsel drew heavily upon the decision of the Court as expressed in two of the three opinions of the court delivered, those being the opinion of the Lord President (Carloway) at paragraphs [17], [18], [20] and [21] the opinion of Lord Drummond Young at paragraphs [36] to [39] and [40] to [42]. Counsel took a number of propositions from these paragraphs. The first was that an obligation to make reparation for loss, injury and damage

is a single and indivisible obligation (paragraph [17]) as was expressed in *Dunlop*. Counsel said that this meant that there was no warrant for splitting up loss into separate heads. The question was when did the defender first suffer loss? The case of *Beard* mentioned in paragraph [18] was an example of the application of the single and indivisible principle. *Beard* involved the lease of shop premises. The defenders' failed to incorporate a functioning rent review clause into the lease. The pursuers as landlords did not appreciate that a wrong had occurred until almost twenty one years after the lease had been executed, a date far removed from that when any loss was suffered. The Court held that the *injuria* (the wrongful act) and *damnum* (the loss) concurred when the lease was executed and not when the rent review would have operated or when the landlords realised their solicitor's error. The second proposition was taken from paragraph [20] on the whole of which counsel relied. In particular he founded upon the statement that "where loss is inevitable, as a matter of law, in almost all cases, loss will have already occurred. It is, put simply, quantifiable future loss." The third came from paragraph [21] on which he also relied in full. It is that the quantification of loss need not be deferred until the exact sum of the loss is known. The loss to the defender, in the form of legal fees and outlays incurred in respect of the Lands Tribunal proceedings, was capable of quantification, "albeit in an uncertain manner" and "was at least quantifiable by reference to a reasonable estimate of the [fees and outlays] to which an extra amount might be added to cover the likelihood of a less favourable credit facility". The fourth proposition counsel found expressed in paragraph [39]. Lord Drummond Young analysed the meaning of *damnum* as used in the case law since *Dunlop* in paragraphs [36] to [38] and the fundamental meaning of *damnum* in paragraphs [40] to [42]. In paragraph [39] he made two points which he described as being of importance on which counsel founded:

> "First, it is the objective existence of the loss that matters, not the creditor's knowledge of that loss. Secondly, so far as the creditor's knowledge is concerned, all that is required is an awareness that he or she has not obtained something that ought to have been acquired."

In paragraph [42] counsel founded upon the statement as his fifth proposition that

> "the right to bring legal proceedings was not dependent on the existence of actual quantifiable damage, but could be initiated if it were shown objectively that there was a sufficiently material threat to the property or rights of a creditor."

[25] Drawing on these propositions counsel submitted that the court cannot mix up the quantification of loss, past, present or future with whether a claimant had suffered loss conceptually. This he said was four-square with the circumstances of the instant case. The court was obliged to follow and apply the decision in *Kennedy* because it was in point and therefore binding on me. In the instant case the referral of matters to the Lands Tribunal brought with it the inevitability that this course would incur fees. The defender could have estimated them and then sued on that basis.

[26] Counsel turned to the case of *WPH Developments* in which the pursuers raised an action for damages against the defenders based on allegedly negligent architectural services in the form of plotting incorrectly the boundaries of a residential development resulting in the construction of walls on neighbouring land resulting in a request that the pursuers remove the encroaching walls. The critical issue in the case was the date when *injuria* and *damnum* concurred. As with *Kennedy* the SAC remitted the case to the Inner House on that issue. Counsel drew attention to and founded upon the observation in paragraph [9] that "*[d]amnum* is when someone suffers a detriment or is worse off, whether physically or economically, because of wrongdoing". He also founded upon the whole of paragraphs [38] and [39] and in particular emphasised the last three sentences of paragraph [39]:

> "As explained in *Dunlop* v *McGowans*, 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 (Carloway) said in *Kennedy* v *Royal Bank of Scotland plc* (para 20), 'where loss is inevitable, as a matter of law, in almost all cases, loss will have already occurred."

[27] Counsel drew together his submissions on prescription by conducting a reflection on what he had presented. He submitted that the decisions in both *Kennedy* and *WPH Developments* were in point and binding on me. Loss is a state of detriment and loss starts when that state occurs. What does the defender aver about his state of detriment? It is that he was forced into raising the Lands Tribunal proceedings which he would not have had to do but for the alleged professional negligence of the pursuers. There was nothing contingent about that. The only uncertainty when raising the proceedings was how much it might cost the defender. The law gives a person in his position the period of five years to make his claim. That is a generous provision. It is not the law that prescription starts when a claimant is able to quantify his loss.

[28] Turning to the defender's position that he could not identify the particulars of the financial impact for him of the proceedings until he got the bills from his lawyers, counsel said that this argument, which he described as the defender's narrow point, had been rejected by the courts in *Kennedy* and *WPH Developments*.

[29] Counsel said that if the pursuers' fifth plea-in-law were sustained then they were entitled to be assoilzied from the crave of the counterclaim rather than that have it dismissed. He found support for that course in the decision of the Inner House in *Pert* v *McAffrey* 2020 CSIH 5, 2022 SC 259 per the Lord President (Carloway) at para [27].

(2) The irrelevant head of loss

[30] Counsel moved on to address the second head, described as the irrelevant head of loss. The defender's averments in statement of facts 7 sought what was in effect an award of solatium. Those averments were irrelevant. The subject matter of the counterclaim was a contract for professional services. It was not one under which the pursuers assumed duties in relation to the defender's personal wellbeing. In any event, the defender's claim in relation to solatium was so manifestly lacking in specification that it was irrelevant. He did not give fair notice of how the averred impropriety of suffering a stress related illness was linked to the averred breach of contract. Similarly, there was no linkage pled between the gall bladder operation and the inability to eat and sleep properly and the breaches of contract. The two sentences containing those averments should be deleted.

