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Greater Glasgow Health Board v Multiplex Construction Europe Ltd [2025] CSOH 56: Prescription, Professionals, and the Perils of Passive Paperwork

(1) [*Greater Glasgow Health Board against Multiplex Construction Europe Limited and others \[2025\] CSOH 56, CA80/24*](#); (2) [*Multiplex Construction Europe Limited against J&D Pierce \(Contracts\) Limited \[2025\] CSOH 57, CA81/24*](#); (3) [*Multiplex Construction Europe Limited against Nightingale Architects Limited \[2025\] CSOH 58, CA82/24*](#); (4) [*Multiplex Construction Europe Limited against WSP UK Ltd \[2025\] CSOH 59, CA83/24*](#)

Date: 27 June 2025

Judge: Lord Braid, the Outer House, Court of Session, Scotland.

Key Words:

Prescription, Induced Error, Reasonable Diligence, Declarator, Indemnity, Injuria and Damnum, Section 6(4), Section 11(1), Section 11(2), Section 11(3), Construction Defects, Cladding, Fire Safety, Practical Completion, NEC Contract, CEL 11, Handover Documentation, O&M Manuals, Contribution Claims, Professional Negligence, Routine Conduct, Corporate State of Mind, Court of Session, Outer House, Multiplex, Greater Glasgow Health Board, J&D Pierce, Nightingale Architects, WSP UK

Summary

These judgments address preliminary proofs in a dispute over alleged cladding defects at Glasgow's Queen Elizabeth University Hospital (QEUH). The key issue is prescription under the [Prescription and Limitation \(Scotland\) Act 1973](#)—specifically, when the five-year period starts, whether it can be postponed, and whether it can be suspended due to induced error. Lord Braid observed that although the principles are "straightforward to state," their application is "less easy" (CSOH56 [120]).

Principal Action: Greater Glasgow Health Board v Multiplex Construction Europe Limited (CSOH 56)

Doctrinal Issues & Central Legal Questions:

1. Commencement of Prescription (Section 11(1) of the 1973 Act):

- **Question:** When did the five-year prescriptive period begin to run for GGHB's claim against MPX concerning defective atrium cladding (allegedly not meeting Euroclass B standards) (CSOH56 [3, 7])? This involves determining the "concurrence of injuria and damnum" (wrong and loss) (CSOH56 [120-121, 127]).
- **Competing Positions:** MPX argued it was no later than January 2013, when GGHB first paid for non-compliant cladding (CSOH56 [127]). GGHB contended it was 26 January 2015, the date of sectional/practical completion (CSOH56 [127]).
- **Decision:** Prescription began on 26 January 2015. MPX's obligation to deliver conforming works arose at completion (CSOH56 [13, 130-131]).

2. Postponement of Prescription (Section 11(2) & 11(3) of the 1973 Act):

- **Question:** Could commencement be postponed due to a continuing default (s.11(2)) or GGHB's lack of awareness despite diligence (s.11(3)) (CSOH56 [121-123])?
- **Decision:** No. GGHB did not plead s.11(3) (CSOH56 [132]). Even if it had, it possessed the hospital (with defects) by 26 January 2015 (CSOH56 [133-134]). s.11(2) did not apply—breaches were not continuing (CSOH57 [12]).

3. Suspension of Prescription (Section 6(4)(a)(ii) of the 1973 Act - Error Induced by Debtor):

- **Question:** Was GGHB induced to refrain from making a claim due to error caused by MPX's words or conduct (CSOH56 [7, 123])? This doctrine is in **flux**, particularly regarding what constitutes "induced error" (CSOH56 [85, 137]).
- **Competing Positions/Arguments by GGHB:** MPX's payment applications, certificates, misleading O&M manuals, FSDS, 2017 email from Mr. Tuckett, Powrie/Wales conversation, and post-2018 silence.
- **Decision: No induced error.**
 - Payment applications and certificates were routine and insufficient to induce error (CSOH56 [143-145]; citing Tilbury Douglas [2024] SC 383; CSOH56 [138-140]).
 - O&M manual not relied on until 2021 (CSOH56 [146]).
 - FSDS and email were not relied upon (CSOH56 [147-148]).
 - Informal Powrie/Wales conversation was insufficient (CSOH56 [44, 45, 149]).
 - MPX's silence post-2018 did not induce error. No duty to disclose defects; Stag Line Ltd v Tyne Ship Repair Group Ltd [1984] 2 Lloyd's Rep 211 distinguished (CSOH56 [150]).
- **Overall s.6(4) Conclusion:** GGHB **failed to prove** induced error (CSOH56 [151]).

