THE ROYAL FACULTY OF PROCURATORS, GLASGOW

# "How did it get so late so soon?" Further Thoughts on Interrupting Prescription

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Sheriffdom of Glasgow and Strathkelvin
Glasgow Sheriff Court

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*Introduction*

[1] A patient suffers an internal injury at the hands of a negligent surgeon in the course of a botched operation. The injury is unknown and unknowable. So the patient pays the surgeon's fee. Five years elapse. The patient falls ill as a result of the injury. Has the surgeon's obligation to make reparation to the injured man prescribed? The current orthodoxy is that the claim has prescribed. With respect, I think that may be wrong.

[2] A man obtains a report from a negligent structural engineer. Relying on the report, the man engages contractors to build a house, but on inadequate foundations. The man is oblivious to the fatal deficiency nor could it reasonably have been discovered by him. So the building contractors are paid in full. Five years elapse. The house collapse. Has his damages claim against the structural engineer been extinguished by prescription? The prevailing view is that the claim has prescribed. With respect, I think that may be wrong.

[3] A client wishes to invest money in a new joint venture company. She instructs a solicitor to draft the usual corporate documents - shareholder agreement, loan agreement, and the like. But the drafting is shoddy; the investment is not adequately protected. The client is unaware of these deficiencies of course. She happily attends the completion party, invests her money, and pays the solicitor's fees. Five years elapse. The client discovers the loss when she tries to trigger the buy-out provisions, and fails. Has her claim against the negligent solicitor prescribed? The predominant view would be that the claim has prescribed. With respect, I think that may be wrong.

[4] Each of these hypothetical scenarios raises a vexed question in the context of the short negative prescription, namely whether a creditor's mere awareness of expenditure incurred by it (which only in hindsight is known to have been wasted), in reliance upon negligent advice, precludes the operation of section 11(3) of the Prescription & Limitation (Scotland) Act 1973 ("the 1973 Act").

[5] I had the privilege of hearing excellent submissions, and of being able to write a judgment, on this subject fairly recently - in a case called *WPH Developments Ltd v Young & Gault LLP (in liquidation)* – and I've been asked to share my thoughts with you.

[5A] I'm happy to do so, but it comes with a health warning. My decision in *WPH* was immediately appealed to the Sheriff Appeal Court; the appeal was then remitted to the Inner House; and a hearing on that appeal is currently pending.

[5B] So I find myself in the rather awkward position of the first instance judge – in that everything I say to you this evening may entirely rejected by the Inner House when it comes to hear this case. In that event, I'm terribly sorry to have wasted your time. The

best I can hope for is anonymity in the appeal judgment. The occupational risk, of course, is that the Inner House appends one of those rather trenchant postscripts to its decision, expressing incredulity at the named sheriff's ignorance of the law!

[5C] So everything I say this evening must be taken with that health warning and a sackful of salt.

[5D] Let's begin by going back to basics.

*The long (twenty year) negative prescription*

[6] The long (twenty year) negative prescription is regulated by section 7 of the 1973 Act. It provides that if a relevant obligation has subsisted for a continuous period of 20 years, the obligation will be extinguished at the end of that 20 year period, unless there has been a relevant claim or relevant acknowledgment of the obligation within that period. In full, section 7 provides, so far as material:

> "(1) If, after the date when any obligation to which this section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years –
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> (a) without any relevant claim having been made in relation to the obligation, and
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> (b) without the subsistence of the obligation having been relevantly acknowledged,
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> then as from the expiration of that period the obligation shall be extinguished…".

[7] The long negative prescription applies to "an obligation of any kind (including an obligation to which section 6 applies)", other than specifically excepted obligations. It

begins to run on the date when the obligation "has become enforceable" (1973 Act, section 7(1)). But when does an obligation "become enforceable" for this purpose?

[8] The answer is found in the "general rule" in section 11(1) of the 1973 Act. The obligation to make reparation becomes enforceable on the date when loss, injury and damage caused by an act, neglect or default has occurred. That simply reflects the common law rule that no right of action arises until *injuria* and *damnum* concur.

[9] There are no special rules postponing the date of commencement of the 20 year prescriptive period. As soon as loss, injury or damage has occurred, caused by the *injuria*, the 20 year clock starts ticking.

[10] And, having started, it does not stop.

[11] For those reasons, the long negative prescription puts me in mind of the line from *Tam O'Shanter* by Robert Burns: "Nae man can tether time or tide."

[12] Once that long (twenty year) negative prescriptive period starts to run it cannot be stopped, absent a relevant claim or acknowledgment.

[13] So, the creditor may be prevented from pursuing it due to some legal disability; or the creditor may have been induced to refrain from claiming by some fraud or error; or the creditor may be wholly unaware of loss, injury or damage for the entire twenty year period - it doesn't matter one iota, for upon the lapse of twenty years from the occurrence of that loss, injury or damage, any obligation to make reparation is extinguished.

*The short (5 year) negative prescription*

[14] Compare that with the short (5 year) negative prescription?

[15] For the purposes of the short (five year) negative prescription, when does an obligation to make reparation "become enforceable"?

[16] Again, the "general rule" in section 11(1) applies. For the purposes of the short (5 year) negative prescription, an obligation to make reparation becomes enforceable on the date when loss, injury and damage caused by an act, neglect or default has occurred.