The submissions for the defender

[31] Counsel for the defender presented his submissions in reply orally. He began by inviting me to repel the pursuers' first, second and fifth pleas-in-law to the counterclaim. He acknowledged that the counterclaim had been presented during July 2022 and that the burden of proving that prescription had not operated rested on the defender as decided in the *Pelagic* case. He accepted that the defender's case faced the test in the case of *Jamieson* v *Jamieson* 1952 S.C. (H.L.) 44, that the counterclaim would not be dismissed as irrelevant unless it must necessarily fail even if all of his averments were proved.

[32] Counsel submitted that the breaches of contract that gave rise to the counterclaim took place in June 2006 and in March 2010 as averred in statement of facts 2 and 3 respectively. The loss that flowed from those breaches was a contingent loss. The defender did not suffer loss on the occurrence of the breaches. It was postponed until the pursuers

issued their fee to him for the work they had conducted in respect of the Lands Tribunal proceedings. That occurred in January 2018 as averred in statement of facts 5 and the fee note was incorporated into his pleadings. The defender had no liability for the payment of fees until that fee note was issued. His loss is the irrecoverable element of the fee note.

[33] Turning to the law, counsel referred to subsections 6(1) and 11(1) of the 1973 Act. He founded upon the decisions in five cases: *C & L Mair* v *Mike Dewis Farm Systems Ltd* [2022] CSOH 47, 2022 S.L.T. 1021; *Law Society* v *Sephton & Co (a firm) and others* [2006] UKHL 22, [2006] 2 AC 543; *Khosrowpour* v *Taylor* [2018] CSOH 64; *Kusz and Kusz* v *Messrs Buchanan Burton* [2009] CSIH 63; and *Fraser* v *DM Hall & Son* 1997 S.L.T. 808. In addition he referred to features of the decisions in *Kennedy*, *Gordon's Trustees* and *WPH Developments* and to a statement in Johnston, *Prescription and Limitation*, second edition, at paragraph 4.41 that so long as a pursuer was merely exposed to a contingent loss or liability, they sustained no loss or damage until the contingency was fulfilled and the loss became actual.

[34] Counsel laid great emphasis upon the decision in the case of *C & L Mair* in which the question in issue was whether loss had occurred several years after the breach founded upon because it was purely contingent. The case was concerned with a claim for damages brought by the proprietor and operator of a farm against a contractor for loss that he averred had been caused by the defenders' breach of obligation and breach of duty under a contract for the supply and installation of a slurry tank. Work on the tank was completed in February 2012. In September 2016 there was a circle slip of the embankment that was adjacent to the tank which caused the ground at the base of the embankment to move. The pursuer averred that the tank was so damaged by that slip and consequent movement that the tank would have to be demolished and built elsewhere and that the defender had failed to give any consideration to the risks posed by the embankment or to advise that

engineering advice be taken. The defender denied that any breach on its part caused the pursuer any loss and pled that in any event any such obligation had been extinguished by prescription in terms of section 6 of the 1973 Act. The case proceeded to debate on the relevancy of the pursuer's averments on prescription. After debate the Lord Ordinary (Braid) repelled the defender's plea of prescription and allowed a proof before answer. At paragraph [13] of his opinion he took as his starting point the statement expressed in Johnston at paragraph 4.41 quoted above. He then in paragraphs [13] to [19] reviewed the decisions in the cases of *Law Society*, *Kusz*, *Gordon's Trustees*, *Khosrowpour*, *Kennedy* and *WPH Developments* and in the course of doing that acknowledged that each case must turn on its own facts (paragraph [18]). He concluded at paragraph [20] of his opinion, that:

> "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*."

Counsel submitted that Lord Braid's reasoning indicated that he took a different approach than that taken in *Gordon's Trustees* and *WPH Developments*. He did not understand that the decision had been reclaimed. He pointed out that the case was dealing with a situation governed by subsection 11(1) of the 1973 Act and not subsection 11(3).

[35] Applying the approach in *C & L Mair* to the averred facts of the case he submitted that *damnum* did not occur until it could be said that the pursuer had suffered any loss and not merely a risk that it might (paragraph [24]). It was a wild oversimplification to say that the central loss to the defender was the existence of the Lands Tribunal proceedings. They were subject to contingencies. The heart of the defender's position was the question of

contingency of loss and that rested on the averments about his liability for fees as expressed in statement of fact 6. The cases founded upon by the pursuers were not looking at the question of contingency.

[36] Counsel turned to the *Law Society* case in which the issue was whether a claim for damages for the recovery of sums paid out by the Law Society as a result of the fraud of a solicitor which was founded in the alleged negligence of a firm of accountants which had signed reports stating that the solicitor had substantially complied with the Solicitors' Accounts Rules was raised too late and was therefore statute-barred under s.2 of the Limitation Act 1980. The judge at first instance held that it was and the Court of Appeal reversed that decision. The firm of accountants appealed to the House of Lords which dismissed the appeal. The House held that:

> "a contingent liability, such as the possibility of an obligation to pay money in the future, was not in itself damage until the contingency occurred; that, consequently, until a claim was actually made, no loss or damage had been sustained … and no cause of action had accrued; and that accordingly the Law Society's claim in negligence was not statute-barred."

Counsel accepted that this case had been decided under a different legal regime that was governed by the Limitation Act 1980 and conceded that it was not a binding authority for the purposes of the instant case. He drew attention to it for the observations of Lord Hoffmann at paragraph 22 regarding contingency of an obligation and at paragraph 30 for his statement that contingency is not damage. He submitted that the case added colour to his submissions and to what Lord Braid and Johnston had said about contingency; Lord Braid at paragraph [13] of his decision in which he adopted the above mentioned approaches of Lord Hoffmann and Johnston at paragraph 4.41.