4. Reasonable Diligence Proviso to Section 6(4):

- **Question:** If there was induced error, when could GGHB have discovered it with diligence? (CSOH [125, 152]). MPX bore the onus (CSOH [125]).
- **Decision:** GGHB failed to comply with CEL 11 fire safety policy (CSOH [155-156]). CEL 11 required review of O&M manuals and risk assessments (CSOH [156-157]). Lord Braid found these steps reasonably expected (CSOH56 [38, 158-159]). GGHB could have discovered the defect by November 2015 or May 2016 (CSOH56 [159-162]).
- **Outcome:** Even if induced error existed, the claim prescribed due to lack of diligence (CSOH56 [160-162]).

5. Final Ruling (Principal Action): GGHB's claim is prescribed. MPX is entitled to decree of

absolvitor.

Downstream Actions: MPX v J&D Pierce (CSOH 57), MPX v Nightingale Architects (CSOH 58), MPX v WSP UK Ltd (CSOH 59)

These actions involve MPX seeking to recover from its subcontractors/consultants (JDP, NA, WSP) any sums it might have to pay GGHB, via claims for **breach of contract/duty** and **indemnity**.

Consequence of Principal Action: Lord Braid notes that since GGHB's primary claim against MPX prescribed, MPX's breach of contract/duty claims against JDP, NA, and WSP (which are dependent on MPX's liability to GGHB) likewise prescribe (CSOH57 [2], CSOH58 [2], CSOH59 [2]). Similarly, the contribution claims from MPX against WSP and NA (under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, s.3) fail because WSP/NA would not have been liable to GGHB (as GGHB's claims against them would also have prescribed) (CSOH56 [169-170]).

However, "lest my decision in the principal action turns out to be wrong" (CSOH57 [2], CSOH58 [2], CSOH59 [2]), Lord Braid independently considered the prescription arguments in each downstream action.

1. Breach of Contract/Duty Claims (MPX v JDP, NA, WSP)

- **Commencement of Prescription:**

- **Question:** When did MPX's claims become enforceable (CSOH57 [3], CSOH58 [6], CSOH59 [3])?
- **Decision:** Prescription began earlier than in the principal action. MPX admitted injuria and damnum occurred upon payment or receipt of non-compliant work.

→ JDP: by 22 Nov 2013 (CSOH57 [13]);

→ NA & WSP: by Dec 2012 (CSOH58 [8], CSOH59 [8]).

- **Postponement of Prescription (Section 11(2) & 11(3)):**

- **Question:** Could awareness be delayed or were breaches continuing?
- **Decision:** No.
 - **Section 11(2) (continuing act):** Breaches were completed upon design/installation (CSOH57 [12], CSOH58 [12-13], CSOH59 [12-13]).
 - **Section 11(3) (unawareness of loss):** MPX was aware of its loss (wasted costs) at the time of payment/receipt (CSOH57 [13-15], CSOH58 [14-15], CSOH59 [14-15]).

- **Suspension of Prescription (Section 6(4)(a)(ii) - Induced Error):**

- **Question:** Was MPX induced into error?
- **Arguments by MPX:** Requests for payment, compliance certificates, warranties, Emma White's email (NA) (CSOH57 [6-7], CSOH58 [6, 16], CSOH59 [6, 16]).
- **Decision:** No.

→ Routine acts (payments, certificates) couldn't objectively induce error (CSOH57 [15-17], CSOH58 [16, 21-26], CSOH59 [16-17, 23-27]).

→ No evidence MPX staff were actually misled (CSOH57 [15], CSOH58 [23, 19-20], CSOH59 [25, 19-21]).

→ WSP/NA warranties given pre-construction and were routine (CSOH58 [18], CSOH59 [18-19]).

→ Emma White's email (NA): Sent after prescription period; factually accurate; silence insufficient (CSOH58 [26-29]).

- **Reasonable Diligence Proviso:**

- **Question:** When could MPX have discovered the error with diligence? (CSOH57 [18-19], CSOH58 [31], CSOH59 [29])
- **Decision:** MPX ought to have discovered the error much earlier than 2021. For JDP, by **late summer 2017** (CSOH57 [19, 21]). For NA, by **January 2015** (Stage 3 completion and review of documentation) (CSOH58 [31-32, 34]), or at the latest, by **August 2017 / March 2018** (post-Grenfell investigations where MPX had relevant information) (CSOH58 [34-35]. For WSP, by **1 August 2017** (review of O&M manual) or latest by **23 March 2018** (Fergus Shaw's email with product info) (CSOH59 [32-35]).
- **Outcome:** MPX's breach of contract/duty claims against JDP, NA, and WSP **also prescribed**, even if the principal action had not (CSOH58 [34-37], CSOH57 [22-23], CSOH59 [35-36]).