[17] But, in two special circumstances, the commencement of the short (five year) negative prescriptive period can be postponed entirely. In effect, the clock can be re-set. Those two special circumstances are where, in the context of an obligation to make reparation, there is a continuing wrong (section 11(2), 1973 Act) OR where the loss, injury or damage is latent (section 11(3), 1973 Act). Sections 11(2) & 11(3) are described as "special rules"; section 11(1) is referred to as the "general rule" (*David T. Morrison & Co. Ltd v ICL Plastics Ltd* 2014 UKSC 222, paragraphs [11] to [13] per Lord Reed). For ease of reference, I set them out in full here:

> "(1) Subject to subsections (2) and (3) below, any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.
>
> (2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased.

> (3) In relation to a case where on the date referred to in subsection (1) above… the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware."

[18] In addition, unlike its longer, harsher 20 year sibling, the short negative prescription can be interrupted or suspended during periods of legal disability; or when the creditor was induced to refrain from making a relevant claim due to fraud, or error induced by words or conduct, on the part of the debtor (section 6(4), 1973 Act).

[19] So far, so good.

[20] Very few problems have emerged in applying the first of the two "special" rules – that is, the continuing act, neglect or default. However, considerable difficulties have emerged in applying the second of the "special" rules. That is the rule that concerns latent damage. Latent damage is loss, injury or damage of which the creditor was not aware, and could not with reasonable diligence have been aware.

*The prevailing view (Midlothian Council)*

[21] That brings us to the decision in *Midlothian Council v Raeburn Drilling and Geotechnical Ltd* 2019 S.L.T. 1327. This was a case that involved section 11(3) – the latent damage provision.

[22] The problem that has emerged is in the application of this "special" rule to cases involving financial loss, specifically "wasted expenditure". The problem is particularly acute in professional negligence cases.

[23] The facts of *Midlothian* will be well-known to you.

[24] Midlothian Council wanted to build a new social housing development at Gorebridge in Edinburgh. It obtained various expert reports, in advance of the construction. Some of those reports were negligent – they failed to warn about the risk arising from the construction of the housing estate on the site of former mine workings, in particular about the risk of gas permeating up through the soil; and the need to install a gas membrane to prevent the escape of gas into the houses. In reliance upon the negligent professional advice, the Council incurred expenditure to contractors in building a housing estate above the former mine workings, critically, without the protection of a gas membrane. In the event, gas permeated up through the soil from the old mine workings down below; the houses proved to be uninhabitable; all the tenants had to be decanted; and the entire estate (64 homes) had to be demolished.

[25] Now, the first step was to identify when *damnum* occurred. That is the "general" rule under section 11(1) of the 1973 Act. The Lord Ordinary (Lord Doherty) concluded (correctly in my view) that the *damnum* comprised the expenditure that was originally incurred and wasted by the Council in building this doomed estate in the first place.

[26] True, the Council did not know, at the time it was being incurred, that the expenditure was wasted. But knowledge is not relevant at this first stage of the inquiry. As a matter of objective fact, and with the benefit of hindsight, the expenditure was wasted and failed to achieve its purpose. As a matter of objective fact, that wasted expenditure was *damnum* caused by the negligence – and it was the occurrence of that *damnum* that triggered the start of the 5 year prescriptive period.

[27] Interestingly, Midlothian Council was not even suing to recover the original construction costs. It was suing for re-construction costs. But it did not matter a jot.

[28] On this first issue, the Lord Ordinary's reasoning is entirely correct. The relevant *damnum* was the expenditure that had been wasted in building the estate in the first place; that *damnum* was to be identified as a matter of objective fact, viewed with the benefit of hindsight; and that *damnum* had occurred over five years prior to the action commencing – as soon as the Council had incurred the expenditure to its contractors.

[29] The inquiry then shifted to the "special" rule. For the purpose of section 11(3), the Court required to consider when the Council first became aware of the occurrence of that *damnum*. This is where I respectfully differ from the learned Lord Ordinary. Lord Doherty concluded that, by virtue of knowing merely that it was incurring expenditure in building the estate in reliance on the advice (expenditure which, as a matter of objective fact, and with the benefit of hindsight, was wasted), the pursuer was to be

treated as thereby being aware of having suffered loss, injury or damage (*Midlothian Council, supra,* paragraphs [22] & [24]).

[30] In my respectful judgment, the learned Lord Ordinary fell into error at this point.

[31] Now, I say this with some trepidation, and the utmost respect. The Lord Ordinary's approach does not exist in a vacuum: it has a degree of support from dicta of Lord Hodge in the Supreme Court in *Gordon's Trustees v Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287. So I approach this whole conundrum with care.

[32] That said, I am reminded of the rather comical illogicality of the Dr Seuss poem, "How did it get so late soon?":

"*How did it get so late so soon?*
*It's night before it's afternoon.*
*December is here before it's June.*
*My goodness how the time has flewn.*
*How did it get so late so soon?*

How can a creditor lose its claim (after five short years) before it is even aware that it exists? How can the right to seek reparation prescribe after 5 years, before you are even aware (or, indeed, before you could reasonably be aware) of the loss, injury or damage? Yes – that can be the effect of the long (20 year) negative prescription – but not of the short (5 year) negative prescription. How can December come before June? How can it get so late so soon?

[33] If I may say so, it seems to me that the critical error in *Midlothian* is that the Lord Ordinary has applied hindsight to ascertain both the date of occurrence of the *damnum*

(for the purpose of section 11(1)) and the state of the creditor's knowledge of the occurrence of that *damnum* (for the purpose of section 11(3)). That is the key error.

[34] It is correct to apply hindsight to determine the former; but, in my respectful view, it is incorrect to apply hindsight to determine the latter.

[35] Obviously, the Council was aware that it had incurred expenditure to its contractors. But it is equally obvious that the Council was not aware (actually or constructively) of having suffered any loss, injury or damage at that time. On the contrary, at the time of incurring expenditure to its contractors, the Council had no awareness (actual or constructive) that any expenditure had been wasted, or that any "detriment" had been suffered by it, or that it was "worse off, financially", or otherwise that any *damnum* had occurred.