[37] Counsel referred next to the Outer House decision of Lord Doherty in *Khosrowpour* which he described as a case over a bilateral contract. In it the pursuer sought damages

from the solicitor whom he had consulted about giving effect to an oral agreement to which he had come with his mother-in-law in about 1989 regarding her purchase of her council house with the sum of £8,000 provided by him on the understanding that it was a term of that agreement that when she died she would leave the house to him. He averred that the defender failed to advise him that he and his mother-in-law ought to have concluded a binding written agreement incorporating what they had agreed and failed to draft such an agreement instead of which he advised him that she should execute a will containing a bequest of the house to him and that she should grant him a standard security over the house. The pursuer averred that she did both, with the standard security being executed on 14 November 1991, but that she later executed a second will on 24 January 2003 that revoked the prior one. On her death on 15 February 2012 he did not receive the house under her testamentary intentions because her second will did not replicate the provision that she leave the house to him. Instead he received from her executor a financial settlement based on the sum of £8,000 that he had given her and the interest that had accrued on it. He averred he had no option but to accept it. He sued for his loss. The action was defended inter alia on the ground that any obligation that the defender might have had to make reparation to the pursuer had been extinguished by the operation of prescription. Lord Docherty held that any such obligation had prescribed on the ground that the pursuer had suffered damnum immediately he parted with the sum to his mother-in-law: "all that he had was a precarious expectancy which could be defeated at any time" (paragraph [28]). Counsel submitted that the particular facts of the case made its decision distinguishable from the instant case.

[38] Counsel moved on to the decision in the case of *Kusz* principally for the discussion of English cases undertaken by the Lord President at paragraph [21] of the opinion of the court

and for the decision of the court at paragraph [22] that "[t]he "fatal blow" or "disaster" occurred, in our view, only on perfection of the contingency by the obtaining of decree for a substantial sum." Counsel submitted that this was the critical point.

[39] Counsel then turned to the case of *Kennedy*. Under reference to the terms of paragraph [20] he said that in the instant case the defender's loss was purely contingent and was dependent upon the outcome of the Lands Tribunal proceedings. That fact distinguished it from the facts of *Kennedy.*

[40] Of the case of *Gordon's Trustees* he said that it concerned the application of subsection 11(3) of the 1973 Act and not subsection 11(1) as did the instant case and for that reason it had nothing to say about it. He was content with Lord Hodge's observations in paragraph [19] of his opinion in the case about subsection 11(1). He said that the decisions in *WPH Developments* and *Kennedy* should he approached in the manner expressed by Lord Hodge at paragraph [20].

[41] Counsel concluded his submissions on the question of prescription by saying that the loss suffered by the defender was his liability to pay the irrecoverable fees incurred in respect of the Lands Tribunal proceedings. The key issue was not the existence of the proceedings, which he did not win until December 2019, but his liability for those fees. The legal ground of his claim had not prescribed at the time that the counterclaim was presented and accordingly the pursuers' fifth plea-in-law should be repelled.

[42] On the second ground of criticism, that of the defender's claim in statement of fact 7 for an award of damages in respect of stress and stress related consequences, counsel said that the averments, on a fair reading, were causally connected to the Lands Tribunal proceedings and were adequately specified. They ought to be allowed to proceed to proof.

He found support for this conclusion in the approach taken by Lord Coulsfield in his decision in the case of *Fraser*.

The submissions in response for the pursuers

[43] Counsel for the pursuers responded by making 8 points.

[44] (1) The detriment in question for the defender was the existence of the Lands Tribunal proceedings. That was evident from averments in his statement of facts 5 and 6 and from what counsel for the defender had said in his submissions. In statement 6 he avers that "[t]he defender's liability for fees as a result of the pursuer's breaches of duty was contingent on proceedings in the Lands Tribunal being required, and on their extent and duration." Counsel emphasised that the defender averred that the proceedings were required, not that they had concluded and it was in that way that he constituted his case against the pursuers. The contingency in question was the requirement to raise the proceedings. That occurred in 2016 and the averred contingency was purified then. Counsel had confirmed that analysis when he said that if Mr Koss had taken the steps that are averred that he should have taken, then there would have been no need for the Lands Tribunal proceedings.

[45] (2) The defender's averments of stress and inconvenience stated that the incidence of those responses was linked to the proceedings. If this were correct then this head of claim must have existed from the moment that the proceedings started. That meant that the single and indivisible right to bring an action started in 2016. Counsel submitted that there was a presumption that once a person was in court as a party to an action it was inevitable that that involvement would incur legal fees. That meant that loss and damage concurred when that situation began which was in 2016 and this fact accordingly pushed to one side the

defender's formulation of his primary case based on contingency. Even if all the rest of the pursuers' submissions were not upheld this one had to be because of the way in which the defender had pled his case.

[46] (3) The defender's submission that the sum of the fees incurred by reason of the outcome of the taxation of the accounts made a difference to the loss sustained by the defender was incorrect. Taxation did not create the loss; it only made a difference in the quantification of the loss. Moreover taxation did not create a head of claim.

[47] (4) The defender's submission that the decision in *WPH Developments* did not deal with the issue of contingency was incorrect. The argument advanced in that case was that the loss in question was effectively contingent on the pursuers receiving claims from people who had bought the houses with defective titles. The sheriff at first instance rejected that submission holding that the loss had occurred when walls were built on neighbouring land and the pursuers did not cross-appeal on that. In the instant case it was wrong to say that the loss occurred at the point in time that a legal bill was presented to the defender.