2. Indemnity Claims (MPX v JDP, NA, WSP)

- **Doctrinal Issue:** Interpretation of indemnity against "claims, proceedings, compensation and costs payable" (CSOH57 [6], CSOH58 [5-6], CSOH59 [5-6]), distinguishing "liability indemnity" (accrual on liability) vs "general indemnity" (accrual on actual loss) (CSOH57 [26], CSOH59 [38]).
- **Central Legal Question:** When does prescription begin for the indemnity? (CSOH57 [3], CSOH58 [7], CSOH59 [7])
- **Competing Positions:**

→ Downstream parties: from breach/awareness of loss (CSOH57 [24])

→ MPX: only from actual claims/loss from GGHB (CSOH57 [24], CSOH58 [38-39], CSOH59 [36])

- **Decision:** Wording supported a "general indemnity". Prescription begins when liability is established or proceedings raised (CSOH57 [26], CSOH59 [38-40], CSOH58 [39-40]). Use of "proceedings" was critical (CSOH57 [26], CSOH59 [38]).
- **Outcome:** Indemnity claims have **not** prescribed (CSOH58 [39-40], CSOH59 [38-40], CSOH57 [27-29]).

3. Relevancy and Competency of Declarator Conclusions (MPX v NA only - CSOH 58)

- **Doctrinal Issue:** Scottish principles on declarators—vagueness, hypothetical content, prematurity (CSOH58 [42]).
- **Central Legal Question:** Are MPX's declarators for breach and indemnity competent and relevant? (CSOH58 [7-8])
- **Competing Positions:**

→ NA: Too vague; no breach specified; premature as no liability on MPX (CSOH58 [43-45])

→ MPX: Declarators avoid multiplicity of actions; permissible even if contingent (CSOH58 [45-46])

- **Decision:** Both declarators (breach of contract/duty and indemnity) competent and relevant. Court favoured practicality to reduce future litigation. Final orders can be shaped to the facts (CSOH58 [46-49]).

The court applied a strict approach to prescription for breach/duty claims, especially on “induced error” and “reasonable diligence,” holding that those claims had prescribed. It took a broader view on when prescription begins for indemnity claims and upheld the relevancy of declaratory conclusions, allowing those to proceed.

Key Themes:

1. Prescription and Limitation Act 1973

- **Why it matters:** Governs time limits for bringing claims in Scotland. The five-year prescriptive period extinguishes obligations if no “relevant claim” is made. Once prescribed, claims cannot be pursued, regardless of merit.
- **How it appears in recent case law:** Courts have frequently addressed prescription. The key sections in these cases are s.6(4) (suspension), and s.11(1), 11(2), 11(3) (commencement/postponement). Principles are “straightforward to state, if less easy to apply”.
- **Policy concerns:** Promotes certainty and prompt action, protecting debtors from stale claims and evidential decay.

2. Commencement of the Prescriptive Period

- **Why it matters:** The “appropriate date” when the clock starts is critical. A later date can preserve a claim.
- **How it appears in case law:**
 - **Section 11(1) - Concurrence of Injuria and Damnum:** An obligation to make reparation arises when “injuria” (the wrongful act or omission) and “damnum” (the loss, injury, or damage) coincide.
 - In building contracts, prescription typically starts at completion, not at the time of defective work, as rectification is possible until then. GGHB’s claim against MPX began on 26 January 2015 (practical completion).
 - MPX’s claims against subcontractors (JDP, NA, WSP) started earlier, when loss was incurred through payments for non-compliant works (e.g. Dec 2012 for NA/WSP, May 2013 for JDP).
 - Authority: *David T Morrison, Gordon’s Trustees, WPH Developments*, and *Tilbury Douglas* confirm that it is enough for a creditor to know the objective facts of loss, not that there was an actionable wrong.
 - **Section 11(2) - Continuing Act, Neglect or Default:** Prescription may be postponed if the act/default is continuing.
 - Courts drew a line between continuing breaches and the ongoing effects of completed acts. Here, breaches (e.g. defective installation) were completed upon installation. Subcontractors’ work ceased before completion, so s.11(2) did not apply to MPX’s claims.
 - **Section 11(3) - Creditor's Ignorance:** If the creditor wasn’t and couldn’t have been aware of loss, prescription starts when awareness was or should have been acquired.
 - GGHB was held objectively aware of loss by 26 January 2015 (possession of defective building).
 - MPX was aware by late 2013 (incurring costs for non-compliant pods).