[36] In *Midlothian*, the "wasted expenditure" in building the estate was indeed *damnum* - but, in my view, it was latent *damnum*.

[37] Why was it latent? The answer is - because it was concealed as being expenditure to the benefit of the Council, not to its detriment; it was masquerading as due payment for a valuable consideration; it had, at all times, the façade of a *quid pro quo* for a sought-after return.

*Why is the analysis in Midlothian wrong?*

[38] It seems to me that a number of criticisms can be directed at the analysis adopted in *Midlothian*.

*Textual analysis*

[39] First, the analysis is not consistent with the plain, ordinary meaning of the statutory text.

[40] Section 11(1) of the 1973 Act is expressly concerned with the date of *occurrence* of *damnum;* section 11(3) is expressly concerned with the date of *awareness* of the occurrence of *damnum*. Only two forms of knowledge are referred to in section 11(3): actual knowledge and constructive knowledge. Actual knowledge is (rather obviously) the real, subjective knowledge actually possessed by the creditor *at the time*. Constructive knowledge is the knowledge which the creditor could have possessed *at the time* if reasonable diligence had been exercised by it *at the time*.

[41] Hindsight is nowhere to be seen in section 11(3).

[42] Hindsight is not the same as actual or constructive knowledge.

[43] Hindsight is knowledge that is acquired *later in time*, after the event.

[44] On a plain reading of the statutory text, the special rule in section 11(3) is not concerned with knowledge only obtained, or obtainable, by the creditor *after* the event, *at a later time*, with the benefit of hindsight.

*Illogicality*

[45] Second, the *Midlothan* analysis is illogical. Section 11(1) states the "general rule" (*David T. Morrison & Co Ltd, supra*): it is concerned with the *occurrence* of *damnum* as a matter of objective fact. Section 11(3) states a "special rule": it is concerned with the creditor's (actual or constructive) *knowledge* of the occurrence of that *damnum.* The

*occurrence* of an event, and *knowledge* (actual or constructive) of the occurrence of an event, are different concepts. If the creditor's *knowledge* is also to be determined with the benefit of hindsight, these two distinct concepts become merged. Hindsight is a "know-it-all". Logically, with the benefit of hindsight, a creditor will always be regarded as having *knowledge* of the occurrence of *damnum*, even when it patently had no such actual or constructive knowledge at the time.

[46] The solution to this illogical predicament is simple: hindsight is relevant to identifying the date of occurrence of *damnum* (under section 11(1)); but it has no role to play in determining the creditor's actual or constructive knowledge of the occurrence of *damnum* (under section 11(3)).

*Conflation of the general rule and the special rule*

[47] Third, by extension, the *Midlothian* analysis conflates the general rule (in section 11(1)) and the special rule (in section 11(3)). If hindsight is to be applied to ascertain the state of a creditor's awareness, then the date of occurrence of *damnum* (per section 11(1)) and the date of knowledge of its occurrence (per section 11(3)), will always coincide.

*Defeating the purpose of the special rule*

[48] Fourth, by extension, the *Midlothian* analysis defeats the purpose of the special rule in section 11(3) - by rendering that subsection redundant. The legislative intent of section 11(3) is clear enough. It deals with cases of "latent damage" (*David T. Morrison & Co Ltd, supra*, paragraphs [13], [14] & [25], per Lord Reed). It is intended to postpone the

date of commencement of the short (five year) negative prescriptive period to the date when the creditor has actual (or constructive) knowledge that *damnum* has occurred. This is the date when damage, previously concealed, is discovered or discoverable. In that way, the palpable injustice is avoided of a creditor losing its right to pursue a claim, after the expiry of just five short years, before the creditor has any inkling that it has suffered loss, injury or damage. If the creditor's actual (or constructive) knowledge at any particular point in time is always to be supplemented with hindsight (which, by definition, is knowledge acquired only "after the event", but imputed retrospectively), then the protective purpose of the special rule in section 11(3) is defeated. That is because, viewed with the benefit of hindsight, no damage could ever be said to be latent, concealed or unknown. So, on the *Midlothian* analysis, section 11(3) is rendered redundant.

*Differential treatment of physical damage and financial loss*

[49] Fifth, the *Midlothian* analysis seems to apply only to "wasted expenditure" or "expenditure incurred". If so, then that approach risks creating a rather irrational distinction between, on the one hand, physical damage and, on the other, financial loss (at least in the form of wasted expenditure or expenditure incurred) in the context of section 11(3) of the 1973 Act.

[50] There is no persuasive jurisprudential reason why "expenditure incurred" or "wasted expenditure" should fall into a special category of its own. Certainly, no such

difference is warranted on the express language of section 11. Section 11(3) applies equally to all types of loss, injury or damage, without distinction.

*Failure to recognise wasted expenditure as latent damnum*

[51] Sixth, according to the *Midlothian* analysis, a creditor's mere awareness that expenditure has been incurred (which expenditure turns out, with hindsight, to have been wasted) is sufficient awareness of the occurrence of loss to trigger the start of the five year prescriptive clock. In my judgment, this analysis is flawed because it assumes that all expenditure by a creditor is manifest detriment. It is not.

[52] *Damnum* describes "the detriment" suffered by a creditor (*Gordon's Trustees, supra,* paragraph [14], per Lord Hodge). *Damnum* means "being worse off, physically or economically" (*Rothwell v Chemical & Insulating Co Ltd & Another* [2008] 1 AC 281, paragraph [7]). Therefore, *awareness* of the occurrence of *damnum* means awareness of the occurrence of "detriment", or awareness of "being worse off, physically or economically".