[48] (5) There were aspects of the reasoning of the decision in *C & L Mair* with which the pursuer took issue. That case was concerned with physical damage caused by a landslip. By contrast the instant case was concerned with pure economic loss. In *C & L Mair* the idea of contingency crept in because the pursuers purchased a piece of equipment that was defective because of the subsequent landslip causing loss as a consequence of physical damage. But for that landslip there would have been no ground for a claim. The landslip was equivalent to the occurrence of the Lands Tribunal proceedings in the instant case.

[49] (6) Continuing with *C & L Mair* if a person paid for a product that carried a defect then the loss occurred at the point of purchase. Lord Hodge discussed this matter in *Gordon's Trustees*. It was open to me to disagree with the decision of Lord Braid.

[50] (7) Subsection 11(1) of the 1973 Act raised a question of pure law. The fact that the defender received legal advice and services from a second firm of solicitors after parting company with the pursuers was an irrelevant consideration for the operation of subsection 11(1). That situation might have sat more recognisably under an argument advanced under subsection 11(3).

[51] (8) Turning to the second head of claim there was no averment that the removal of the defender's gall bladder came about because he was involved in the proceedings before the Lands Tribunal.

The further submissions in reply for the defender

[52] In responding to the foregoing submissions counsel for the defender submitted in respect of the question of detriment that it was the defender's liability for fees that was contingent. The *damnum* was contingent on the outcome of the Lands Tribunal proceedings. On the question of solatium he conceded that there was a certain lack of specification but that the averments should not be construed as saying that the defender suffered stress and damage as at the commencement of those proceedings. The three sentences in statement of facts 7 that expressed this head of claim stood or fell together. The case of *C & L Mair* was not a case of physical damage.

Discussion

[53] The defender's counterclaim is founded in a contract. That is not disputed. He does not aver what it was or when it was constituted but there is at least for present purposes no dispute about its existence. By inference and without objection on behalf of the pursuers it must have existed prior to 8 June 2006 and been entered into between the defender and the

predecessor firm to the pursuers. The pursuers, by raising the principal action against the defender and by resisting his counterclaim, indicate that they have assumed the responsibility of asserting the right to recover fees due to the predecessor firm and of satisfying the defender's claim for damages. The only term of the contract which the defender avers is the implied term on which he founds for his claim. It is expressed in statement of facts 6 as being that in acting on the defender's behalf, the pursuer would use the knowledge, skill and care of a reasonably competent solicitor. The relevance of that term is not in dispute. The solicitor whom the defender consulted in 2006 and 2010 was Mr Koss who is described as being of the pursuer. They accept responsibility for his acts and omissions if any be proved. The defender alleges that Mr Koss failed in his duty to him in the various ways expressed in statement of facts 6 from which he concludes that no reasonably competent solicitor exercising such knowledge, skill and care would have acted as Mr Koss did. As a consequence he breached the duty of care that he owed to the defender and that gives rise to an obligation to make reparation to him for the loss, injury and damage on which he condescends. That obligation the defender says rests with the pursuers.

(1) Prescription

[54] For the purposes of the application of prescription, the obligation to make reparation on which the defender founds is one which is subject to the provisions of section 6 and subsection 11(1) of the 1973 Act. Section 6(1) provides in so far as relevant for present purposes:

> (1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—
> (a) without any relevant claim having been made in relation to the obligation …

> then as from the expiration of that period the obligation shall be extinguished."

Section 11(1) provides on the same footing:

> … any obligation (arising from … any breach of … a contract …) to make reparation for loss, injury or damage … shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred."

[55] The prescriptive period is five years, the short negative prescription. It commences on the date when the loss, injury and damage occurs: subsection 11(1). As authoritatively stated in the leading speech of Lord Keith of Kinkel in *Dunlop* at page 81 that is the date on which *injuria* and *damnum* concur and the date when the right to raise an action on the obligation to make reparation accrues. That obligation is single and indivisible. Where an interval of time may elapse between the occurrence of *injuria* and *damnum* then the quinquennial time runs from the date when *damnum* results and not from the earlier date of *injuria*. An example of a case in which that ratio has been followed and applied is *Kennedy*.

[56] In the present case, the defender asserts that the *injuria* that gave rise to the counterclaim took place in June 2006 and in March 2010 as averred in statement of facts 2 and 3 respectively. It took the form of breaches of contract. The defender does not aver that he suffered *damnum* or loss on the occurrence of either breach. Had he done that his right of action grounding the counterclaim would have prescribed years before he presented it. What he does aver is that the loss that flowed from those breaches was a contingent loss which was postponed until the pursuers issued their fee note to him for the work they had conducted in respect of the Lands Tribunal proceedings. He asserts that the defender had no liability for the payment of fees until that fee note was issued. That occurred on an unstated date on or more probably shortly after 4 January 2018 as averred in statement of facts 6. His loss is the irrecoverable element of the fee note. He presented his counterclaim

during July 2022. That was within five years after the issuance of that fee note to him. Accordingly his right of action to bring it had not prescribed at that point in time.

[57] The pursuers dispute the defender's position that *damnum* concurred with *injuria* in January 2018. Counsel for the pursuers submitted that the defender's averments were open to the interpretation that there were four dates when that event occurred: 2006, 2010, 2015 and 2016. Any one of these would result in the counterclaim having prescribed before it had been presented. The defender's position that the loss was postponed until January 2018 was incorrect.

