

**“Time will tell: the shifting landscape of  
prescription”**

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“I have no desire to suffer twice,  
in reality and then in retrospect.”

- Sophocles, Oedipus Rex



## In the beginning...

### Section 6(1), Prescription and Limitation (Scotland) Act 1973

Where an obligation has subsisted for a continuous period of 5 years without a relevant claim/acknowledgement being made, at the end of the 5-year period, the obligation is extinguished.

Applies to the obligations listed in Schedule 1(1) of the Act.

Schedule 1, para 1(d) includes “any obligation arising from liability...to make reparation.”

The 5-year period starts on the “appropriate date” (date the obligation became enforceable or as per Schedule 2).



# When does an obligation become enforceable?

## Section 11, 1973 Act

Concerns “obligations to make reparation” (contract/delict...)

Section 11(1): An obligation to make reparation for “loss, injury or damage caused by an act, neglect or default” becomes enforceable “on the date when the loss, injury or damage occurred”.

Section 11(2): Where there is a continuing wrong. Appropriate date delayed until wrong comes to an end.



## Creditor unaware of loss when the obligation became enforceable?

### Section 11(3), 1973 Act

Where “the creditor was not aware, and could not with reasonable diligence have been aware, that the loss, injury or damage caused as aforesaid had occurred” the enforceable date is “the date when the creditor first became, or could with reasonable diligence have become, so aware”.

Prevents a creditor from losing his/her claim before he/she knows (actually or constructively) of its existence.



## Knowledge/awareness of what?

Knowledge that “loss, injury or damage caused as aforesaid had occurred”.

“Caused as aforesaid”? Points back to section 11(1): “loss, injury or damage caused by an act, neglect or default.”

Uncertainty: did time start to run as soon as the creditor becomes aware of the loss or did the creditor also need to be aware that the loss was caused by an act, neglect or default?



## *David T Morrison & Co Ltd v ICL Plastics Ltd 2014 SC (UKSC) 222*

Perceived knowledge prior to this case, creditor needed to be aware:

- Of the loss
- That it was caused by an act, neglect or default
- But the identity of the debtor did not need to be known

UKSC changed this. All that is needed is that the creditor is aware that a loss had occurred.

Attributability, actionability, identifying the wrongdoer are irrelevant.



## *Gordon's Trustees v Campbell Riddell Breeze Patterson LLP 2017 SLT 1287*

Could section 11(3) delay the starting of the prescriptive period when the creditor was aware of incurring expenditure but did not know that it would be ineffective?

UKSC said no.

- "Loss, injury or damage" is treated as an objective fact.
- Words have the same meaning for section 11(1) and (3).
- Section 11(3) delays the clock from running until there is awareness of the same loss.



## *Gordon's Trustees v Campbell Riddell Breeze Patterson LLP 2017 SLT 1287*

### Paragraph 21

“It follows that s.11(3) does not postpone the start of the prescriptive period until a creditor of an obligation is aware actually or constructively that he or she has suffered a detriment in the sense that something has gone awry rendering the creditor poorer or otherwise at a disadvantage. The creditor does not have to know that he or she has a head of loss. It is sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought or that he or she has incurred expenditure.”

“Harsh” but “offers certainty.” (paragraph 22)



## *Midlothian Council v Raeburn Drilling and Geotechnical Ltd 2019 SLT 1327*

### Facts

- Pursuer, a local housing authority, developed a social housing estate.
- Located above coal strata and former mine.
- Houses later found to be uninhabitable: danger to health caused by gas ingress.
- Required to be demolished a few years after they were built.
- Basis of pursuer's claim against the 4<sup>th</sup> defender: it failed to advise that a gas defence system was needed.



## *Midlothian Council v Raeburn Drilling and Geotechnical Ltd 2019 SLT 1327*

Arguments: 4<sup>th</sup> defender (para 9)

- Loss (*damnum*) occurred when pursuer incurred expenditure constructing the development in reliance of the advice.
- It did not matter that the pursuer was seeking the costs to demolish and rebuild rather than the original construction costs which proved to be abortive. That did not alter the fact that wasted expenditure had been a loss.
- Pursuer, being aware of that expenditure at the time, had sufficient awareness of the loss. It didn't need to know it had suffered a detriment or that something had gone awry.



## *Midlothian Council v Raeburn Drilling and Geotechnical Ltd 2019 SLT 1327*

Arguments: pursuer (paras 10-11)

- Construction expenditure was not “wasted”.
- Loss occurred at the date of completion in 2009 – when it was left with an uninhabitable development. It did not know that it was uninhabitable until 2013.
- On expenditure, in *Gordon’s Trustees*, the trustees incurred expenses before and after it failed to obtain vacant possession. On 4<sup>th</sup> defender’s hypothesis, the trigger would be at the time of the earlier expenditure – resulting in far reaching consequences.