[53] Some expenditure by a creditor may well constitute a manifest "detriment", of which the creditor is fully aware. This may include professional fees incurred following the discovery of a loss, injury or damage – most obviously perhaps, expenditure incurred in an effort to mitigate or remedy that *damnum*.

[54] An example may be the legal fees incurred by the pursuers in *Gordon's Trustees* in their litigation to evict the sitting tenant. But the legal fees were not the *damnum* for prescription purposes; the legal fees were merely a consequential head of loss, incurred

after the occurrence of the true *damnum;* the true damnum was the pursuers' failure to recover possession of their fields upon expiry of the notices to quit – and that *damnum* was manifest, not latent.)

[55] But other expenditure may not constitute a manifest detriment at all. Instead, it may be loss (a "detriment") that is latent in nature, being a detriment of which the creditor is unaware. This may include expenditure which, at the time it was incurred, was apparently to the benefit of the creditor, not to its detriment, and which is only subsequently revealed as wasted, lost or futile. An obvious example would be the cost of constructing a house unwittingly upon inadequate foundations, in reliance upon the negligent advice of a structural engineer.

[56] So, in summary, awareness of the *incurring* of expenditure is not necessarily the same as awareness of the *occurrence* of *damnum*, for the purpose of section 11(3). Much depends on the nature of the expenditure. Some expenditure, in hindsight found to be wasted, may be concealed or disguised as expenditure to the benefit of the creditor, not to its detriment; it may be masquerading as due payment for a valuable consideration; it may have the appearance of being a *quid pro quo* for a sought-after return. The creditor is obviously aware of the incurring of expenditure but is wholly unaware of the occurrence of *damnum*, because the detriment suffered by the creditor (the wasted expenditure) is concealed, disguised, and latent.

[58] Property damage may be latent. That is easy to understand. It might be hidden behind some plasterboard, or concealed between the eaves in an attic, or it may be hidden deep within a vehicle engine. Damage has "occurred" (for the purposes of

section 11(1)); but the owner is not *aware* of the occurrence of damage because it is concealed; it is latent.

[59] Personal injury may be latent. An employee inhales noxious particles which damage his lungs. Injury has "occurred" (for the purposes of section 11(1)), no doubt about that; but the employee is not aware of the occurrence of injury because it is concealed; it is latent.

[60] Likewise, financial loss (such as wasted expenditure) can be latent. It can be latent when it is concealed, disguised or masquerading as expenditure to the benefit of the creditor – whereas, in fact, unbeknown to the creditor, he is financially worse off; it is expenditure to his detriment. The obvious example is the construction of a building. In reliance upon a report from a negligent structural engineer, a man engages contractors to build a house, but on inadequate foundations. The man is oblivious to the fatal deficiency nor could it reasonably have been discovered by him. The contractors are paid in full. Five years elapse. The house is condemned. *Damnum* occurred as soon as expense was incurred to the contractors in reliance upon the negligent advice. That was the date when the man suffered detriment because, as a matter of objective fact, with the benefit of hindsight, his expenditure was wasted. Of course, he is fully aware that the expenditure has been incurred, that his money has been spent. But he is not aware that the expenditure constitutes *damnum*; he is not aware that the expenditure is a "detriment" suffered by him. On the contrary, his state of knowledge (reasonably so) is that the expenditure is not wasted but, rather, that it is expenditure to his positive benefit. So, in that scenario, the *damnum* (the wasted expenditure) is latent – and it

remains latent for as long as it is concealed or disguised as expenditure to the benefit of the creditor, not to his detriment; for as long as it is masquerading as due payment for a valuable consideration.

[61] The same logic would apply to a purchase made on the back of a negligent home valuation report.

[62] On the *Midlothian* analysis, the mere fact that the credtor is aware that he has spent money would mean that he is deemed to be aware of the occurrence of *damnum* – and the obligation to make reparation would be treated as prescribed.

[63] I say – that is the wrong analysis. The creditor is aware it has incurred expenditure – but it is not aware that the expenditure constitutes *damnum* (in other words, that it is a "detriment" suffered by it). The *damnum* is latent.

*Miscellaneous considerations*

[64] Seventh, there are a number of other considerations that tend to suggest that the *Midlothian* approach is incorrect.

[65] Take construction contracts, as an example. If employers are to be shackled with knowledge of the occurrence of *damnum*, merely by having incurred expenditure to their contractors, then employers may be well-advised to sue their contractors immediately upon practical completion (or upon payment) simply to interrupt the running of any potential five year prescriptive period (just in case the expenditure subsequently turns out to have been wasted).

[66] Indeed, arguably, the same position would apply to any party receiving goods or services in a contractual relationship. The party paying for goods or services would require to sue the provider of those goods and services immediately upon making payment in order to preserve the right to recover damages (including reimbursement of the price) caused by any undetected mis-performance of the contract.

[67] A client should perhaps sue his solicitor, immediately upon paying the fee note, for damages in respect of every deed or document executed, or litigation settled, or legal opinion tendered and acted upon, just in case it transpires that the advice was defective and that the legal expenditure subsequently proves to have been wasted.

[68] A house purchaser should sue the author of a home valuation report immediately upon purchasing a house, to preserve any right of action against the surveyor, just in case the home report is later shown to have disclosed a negligent over-value.

[69] These rather absurd unintended consequences may follow if hindsight is applied to ascertain the state of the creditor's actual or constructive awareness of the occurrence of *damnum*.