[58] Where, as here, there is a disputed question over the application of the short negative prescription under sections 6 and 11(1) of the 1973 Act to a right of action, the onus of proof rests upon the party who seeks to preserve title to sue. In the present case that is the defender. I take that from the reasoning and conclusion of Lord Menzies in the case of *Pelagic* as expressed in paragraphs [86] to [96] of his opinion. The standard of proof is the civil standard. For the purposes of the present debate the test of the defender's averments of fact is that in the case of *Jamieson* v *Jamieson* 1952 S.C. (H.L.) 44, that the counterclaim will not be dismissed as irrelevant unless it must necessarily fail even if all of his averments were proved. It will necessarily fail if his claim has prescribed.

[59] Counsel sought support for their respective positions on the facts of the case in the decisions of the cases they cited. Counsel for the pursuers placed most emphasis upon *Kennedy* and *WPH Developments* but also referred to *Gordon's Trustees*. Counsel for the defender relied heavily upon *C & L Mair* and in addition referred to the *Law Society* case, to *Khosrowpour* and to *Kusz*.

[60] *Gordon's Trustees* was primarily concerned with the application and effect of subsection 11(3) of the 1973 Act but the decision of the Supreme Court, delivered by Lord

Hodge with whom the other four justices agreed, analyses subsection 11(1) as well. The heads of loss claimed in the case included recovery of legal fees incurred by the trustees in pursuing a claim before the Scottish Land Court, a broadly similar situation to the present facts. Lord Hodge, in his sophisticated analysis of the proper interpretation of and meaning to be given to the wording of both subsection 11(1) and 11(3) and the effect of that on the issue before the Court, said of subsection 11(1) at paragraph [19] that:

> "In s.11(1) the phrase "loss, injury or damage", … is a reference to the existence of physical damage or financial loss as an objective fact. Thus if a person's building is damaged in an explosion, or a garden wall is damaged as a result of subsidence, there is physical damage which is enough to start the clock under that subsection, unless either or both of subss.(2) or (3) apply. No question arises under subs.(1) as to the creditor's knowledge of that objective fact. As Lord Keith stated in *Dunlop* v *McGowans* (p.81 (p.133)): "The words 'loss, injury or damage' in the last line of the subsection refer back to the same words in the earlier part and indicate nothing more than the subject-matter of the single and indivisible obligation to make reparation."
>
> Thus if, as a result of a breach of contract, a person purchases defective goods, incurs expenditure or fails to regain possession of his property when he or she wished to do so, the s.11(1) clock starts when the person acquires the goods, the expenditure is incurred or when the person fails to obtain vacant possession of the property."

Furthermore at paragraph [21] Lord Hodge adds to his discussion of how to determine the concurrence of *injuria* and *damnum*:

> "The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure."

[61] In *Kennedy* a decision of the Inner House, the Lord President (Carloway) began his analysis of the law of when *injuria* concurs with *damnum* by observing: "[t]he question ... in this, as in every, case is ultimately one of fact" (paragraph [17]). He quoted at paragraph [19] with approval Lord Hodge's description in *Gordon's Trustees* quoted above

that loss, injury or damage was "a reference to the existence of physical damage or financial loss as an objective fact." He went on to say that:

> "The relevant pursuer, if he or she had incurred expenditure … would find that the prescriptive period runs, at the latest, from the date of that expenditure … notwithstanding that he or she had not realised that there was a claim in respect of the loss against another."

Of the concept of loss he observed at paragraph [20] that for prescription to start running the loss had to be actual "but it does not either require to have been suffered or to be precisely calculable at the relevant date and it may increase over time". He went on to say that "where loss is inevitable, as a matter of law, in almost all cases, loss will have already occurred. It is, put simply, quantifiable future loss." This he said was illustrated by *Dunlop* and was clear also from *Beard.* Of the calculation of loss he said at paragraph [21]:

> "However difficult the exercise of quantification may have been at the point of termination, it is of a similar type of exercise to that often embarked upon by the courts in relation to the prediction of future events in damages claims. As at the date of termination, the pursuer's loss was at least quantifiable by reference to a reasonable estimate of the legal, valuation, arrangement and security fees, to which an extra amount might be added to cover the likelihood of a less favourable credit facility."

Lord Drummond Young agreed with that approach which he said was clearly implicit in *Gordon's Trustees*. He also stated that it was important to realise that "it is the objective existence of the loss that matters, not the creditor's knowledge of that loss" and that "so far as the creditor's knowledge is concerned, all that is required is an awareness that he or she has not obtained something that ought to have been acquired" (paragraph [39]).

[62] The decision of the Inner House in *WPH Development Ltd*, delivered by Lord Malcolm, applied the reasoning of the decisions in *Gordon's Trustees* and *Kennedy*. That case was concerned with the application of subsection 11(3) but referred to and adopted statements made in the earlier cases relating to the date at which loss occurred as a matter of

law and that the fact that an accurate calculation of all consequential loss could not be made until later than that did not alter the date of commencement of the prescriptive period. Of the feature of this latter point that was relevant to the facts of that case Lord Malcolm said:

> "We see no basis for interpreting the recent decisions [primarily *Gordon's Trustees* and *Kennedy*] 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."

[63] The case of *C & L Mair* raised the question of contingency of loss. The pursuer argued at debate that he had suffered no loss until the occurrence of the circle slip of the embankment that damaged his slurry store. This was an event that might or might not occur and thereby cause loss which was sufficient to commence the prescriptive period (paragraph [6]). The defenders' submissions were mainly predicated on the reasoning in *Gordon's Trustees*. They contended that loss 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 (paragraphs [9] and [10]). Lord Braid held that ultimately each case had to turn on its own facts. He went on to hold that Scots Law at least admitted of the possibility that there were situations where *damnum* would not be held to have occurred where loss was wholly dependent upon a future event which might or might not occur, or was otherwise merely contingent (paragraph [18]). He concluded that there was nothing in the authorities which required the prescriptive clock to begin running where any loss was purely contingent and that the starting point in all cases had to be to ask when, objectively assessed, loss first occurred. He distinguished between loss which had occurred, even although it was not appreciated at such at the time, and loss which had not yet occurred, but might do so in the future. The latter he said was purely contingent and did not amount to

damnum (paragraph [20]). Applying that approach to the facts of the case he held that until the slip occurred there was no *damnum* and the pursuer's claim had not prescribed.