- Courts confirmed that awareness of the facts constituting loss suffices to start prescription under the current law.
- **Policy concerns:** These sections balance fairness (by protecting against hidden losses) with finality for debtors. Section 11(2) clarifies what counts as a continuing wrong.

3. Suspension of Prescription (Section 6(4))

- **Why it matters:** Section 6(4) allows the prescriptive period to be suspended where a creditor was induced into error by the debtor's conduct. It can "rescue" otherwise time-barred claims.
- **How it appears in recent case law:**
- **Section 6(4)(a)(ii) - Error Induced by Debtor's Words or Conduct:** Prescription is suspended if the creditor was "induced to refrain from making a relevant claim" by an error caused by the debtor.
 - A "liberal approach" is taken to what constitutes "conduct," and it need only "contribute" to the error, not be its sole cause (*Heather Capital Ltd (In Liquidation) v Levy & McRae*). The error must relate to the creditor's "rights and remedies" (*Tilbury Douglas Construction Ltd v Ove Arup & Partners Scotland Ltd*). An "error as to the existence of the obligation will suffice"; a conscious decision not to press the claim is not required (*BP Exploration Co Ltd v Chevron*).
 - Ignorance is not enough—the creditor must be in actual error.
 - Routine conduct (e.g. providing services, accepting payments, asserting compliance) is usually insufficient to induce error (*Tilbury Douglas Construction Ltd v Ove Arup and Partners Scotland Ltd*).
 - **GGHB's arguments (against MPX) for induced error (CSOH56):** GGHB cited payment applications, building warrant certificates, FSDS, an O&M manual, emails, and MPX's silence.
 - Court held these were routine, not relied on, or did not cause error.
 - MPX's silence on its 2018 internal investigation did not amount to inducement; no duty in Scots law to act against one's own interest.
 - **MPX's arguments (against JDP, NA, WSP) for induced error (CSOH57-59):** MPX argued it was induced by subcontractors' payment requests, compliance statements, and warranties.
 - Court rejected all, treating them as routine, non-inducing conduct.
 - Emma White's email (NA) was irrelevant—sent after the claim prescribed.
 - **Proviso to Section 6(4) - "Reasonable Diligence":** Suspension ends once the creditor *could* have discovered the error with reasonable diligence. The debtor must prove this.
 - "Reasonable diligence" is what a prudent person would do in the circumstances (*Heather Capital*), not full awareness of all facts (*Glasgow City Council v VFS Financial Services Ltd*).
 - **GGHB's diligence:** GGHB failed to comply with CEL 11 (fire safety policy): it did not review the O&M manual until 2021 or conduct adequate risk assessments. Experts said CEL 11-compliant steps would have revealed issues by Nov 2015 or May 2016. Claim still prescribed.
 - **MPX's diligence (in relation to its claims against JDP, NA, WSP):** MPX should have acted on discrepancies in the fire strategy earlier. Even if induced error was assumed, it could have discovered the issue by late 2017 or by 23 Mar 2018 (internal report by Fergus Shaw).
- **Underlying policy concerns:** Strikes a balance between protecting misled creditors and

ensuring claims are pursued promptly. Emphasises the importance of active diligence by owners and contractors.

4. Indemnities and Declarator Actions

- **Why it matters:** Indemnity clauses define when one party must compensate another. Determining when they become enforceable is key for assessing prescription. Declarator actions clarify legal rights/status and help avoid multiple proceedings, even before quantifiable loss arises.
- **How it appears in recent case law:**
 - **Interpretation of Indemnities:** Enforceability depends on contract terms (*Scott Lithgow Ltd v Secretary of State for Defence*).
 - In the QEUH cases, indemnities referred to “claims, proceedings, compensation and costs payable”.
 - This wording implied obligations arose only when liability was established or proceedings commenced—not at breach—indicating a “liability indemnity,” not a “general indemnity”.
 - **Prescription of Indemnity Claims:** Given this interpretation, MPX’s indemnity claims against JDP, NA, and WSP had **not prescribed**, as enforceability only arose upon GGHB’s claim against MPX.
 - **Competency and Relevancy of Declarator Actions:**
 - A declarator must declare an “existing status or right” and avoid vagueness or hypotheticals (*Walker, Keatings v Advocate General for Scotland*).
 - Courts apply a “practical approach” to prevent multiple proceedings. It’s competent to raise proceedings even if enforceability is contingent on another judgment (*County and District Properties*, cited in *The Mayor and Commonalty... v Reeve*).
 - The court held MPX’s declarator conclusions (against NA and implicitly WSP) on breach and indemnity were relevant and competent, despite broad wording. Tailored orders could be issued later, and a live dispute over potential liability sufficed.
- **Underlying policy concerns:** Supports procedural economy, prevents fragmented litigation, and enables parties to secure rights in advance of fully quantified claims.