[70] In the second place, the *Midlothian* approach allows no scope for the exercise of "reasonable diligence". You will remember that the special rule in section 11(3) of the 1973 Act applies if the creditor was not aware, and could not with reasonable diligence have become aware, of the occurrence of *damnum*. If the mere incurring of expenditure amounts to knowledge of the occurrence of *damnum* (because, unbeknown to the paying party, the expenditure was worthless or wasted), where is the scope for the creditor to

exercise reasonable diligence to discover the damage? In many cases the only conceivable way in which the creditor could do so would be to seek a second opinion on the quality and adequacy of every piece of professional advice rendered, or contractual service provided, or on any goods delivered. Again, this seems a rather extreme course of action.

[71] In the third place, stepping back, there is a certain skewed and unpalatable logic in the proposition that if a person spends money in reliance upon advice without knowing, or having any reason to think, that the expenditure is wasted (because the advice was wrong), the creditor is nonetheless deemed to know immediately, at the time of incurring the expenditure, that this is indeed what is happening.

*The Supreme Court decisions*

[72] Of course, all of this whining and moaning by me is academic if Supreme Court precedent supports the *Midlothian* analysis. However, in my judgment, the *Midlothian* analysis is not supported by the true *ratio decidendi* of the leading Supreme Court decisions in *Gordon's Trustees* and *David T. Morrison & Co Ltd* (or other binding authority).

[73] I don't have time in this talk to explore that in any detail. Suffice to say that in both *Gordon's Trustees* and *David T. Morrison & Co Ltd,* the relevant *damnum* was manifest and patent from the very moment that it occurred. Section 11(3) had no application because the *damnum* was never latent.

[74] In *David T. Morrison & Co Ltd*, a shop suffered extensive physical damage in an explosion. The physical damage constituted *damnum*. That *damnum* was, in no sense, latent. It was patent from the outset. The owner was fully aware that damage had occurred from the moment it occurred.

[75] In *Gordon's Trustees*, landlords wanted to recover vacant possession of their fields in order to realise their development value; they served notices to quit on a tenant; but, on expiry of the notices (on 10 November 2005), the landlords were unable to recover vacant possession from the tenant. For the purpose of section 11(1), the landlords' failure to recover possession of their fields was the relevant *damnum*. That was "a detriment" to the landlords. They had not obtained something (possession of their asset) that they had sought. In no sense was that *damnum* latent. It was patent from the moment it occurred. The landlords were fully aware that they had not recovered possession of their fields from the moment that detriment occurred (*Gordon's Trustees, supra*, per Lord Hodge, paragraph [24]).

[76] So in both cases the occurrence of *damnum* plainly coincided with the creditor's awareness of its occurrence.

[77] The material issue in dispute in *Gordon's Trustees* was whether the landlords could postpone the date of commencement of the five year prescriptive period to a later date (three years later), when the landlords' subsequent litigation against the tenant in the Scottish Land Court (to remove the tenant from the fields) had failed. The landlords argued that it was only on this later date, when the Scottish Land Court had issued its

decision, that the landlords "first knew that they had suffered loss" (*Gordon's Trustees,* supra, paragraph [11] H-J).

[78] Undoubtedly, that was not the case. The landlords knew they had suffered "detriment" long before their litigation failed. The litigation was pursued precisely because they *had* suffered detriment (back in 2005), when they failed to recover possession of their fields. The litigation was pursued to reverse that detriment, to remedy that detriment.

[70] This may be an appropriate point to make an observation on a recurring issue. In *Gordon's Trustees* it was submitted that the landlords didn't really know for certain that they had suffered loss until their litigation had failed three years later.

[80] That is a common argument. It's really an attempt to say – the *damnum* hasn't occurred yet; or that the *damnum* hasn't crystallised; or that the *damnum* wasn't certain to occur; or that the *damnum* is contingent. It is an argument that also arose in the *WPH* case. But it is an argument that has consistently been rejected over the years, except in limited cases.

[81] To explain, firstly, it is important to bear in mind that *damnum*, when it occurs, does not require to be "precisely calculable" at that date and that "it may increase over time" (*Kennedy, supra,* paragraph [20]). All that is required is that the *damnum* when it occurs, must be "beyond what can be regarded as negligible" or "purely minimal damage" (*Cartledge v Jopling* [1963] AC 758).

[82] Secondly, once *damnum* has occurred, the mere hope or belief, or possibility or even probability, that the *damnum* might be cancelled, or reversed, or mitigated does not render that *damnum* contingent, or otherwise postpone the occurrence of *damnum*. In those cases, *damnum* has occurred – everything done thereafter is, by definition, a damage-limitation exercise!

[83] Third, the creditor does not require to be aware of the cause of the detriment or of its actionability, or of the identity of the wrongdoer.

[84] So, the *damnum* in *Gordon's Trustees* was not contingent, or uncertain, or otherwise postponed. It may have been difficult to quantify, but it had occurred, as soon as the landlord failed to recover possession of the fields.

*WPH Developments Ltd v Young & Gauld LLP (in liquidation)*

[85] Let's turn to a case in which I was recently involved. I had the privilege of hearing excellent submissions on this issue.

[86] As I say, I venture upon this discussion with some trepidation because my judgment in the case has been appealed, and an appeal hearing before the Inner House is pending. (A procedural hearing is assigned for 18 November 2020, but no substantive hearing has yet been fixed, as far as I am aware.)

[87] The case of *WPH Developments Ltd v Young & Gauld LLP (in liquidation)* involved all of the issues I've been discussing this evening.

[88] Here are the basic circumstances.