[64] The *Law Society* case is a decision of the House of Lords. It was referred to as support for a contingent liability not being in itself damage until the contingency occurred that being the decision of House.

[65] In *Khosrowpour* the particular facts led Lord Doherty to hold that loss had occurred more than five years before the raising of the action. That was because it had occurred when the pursuer had handed the sum of money to his mother-in-law. What he got in return he got was "a precarious expectancy which could be defeated at any time", which is exactly what happened. Counsel for the defender sought to distinguish *Khosrowpour* from the present case on its facts.

[66] Counsel for the defenders referred to *Kusz* for the decision of the Inner House on the question of contingency. In that case the pursuers sought reparation from the defenders who were a firm of solicitors for the failures of one of their partners to raise an action of damages against a builder timeously seeking arrestment and inhibition on the dependence despite having been made aware that the builder intended to sell his dwelling house and relocate abroad. By the time the action was raised and diligence on the dependence granted and inhibition registered the proposed defender had disburdened himself of his heritable property in Scotland. The arrestment attached only a nominal sum. The pursuers secured decree by default in the sum of £116,392.46 but were unable to obtain satisfaction of their decree. The First Division held that the cause had not prescribed because in the opinion of the court, delivered by the Lord President (Carloway):

> "The "fatal blow" or "disaster" occurred, in our view, only on perfection of the contingency by the obtaining of decree for a substantial sum."

[67] Determining the date on which the prescriptive period starts is a matter of facts and circumstances. That is evident from all the cases cited. That said, there is much in the reasoning in the cases that I can and should apply to a consideration of the facts of the present case. The general statements of the law in *Dunlop*, *Kennedy* and *WPH Developments* are in point and are binding on me and those of Lord Hodge in *Gordon's Trustees* are in point. I note that counsel for the defender was, as he put it, content with what Lord Hodge said about subsection 11(1) in paragraph [19] of *Gordon's Trustees*. The decision in *Law Society* is of value for its discussion on contingency quoted above. It is a similar expression to that stated in *C & L Mair* but beyond that I recognise that the action was brought under a different statute, the Limitation Act 1980. It does not apply to Scotland, and there was no attempt made during the debate to equiparate its terms and requirements with those of the 1973 Act. The decisions in *C & L Mair, Khosrowpour* and *Kusz* are not binding on me. They are valuable and instructive illustrations of assessing the date when the prescriptive period begins to run, and particularly so for the approach taken and decision made on contingency in *C & L Mair*, but fundamentally they turn on their own facts.

[68] The initial task facing me is to determine the point in time when *injuria* occurred. Both counsel accepted that it had occurred. Counsel for the defender submitted it took place, in the form of breaches of contract, in June 2006 and in March 2010 as averred in statement of facts 2 and 3 respectively while counsel for the pursuers submitted that it occurred in 2006 but certainly in 2010. I have concluded that it occurred on 8 March 2010 in the course of the meeting between Mr Koss and the defender convened for Mr Koss and the defender to discuss the claim in the letter which the defender had received that Churchill Homes owned part of the defender's land. This was the same matter that had been discussed at their earlier meeting on 8 June 2006. The defender was obviously concerned

about the content of the letter. Mr Koss had the opportunity at the meeting to revisit and address the question of what the defender avers was a significant discrepancy in the titles requiring further investigation. Mr Koss's response was to reassure the defender that he had nothing to worry about because the oldest title would prevail.

[69] In taking that decision he confirmed and followed the advice that he had given in the earlier meeting on the same matter. That decision constituted the breach of contract. He had the opportunity at that meeting to reconsider and change it but he did not do that. His advice at the 2010 meeting overtook his advice in 2006. The breach that constitutes *injuria* is a single breach because although he gave the same advice in 2006 he had the opportunity at the 2010 meeting to reach a different conclusion.

[70] His reiterated stance on the matter of the title question laid the foundation for the four consequences that the defender avers flowed from that act of *injuria*. The first was the rejection in 2015 of the proposed transfer of land from the ownership of the defender to his company, Casa Developments SCO Ltd. The second was the raising of proceedings before the Lands Tribunal at the instance of the defender and the third was his subsequent appeal proceedings before the Court of Session. The fourth was the fact that the defender thereby was liable to pay legal fees not all of which he recovered from the paying party, he having been successful in those proceedings. It is that irrecoverable element of the fees which he seeks to recover by means of this action. All four consequences flowed from the decision of Mr Koss to rely upon his advice that the oldest title to the land in question would prevail. Nothing turned in the debate on the fact that the defender was ultimately successful before the Court of Session.

[71] The next task is to determine the point in time when *damnum* occurred. Counsel for the pursuers submitted that the loss to the defender that flowed from the pursuers' alleged

breach of contract was, as averred in statement of fact 4, the rejection of his application to the Land Register to transfer the title of a section of his land to his company, Casa Developments SCO Ltd because of the boundary issue. The defender was made aware of that decision by letter from Mr Koss to him dated 25 November 2015. That was the date that triggered the start of the quinquennium. Counsel for the defender submitted that the loss suffered by the defender, being the irrecoverable element of the fee note, was a contingent loss. He did not suffer it on the occurrence of *injuria*. It was postponed until the pursuers issued their fee to him for the work they had conducted in respect of the Lands Tribunal proceedings. That occurred in January 2018, as averred in statement of facts 6. The defender had no liability for the payment of fees until that fee note was issued.