## *Midlothian Council v Raeburn Drilling and Geotechnical Ltd 2019 SLT 1327*

### Decision

- Lord Doherty, relying on *Gordon's Trustees*, found in favour of the 4<sup>th</sup> defender.
- Hard to see why construction expenditure was not a loss before practical completion. *Damnum* occurred as soon as the pursuer accepted and acted upon the 4<sup>th</sup> defender's advice.
- Pursuer may not have known that it suffered a detriment, but that did not mean it was not aware it had suffered loss. (para 20)
- "...as a matter of objective fact, and with the benefit of hindsight, the expenditure was wasted and it did fail to achieve its purpose". (para 22)



## *WPH Developments Limited v Young & Gault LLP (in liquidation) [2020] SC GLA 27*

### Facts

- Architect (defender) draws up plans for a property developer (pursuer).
- Plans incorrectly depict the outer boundary of the site.
- In reliance of the plans, pursuer pays contractors to build housing estate. Pursuer then sells houses.
- Problem: outer boundary wall encroaches onto neighbouring land.
- Not known/knowable at the time.
- Pursuer becomes aware of the encroachment - pays for investigations, costs of demolishing and rebuilding the wall and settles claims with neighbour and owners of affected houses.



## *WPH Developments Limited v Young & Gault LLP (in liquidation) [2020] SC GLA 27*

Arguments: pursuer

(1) There was no loss before the issue was investigated and the way forward determined (which was within 5 years before raising the action).

(2) There was no certainty there would be loss.

(3) The “big loss/grievance” was building on land it did not own and the individual heads of loss should be grouped beneath it.



## *WPH Developments Limited v Young & Gault LLP (in liquidation) [2020] SC GLA 27*

Arguments: defender

- (1) Loss occurred, as a matter of objective fact, when the pursuer incurred expenditure in reliance of the erroneous plans, ie when it built on land it did not own (because that expenditure was wasted).
- (2) Pursuer was aware of the expenditure at the time, so it could not use section 11(3).



## *WPH Developments Limited v Young & Gault LLP (in liquidation) [2020] SC GLA 27*

### Decision

Sheriff Reid agreed with the defender's first proposition but disagreed with the second.

To agree with it would conflate section 11(1) with 11(3), frustrating the purpose of the latter.

Whilst hindsight can be applied to determine the occurrence of loss, it has no part to play in identifying the creditor's awareness of the occurrence of loss.



## *WPH Developments Limited v Young & Gault LLP (in liquidation) [2020] SC GLA 27*

### *Damnum*

“In very general terms, it may be said to comprise the failure to obtain something that was sought or, conversely, the acquisition (or incurring) of a liability, burden or expense that was not sought. In both cases, the creditor is financially “worse off” (*Rothwell*) or has suffered “a detriment” (*Gordon’s Trustees*).” (para 72)



## *WPH Developments Limited v Young & Gault LLP (in liquidation) [2020] SC GLA 27*

*Damnum – English approach (para 73 et seq)*

(1) “Damaged asset” rule: creditor’s interest in an asset (physical or intangible) is diminished or devalued due to a breach, etc (*Gordon’s Trustees* and *Midlothian Council* fall under that category).

(2) “Package of rights” rule: creditor acquires fewer rights or less valuable rights (a disappointing package of rights) due to a breach, etc (for example, where solicitors draft a lease with an inoperable rent review clause. The landlord acquires fewer/less valuable rights).

Neither rule is mutually exclusive.

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## *WPH Developments Limited v Young & Gault LLP (in liquidation) [2020] SC GLA 27*

### *Awareness of damnum*

Loss = the “detriment suffered by the creditor” or the “state of being worse off, physically or economically.”

Awareness of the occurrence of loss = awareness of the occurrence of “detriment” or “being worse off.” (para 115)

“*damnum* is latent for as long as it is concealed or disguised as expenditure to the benefit of the creditor, not to its detriment.” (para 123)



## *WPH Developments Limited v Young & Gault LLP (in liquidation) [2020] SC GLA 27*

### *Supreme Court decisions*

Neither *Morrison* nor *Gordon's Trustees* was a latent case.

Comments in *Gordon's Trustees* on expenditure were *obiter dicta*.

Suggestion that the clock is not postponed until the creditor becomes of having suffered a detriment was "confusing".

"Sufficient that a creditor is aware that he or she has not obtained something which the creditor had sought" = awareness of detriment?



## *Comments*

Lack of judicial consensus.

*WPH*: No room for hindsight to determine awareness of loss can counter an otherwise “harsh” outcome.

If hindsight applies - raise an action as soon as the price is paid under a contract?

How to advise a client that has incurred expenditure in reliance of the advice?

Less certainty? But still subject to 20-year prescription.

Would only apply where the loss was truly “latent”.



## *Looking ahead...*

*WPH* appeal?

Lord Doherty in the Inner House

Section 5, Prescription (Scotland) Act 2018

For now:

(1) Clock starts to run under section 11(1) when a loss (caused by a wrong) has occurred. Assessed objectively, with hindsight.

(2) Section 11(3) can postpone the starting of the clock until the creditor is aware of that loss. Assessed with hindsight...?



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