[89] An architect drew up plans for a client who was a property developer. It was averred that the plans erroneously depicted the outer boundary of the developer's site on a plot of land in the beautiful leafy quarter of Newton Mearns. In reliance on the allegedly erroneous plans, the developer incurred expenditure to contractors in building a housing estate on the site – but with the outer boundary wall encroaching onto a neighbouring farmer's land. It was averred that the encroachment was unknown and unknowable. Time passed; the developer was later alerted to the encroachment by the neighbouring proprietor; and the developer was compelled to demolish and relocate the offending boundary wall. But over five years had elapsed since the developer had first spent money building the wall in reliance upon the architect's allegedly erroneous plans.

[90] The question was this – had the architect's alleged obligation to make reparation to the client prescribed?

[91] The defending architect argued that any obligation to make reparation had prescribed. The defender relied upon *Midlothian Council* and the dicta in *Gordon's Trustees v Campbell Riddell Breeze Paterson LLP*, *supra*.

[92] Two propositions are advanced for the architect.

[93] First, for the purposes of section 11(1) of the 1973 Act, viewed with the benefit of hindsight, *damnum* occurred, as a matter of objective fact, as soon as the developer, in reliance upon the plans, incurred expenditure to contractors to dig into the soil and build upon land it did not own - because the expense in doing so was thereby wasted.

[94] Second, since the developer was fully aware that it was incurring expense (albeit only in hindsight known to have been wasted), the developer could not rely on section 11(3) to postpone the date of commencement of the prescriptive period.

[95] In my judgment, the first proposition was correct, but the second proposition was wrong.

[96] Hindsight was properly applied to identify the date of *occurrence* of *damnum* (under section 11(1) of the 1973 Act), but it had no part to play in determining the date of the creditor's *awareness* (actual or constructive) of the occurrence of *damnum* (under section 11(3)). I decided that the developer had made relevant averments which, if proved, would entitle it to avail itself of the protection afforded by the "special rule" in section 11(3) of the 1973 Act, and to postpone the date of commencement of the prescriptive period.

[97] Whether I am right or wrong remains to be seen.

[98] I'll explain my approach in the *WPH* case – and you can decide for yourselves.

*The three-stage approach*

[99] In latent damage cases like this, it is necessary to apply a three-stage approach.

[100] First, one must identify the *injuria* (the wrongful "act, neglect or default") that is founded upon, for the purpose of section 11(1) of the 1973 Act.

[101] Second, again for the purposes of section 11(1), one must identify the date of occurrence of *damnum* (the "loss, injury or damage") caused by that *injuria*.

[102] Third, for the purposes of section 11(3) of the 1973 Act, one must identify when the creditor first became "aware" (or could with reasonable diligence have become aware) that such *damnum* had occurred. I shall address each in turn.

*The injuria*

[103] The first stage is generally not too difficult. One seeks to identify the breach of duty, or breach of contract, or the like, that is founded upon in the action, and that gives rise to the cause of action.

[104] In *WPH*, the *injuria* was the architect's alleged negligence and breach of contract in providing plans that allegedly depicted the wrong boundary line to the estate.

*The damnum*

[105] The second stage can be more problematic.

[106] It is necessary to identify the *damnum* that is caused by that *injuria* – and the date on which that *damnum* "occurred" (per section 11(1) of the 1973 Act)?

[107] In cases of physical damage, that should be easy; in financial loss claims, it can be tricky.

[108] *Damnum* means "the detriment" suffered by the creditor" (*Gordon's Trustee's, supra,* paragraph [14] & [24]). It is "an abstract concept of being worse off, physically or economically" (*Rothwell v Chemical & Insulating Co Ltd & Another* [2008] 1 AC 281,

paragraph [7]). The "detriment" may take varying forms but it will always be either physical damage or economic loss.

[109] In *WPH*, the *damnum* was the wasted expenditure incurred by the developer in building on land that it did not own; and the resulting unwanted legal liability on the developer to remove the encroachment.

[110] Do not confuse *damnum* with individual heads of loss. *Damnum* occurs on one occasion only - heads of loss may arise at different times. In any event, a pursuer may choose not to pursue a particular head of loss - so that cannot be determinative. In *Midlothian*, for example, the pursuer was not suing for any of the wasted expenditure in the original construction at all – instead, it chose to sue for the subsequent re-construction costs. But that clever ruse didn't matter: the *damnum* was held to be the original abortive construction expenditure. So, do not be fooled by the individual heads of loss that may have been suffered or claimed; look at the bigger picture; and ask whether the pursuer has failed to obtain something that was sought; or has incurred something that was not sought (like a liability or expense); or the pursuer's assets, or package of contractual rights, have otherwise been diminished, or devalued, or encumbered in some material way. In *Gordon's Trustees*, the *damnum* was the failure of the landlord to recover possession of their land; in *Kennedy* v *The Royal Bank of Scotland plc* 2019 SC 168, it was (more subtly) the threatened cancellation of a borrower's credit facilities; in *Khosrowpour v Taylor* 2018 CSOH 64, it was a son's failure to obtain certain contractual rights from his mother.

[111] Knowledge is irrelevant to the fact of the occurrence of *damnum.* Loss, injury or damage may have "occurred" whether or not the creditor was aware of its occurrence, still less of its cause, or its actionability, or the identity of any person(s) responsible for it. The *occurrence* of loss, injury or damage (under section 11(1)) is a matter of objective fact, to be determined with the benefit of hindsight (*Gordon's Trustees, supra,* paragraph [24]*).*

[112] Over the years, ingenious attempts were made to interpret section 11 to add further prerequisites (to the benefit of the creditor), such as that, in order for the (five year) prescriptive clock to start, the creditor required to have knowledge not merely of the occurrence of loss but also of its attributability (i.e. that it was caused by some act or omission) (*Greater Glasgow Health Board v Baxter, Clark & Paul* 1990 SC 237; *Kirk Care Housing Association v Crerar & Partners* 1996 SLT 150; *Glasper v Rodger* 1996 SLT 44); or of its *prima facie* legal actionability (*ANM Group Ltd v Gilcomston North Ltd* 2008 SLT 835, paragraph [58]); *Pelagic Freezing Ltd v Lovie Construction Ltd* [2010 CSOH 145, paragraph 111); or of the identity of the wrongdoer (*David T. Morrison & Co. Ltd, supra*).