[72] In my opinion the point in time when *damnum* occurred was the date when Mr Koss, as the then duly authorised and mandated law agent of the defender, received notification that his client's application to the Land Register had been rejected because of the boundary issue. The rejection was the first averred consequence of the decision taken at the 2010 meeting about the boundary issue. It was the first actual determination made in response to that decision and it was one that was adverse to the heritable interests of the defender. That rejection constituted a state of detriment to the defender caused by the breach of contract that occurred at the 2010 meeting. As such it caused the concurrence of *injuria* and *damnum*. It created the single and indivisible obligation on the pursuers to make reparation to the defender. It made the defender aware that he had not obtained what he had sought and been led to believe by the advice he had received from Mr Koss that he was entitled to expect. The rejection established the objective existence of loss to him. Moreover it posed for him, by the nature of the rejection and its potential consequences for his business

interests, a sufficiently material threat to his legal rights to the heritable property in question to establish his right to bring legal proceedings arising out of the act of *injuria*.

[73] The defender's averments do not state what the date of receipt of the intimation of rejection was but it was either on or before 25 November 2015. Neither counsel suggested any other date on this issue. For present purposes I conclude that it was, at the latest, the date on which Mr Koss, as the law agent of the defender, was made aware of that decision and actioned it by writing to the defender to inform him of it. That is 25 November 2015.

[74] The next task is to apply that conclusion to the facts of the case and determine its effect on the question of whether the legal ground of the counterclaim had prescribed by the time it was presented to the court. The manifestation of the concurrence of *injuria* and *damnum* did not occur on 25 November 2015. It was deferred until the occurrence of the court proceedings that are the second and third consequences. The court proceedings were linked directly to the first consequence because the defender avers in statement of facts 5 that he was forced to raise the Lands Tribunal proceedings in order to establish his title to his land and to rectify the inaccuracy in the Land Register and then in statement of facts 6 that he had to appeal to the Court of Session against the decision of the Lands Tribunal. Those two consequences brought with them of necessity the occurrence of a liability to meet the legal fees of both of those court proceedings which resulted in the fourth consequence as averred in statement of facts 7.

[75] The defender does not dispute that liability. Of it he makes two assertions in statement of facts 6. The first is that it was contingent on proceedings in the Lands Tribunal being required, and on their extent and duration and the second that he became liable to pay fees to his advisers when the fee notes were issued, or shortly thereafter. He then states that the pursuers' fee note in respect of their work done on the Lands Tribunal case was dated 4

January 2018 and the fees issued by Burness Paul in respect of the Court of Session action post-dated his instruction of them in April 2018.

[76] Had the defender not raised court proceedings before the Lands Tribunal and then the Court of Session he would not have been liable to pay the legal fees that those actions brought with them. Accordingly his liability to pay those fees was contingent upon the existence of those actions which he avers were necessary and subject to the extent and duration of the actions because of the vagaries and uncertainties that can accompany any court action. To that extent I accept his first assertion that his liability was contingent. But I disagree with his second assertion.

[77] The critical question on the defender's liability to pay the legal fees of the actions is: at what point in those proceedings did his liability to pay them commence? I am persuaded by the submission made on behalf of the pursuers that in raising proceedings before the Lands Tribunal and also before the Court of Session with the assistance of solicitors the defender would inevitably become liable to pay for the professional services he received in prosecuting those proceedings from their outset. In my opinion raising proceedings before the Lands Tribunal and subsequently before the Court of Session inevitably brings with it a financial cost in the form of legal fees and outlays. The normal and expected commencement of an obligation to pay legal fees for the conduct of such court proceedings is when the proceedings are first raised and that obligation persists throughout the passage of those proceedings through the court process until the point of final determination whenever and whatever that is. The fact that the defender secured awards of expenses in his favour in due course in both actions, albeit for a proportion of but not all of his liability to his solicitors, does not of itself alter the existence of the liability to pay the legal fees incurred in respect of them or the date of its commencement.

[78] The critical verb in relation to the liability to pay legal fees is the verb to incur. I find authoritative support for this that is in point in the words of Lord Hodge in *Gordon's Trustees* where he said that "if, as a result of a breach of contract, a person … incurs expenditure … the s.11(1) clock starts when the expenditure is incurred" (paragraph [19]). Furthermore I find support that is binding on me in the words of the Lord President (Carloway) in *Kennedy* where he said the same at paragraph [19]: "[t]he relevant pursuer, if he or she had incurred expenditure … would find that the prescriptive period runs, at the latest, from the date of that expenditure". The defender incurred the obligation to pay the legal fees of the pursuers with effect from the date of raising the proceedings before the Lands Tribunal. That was at some unstated date in 2016. It is always open to parties to enter by agreement into an alternative arrangement for the payment of legal fees that alters the normal and expected arrangement but no such alternative is averred. In particular the defender does not aver that he and the pursuers entered into an arrangement whereby his obligation to meet their fees was postponed until they issued their fee note to him dated 4 January 2018 for their work in respect of the Lands Tribunal proceedings or to a date that was shortly thereafter. Accordingly I hold that the defender's obligation to pay is not postponed to a date later than the raising of the proceedings in 2016 and is not contingent on the receipt by him of the pursuers' fee note to him dated 4 January 2018 for the work they had conducted in respect of the Lands Tribunal proceedings and that the defender had no liability for the payment of fees until that fee note was issued, or shortly thereafter and the same applies to the fee note issued to him by Burness Paul. Neither of those acts created the concurrence of *injuria* and *damnum*.