[113] All such arguments were comprehensively quashed by the Supreme Court in *David T Morrison, supra*.

[114] Section 11(1) is concerned solely with whether *damnum* has "occurred" as an objective fact, viewed with the benefit of hindsight – and nothing else. For ease of reference, I've appended citations of a selection of reported decisions in which the courts have sought to identify the date of concurrence of *injuria* and *damnum*.

*Is the damnum contingent or "uncertain"?*

[115] As I mentioned earlier, a familiar argument is that *damnum* is contingent in some way, or that the *damnum* did not become "certain" until many years later.

[116] This argument was also advanced by the pursuer in the *WPH* case.

[117] The argument was that no *damnum* had occurred at an earlier stage because there was no "certainty" that the neighbouring landowner would ever insist upon the removal of the encroaching walls. It was argued that certainty of loss only emerged many years later when, after "protracted negotiation", it became clear that the neighbouring farmer was indeed insisting upon the removal of the encroachment from his land.

[118] True, if damnum truly is contingent, it will not be treated as having "occurred" until the contingency is purified (*Law Society v Sephton & Co* [2006] 2 AC 543). But in my judgment, in *WPH* there was no true contingency.

[119] On the contrary, the *damnum* was real, actual and immediate (albeit perhaps not precisely calculable).

[120] The *damnum* was the wasted expenditure incurred in building on land that the pursuer did not own; and the resulting legal liability on the pursuer to remove the encroachment. *Damnum* does not become contingent merely because there is a hope or possibility (or even a probability) that, by some hypothetical voluntary act or omission of a third party (or of the debtor himself), or some other happy turn of fate (an "intervening factor" per *Midlothian Council, supra,* paragraph 17), the *damnum* might subsequently be mitigated, circumvented or eliminated entirely. Such hypotheticals are

relevant only to the quantification of damages; they do not establish the non-occurrence of the *damnum*, or any true contingency.

[121] In *WPH*, the mere possibility that, following "protracted negotiations", the disgruntled neighbour might mitigate, circumvent or eliminate that *damnum* (by, for example, not insisting upon the removal of the encroachment) was nothing to the point. Similar arguments has been rejected in many previous cases (*Jackson* v *Clydesdale Bank plc* 2003 SLT 273, page 280; *Beard* v *Beveridge Herd & Sandilands WS* 1990 SLT 609, page 611F-G; *Khosrowpour v Taylor* 2018 CSOH 64, paragraph [30]). The only true "uncertainty" was whether the extant *damnum* could be mitigated, circumvented or eliminated by the "protracted negotiations" with the neighbour.

[122] Therefore, for the purposes of section 11(1) of the 1973 Act, on the face of the pursuer's own averments, *damnum* had indeed "occurred" more than 5 years prior to the commencement of the action.

[123] The battle-ground then shifted to the "special rule" under section 11(3) of the 1973 Act.

*Awareness of the occurrence of damnum*

[124] The third and final step was then to identify when the creditor became aware that *damnum* had occurred.

[125] The defender's position in *WPH* was straightforward. It adopted the *Midlothian* analysis. It submitted (incorrectly, in my view) that, for this purpose, the pursuer was *aware* of the occurrence of *damnum* more than 5 years earlier because the pursuer knew

that it was incurring expenditure to its contractors (which expenditure, with the benefit of hindsight, was wasted). Accordingly, so the defender said, the pursuer could not avail itself of the protection in the section 11(3) of the 1973 Act.

[126] I disagreed with that analysis for the reasons I have explained earlier – and concluded that the pursuer was entitled to proof of its averments that it did not become aware of the *damnum* till several years later.

*The new Prescription (Scotland) Act 2018*

[127] Lastly, may I offer some comments on the Prescription (Scotland) Act 2018.

[128] This was not the subject of any detailed submission in the *WPH* case – so it is not something on which I have had the benefit of hearing full, informed argument.

[129] Subject to that important caveat, however, I'm happy to share with you my strictly preliminary thoughts. Section 5 of the new Prescription Act 2018, when it comes into force, will have effect to insert some additional factual requirements into section 11(3) of the 1973 Act. In terms of the new formula, the five-year prescription will not begin to run until the date when the creditor became aware (or could reasonably have been expected to become aware) of the facts set out in new subsection (3A), namely:

(a) that loss, injury or damage has occurred;

(b) that the loss, injury or damage was caused by a person's act or omission; and

(c) the identity of that person.

[130] The 2018 Act expressly provides that awareness of the actionability of the act or omission is not required. That simply affirms the current position: awareness of the wrongfulness or actionability of the relevant act or omission is irrelevant to the application of section 11(3).

[131] The upshot is that the new legislation does provides two additional protections to the creditor claimant. However, I am not quite convinced that they are sufficient to neutralise the defender's principal argument in *WPH* or *Midlothian Council*.

[132] The first requirement remains unchanged - namely, the creditor must be unaware that loss, injury or damage has occurred. The new Act says nothing about whether or not awareness is to be determined with the benefit of hindsight.

[133] So, it seems to me that the same *Midlothian* argument could be run.

[134] Take the facts of *WPH*. If the 2018 Act had applied (NB: it didn't), the defending architect would have been quite at liberty to run the same *Midlothian* argument: that is, that the *damnum* represented the developer's wasted expenditure in building on the land (correct); that the developer was fully aware of the incurring of that expenditure at the time (correct); and that, accordingly, with the benefit of hindsight, the developer is deemed to have been aware of the occurrence of *damnum* (incorrect).

[135] The two new additional statutory requirements (of attributability and identification) would provide no greater protection to the pursuer in *WPH*.

[136] As regards attributability (the first new requirement), that requirement would be satisfied – because the pursuer would have been aware that that expenditure was incurred due to the architect's act in submitting the plans. (Remember the new

requirement does not require awareness that the expenditure was wasted or awareness of any wrongful act by the defender.)

[137] As regards identification (the second new requirement), again, that requirement would be satisfied – because the pursuer was always fully aware of the architect's identity.

[138] Neither of these new requirements addresses or eliminates the *Midlothian* analysis – which arises under the first requirement (and merely re-states the existing position).

[139] Whether I'm right in that strictly preliminary view – or, indeed, in any of these rambling thoughts this evening - remains to be seen.

Sheriff S. Reid
Sheriffdom of Glasgow & Strathkelvin

GLASGOW, 10 November 2020

The concurrence of *injuria* and *damnum*

Illustrative cases

1. *Dunlop v McGowans* 1980 S.C. (HL) 73 (*damnum* occurred when the proprietor was deprived of vacant possession of subjects due to the defender's failure to serve a notice timeously)
2. *Highland Engineering Ltd v Anderson* 1979 S.L.T. 122 (prescription in relation to partnership debts ran from the date on which the debt was constituted against the partnership)
3. *George Porteous (Arts) Ltd v Dollar Rae* 1979 S.L.T. (Sh. Ct) 51 (the relevant date was when the local authority served a demolition enforcement notice on the proprietor following upon the defenders' failure to obtain planning permission)
4. *Riddick v Shaughnessy Quigley & McColl* 1981 S.L.T. (Notes) 89 (date on which pursuer was evicted from the premises)
5. *British Railways Board v Strathclyde R.C.* 1981 S.C. 90 (date on which a tunnel collapsed)
6. *Renfrew Golf Club v Ravenstone Securities Ltd* 1984 S.C. 22 (it was held that an underlying defect in a newly constructed golf course may not necessarily constitute *damnum* until some damage such as waterlogged greens occurred) (NB: this decision should now be approached with caution.)

7. *East Hook Purchasing Corp. Ltd v Ben Nevis Distillery (Fort William) Ltd* 1985 S.L.T. 442 (date on which the depositary of whisky parted with possession of the goods).
8. *Scott Lithgow Ltd v Secretary of State for Defence* 1989 S.C. (HL) 9 (date of discovery of defective submarine cables, being date when Secretary of State's contractual obligation to indemnify contractor arose)
9. *Beard v Beveridge, Herd & Sandilands W.S.* 1990 S.L.T. 609 (date of execution of lease containing defective rent review clause)
10. *Fergus v MacLennan* 1991 S.L.T. 321 (date by which, as a result of positive prescription acting in favour of another, a beneficiary irretrievably lost her right to heritable property bequeathed to her but not conveyed to her despite her instructions to solicitors)
11. *Sinclair v MacDougall Estates Ltd* 1994 S.L.T. 76 (date when certain major building defects and damage were evident);
12. *J.G. Martin Plant Hire v Bannatyne Kirkwood France & Co.* 1996 S.C. 105 (date of raising of defective court action);
13. *Strathclyde R.C. v Border Engineering Contractors Ltd* 1997 S.C.L.R 100 (date of completion or purported completion of building contract);
14. *Osborne & Hunter Ltd v Hardie Caldwell* 1999 S.L.T. 153 (date of loan to suspect borrower)
15. *G.W. Tait & Sons SSC v Taylor* 2002 SLT 1285 (breach of obligation to deliver a valid standard security)

16. *Jackson v Clydesdale Bank plc* 2003 SLT 273 (date of receiver's contract to sell company in receivership at under-value)
17. *AMN Group Ltd v Gilcomston North Ltd* 2008 SLT 835
18. *Monaghan v Buchanan* [2010] CSOH 69
19. *Pelagic Freezing Ltd v Lovie Construction Ltd* [2010] CSOH 145 (NB: approach with care)
20. *David T. Morrison & Co. Ltd v ICL Plastics Ltd* 2014 UKSC 222 (physical damage to shop, following explosion)
21. *Gordon's Trustees v Campbell Riddell Breeze Paterson LLP* 2017 SLT 1287 (failure of landlord to recover possession of land from a tenant upon expiry of notice)
22. *Khosrowpour v Taylor* 2018 CSOH 64 (payment of money by son, without obtaining in return contractual rights to acquire/inherit mother's house)
23. *Midlothian Council v Raeburn Drilling and Geotechnical Ltd* 2019 S.L.T. 1327
24. *Kennedy* v *The Royal Bank of Scotland plc* 2019 SC 168 (date of Bank's notification to customer of termination of customer's credit facilities)
25. *Loretto Housing Association v Cruden Building & Renewals Ltd & Others* [2019] CSOH 78
26. *Ian Ford v The Firm of W&AS Bruce* [2020] SCKIR 9
27. *WPH Developments Ltd v Young & Gault Ltd (in liquidation)* 2020 SLT (Sh Ct) 185 (date of incurring wasted expenditure in building upon neighbour's land and incurring of unwanted legal liability to remove encroachment; *separatim* date of incurring of legal liability to purchasers for breach of warrandice)