[79] With regard to the concept of loss, as at 25 November 2015 the defender was not in a position to determine what loss he had suffered or to calculate the nature and extent of his

loss but the fact of loss was actual and the prescriptive clock had begun to tick and the rejection of his application to the Lands Register was an event that made loss inevitable: *Kennedy* at paragraph [20]. As for the calculation of that loss I adopt and follow the statement of the Lord President at paragraph [21] of *Kennedy*:

> "However difficult the exercise of quantification may have been at the point of termination, it is of a similar type of exercise to that often embarked upon by the courts in relation to the prediction of future events in damages claims. As at the date of termination, the pursuer's loss was at least quantifiable by reference to a reasonable estimate of the legal, valuation, arrangement and security fees, to which an extra amount might be added to cover the likelihood of a less favourable credit facility."

Applying these passages to the present case, the loss consisted of his liability for payment of legal fees that he would not to have had to incur but for the breach of contract. The fact of that loss began on the date of concurrence. It did not occur on a later date or dates as averred in statement of facts 6. The calculation of what that loss actually meant for him was a matter for assessment during the running of the prescriptive period. The fact that he could not determine the sum of his loss accurately until after he had been awarded judicial expenses in respect of both the Lands Tribunal proceedings, awarded on 8 March 2019, and the Court of Session proceedings, awarded presumably on or after 19 December 2019 the date of the opinion of the First Division has no effect upon the date of concurrence.

[80] As a result of my conclusion I disagree with the defender's averments in statement of facts 6 that the defender became liable to pay fees to his advisers when they were issued, or shortly thereafter and that his loss and damage in respect of the irrecoverable element of his liability for fees was contingent on the outcome of the proceedings, expenses being awarded, the outcome of taxation, and the extent of the recovery of fees from the paying party. Had I had to resort to applying the pursuers' first *et separatim* second plea-in-law in their answers to the counterclaim I would have held those averments to be irrelevant.

[81] A further result of my conclusion is that I distinguish the ratio and reasoning of the decision in *C & L* Mair because the question of contingency raised in that case does not arise in the present case. It was raised in the context of a set of facts that were very different from those in the present case.

[82] At the beginning of this Note I said that the dispute between the parties raised the issue of at what date did *injuria* and *damnum* concur. For all the foregoing reasons I have concluded that the date of concurrence was 25 November 2015 and no later date.

Conclusion

[83] Applying that finding to the issue of whether the ground of action of the defender's counterclaim had prescribed by the time it was raised and presented to the court, the defender raised it during July 2022. He did that by way of adjustment to his defences to the principal action. In it he avers and pleads that the pursuers are obliged to make reparation to him for the loss, injury and damage that he has sustained as a result of the breach of contract between him and their predecessor firm for which they have assumed responsibility. That is an obligation that is subject to the short negative prescription of five years: section 6 of the 1973 Act. I hold 25 November 2015 to be the appropriate date for the purposes of section 6 of the 1973 Act. That was the date on and from which the obligation became enforceable: subsection 11(1) of the 1973 Act. That obligation subsisted from then for a continuous period of five years. That period of five years expired at midnight on 24 November 2020. As at that point in time the defender had not made any relevant claim in relation to the obligation: section 6(1)(a) of the 1973 Act. By the time he raised his counterclaim the obligation to make reparation on which he founds in it and the legal ground on which he presented it had prescribed. Accordingly I grant the pursuers' primary

motion and therefore sustain their fifth plea-in-law in their answers to the counterclaim and repel the defender's plea-in-law in the counterclaim. Rather than dismiss the counterclaim I assoilzied the pursuers from its crave as requested in the plea. I do that because I apply the decision of the Inner House in the case of *Pert* as expressed by the Lord President (Carloway) at paragraph [27] of his opinion.

[84] My decision having rested entirely on the pursuers' fifth plea-in-law in their answers to the counterclaim I do not need to make use of the pursuers' first and second pleas-in-law. The pursuers went to debate on them as well as their fifth plea. It seems to me that I have to repel them as a result of sustaining their fifth plea.

(2) The irrelevant head of loss

[85] By reason of my decision on the issue of prescription I do not need to make a decision on the pursuers' second ground of challenge, to the relevancy and specification of the defender's claim for damages for stress, distress and inconvenience, because this head of loss falls with the counterclaim. Had I had to make that decision I would have upheld the pursuers' submissions. The counterclaim arises out of a contract. Its nature relates to the provision of professional services. The defender does not aver that the pursuers assumed duties under the contract in respect of the defender's personal wellbeing that included the substance of his head of claim and nothing was advanced to support it being in a class of contract where the consequences he asserts flow from it as a matter of law. His averments in respect of stress, distress and inconvenience are irrelevant. Furthermore, and in any event, what he does aver is so manifestly lacking in specification that it is irrelevant. He does not give fair notice of how the averred impropriety of suffering a stress related illness was linked to the averred breach of contract. Moreover, he does not aver a linkage between the

breaches of contract and the gall bladder operation and his inability to eat and sleep properly. In addition the averments about the interest of his son and daughter in developing the land in question but being thwarted in that by the dispute over ownership are both irrelevant and lacking in essential specification.

[86] For these reasons I would have sustained the pursuers' second plea-in-law in their answers to the counterclaim to that extent and would have deleted the six sentences in statement of facts 7 that contain the averments in support of that head of claim, those being from "In addition" in line 9 to "such distress and inconvenience" in line 15 inclusive. I would not have needed to do anything with their first plea-in-law and would have repelled it for want of insistence.

Further procedure

[87] Both counsel agreed that on issuing my decision on the debate I should appoint the cause to a procedural hearing to determine further procedure and any live questions of expenses arising from the diet. I have appointed a hearing for those purposes on the assigned date.