5. Evidential Considerations

- **Why it matters:** Accurate findings of fact depend on credible, admissible evidence—especially in complex, multi-party construction disputes involving historical events.
- **How it appears in recent case law:**
 - **Credibility and Reliability of Factual Witnesses:** The court scrutinised witness testimony.
 - Mr. Powrie’s account of his meeting with Mr. Wales was accepted as truthful but discounted in significance due to context and lack of follow-up.
 - Testimony based on assumptions or hypotheticals was given less weight.
 - **Expert Opinion Evidence:** Experts assist the court within defined areas of expertise.
 - *Kennedy v Cordia (Services) LLP* guides admissibility. Most objections affect weight, not admissibility.
 - *Field v Leeds City Council* and *Somerville v McGuire* confirm party-employed experts may be admitted, though impartiality can be tested.
 - Mr. Connolly (NHSScotland Assure) was found non-partisan despite concerns. He and

Mr. Woods gave key views on CEL 11 and GGHB's reasonable diligence.

- **Hearsay Evidence:** Hearsay evidence (statements reported by someone who did not directly observe the event) is generally **admissible** in Scotland, with its weight being a matter for the court.
- **Inference from Failure to Lead Witnesses:** Following *SSE Generation Ltd v Hochtief Solutions AG*, a court *may* infer negatively from a party's failure to call a key witness.
 - Here, no adverse inferences were drawn. The judge concluded GGHB simply failed to prove it was induced into error by MPX.
- **Underlying policy concerns:** Ensures fair procedure through rigorous evidential standards and proper expert input while affirming the court's role in determining fact and law.

Background

1. Traditional position under law and Emergence of key judgments

The law of prescription in Scotland has developed along a "well-trodden" path, though application remains complex. It is governed primarily by the **Prescription and Limitation (Scotland) Act 1973**.

- **Extinction of Obligations:** Under s.6(1), read with s.6(3) and Schedule 1, obligations to make reparation prescribe after five years without a "relevant claim".
- **Commencement of the Prescriptive Period (Section 11(1)):**
 - Prescription begins at the "concurrence of injuria and damnum". In construction, liability often arises at completion—not at the time of defective work.
 - For MPX, loss occurred when it paid for or received non-compliant materials, even if full liability was unknown.
- **Postponement of Prescription (Section 11(3)):**
 - Postpones prescription if the creditor was unaware—and could not have been aware—of the loss.
 - *David T Morrison, Gordon's Trustees, WPH Developments*, and *Tilbury Douglas* confirm that awareness of objective facts (not legal wrongs) is enough.
 - *Tilbury Douglas* was noted as under appeal.
- **Continuing Act, Neglect, or Default (Section 11(2)):**
 - If the wrongful act continues, prescription runs from when it ceased.
 - *Johnston v Scottish Ministers* 2006 SCLR 5 and *Warren James (Jewellers) Ltd v Overgate GP Ltd* CSOH 57, distinguish between a **continuing breach** (which engages Section 11(2)) and **simply the continuing effects of a past act** (which does not).
- **Suspension of Prescription by Fraud or Error (Section 6(4)):**
 - Prescription is suspended where a creditor is induced into error or fraud by the debtor.
 - *BP Exploration*: No need for conscious decision not to sue—being misled is enough.
 - *Heather Capital*: Conduct need only contribute to the error.
 - *Tilbury Douglas* doubted whether routine acts (e.g. payments, confidence in one's work) qualify.
 - Contrasted with *Rowan Timber*, which involved repeated false billing.
 - A corporate creditor's state of mind may derive from key officers (*Dryburgh*).
 - The "reasonable diligence" proviso applies once the creditor could have uncovered the error; the debtor bears the burden (*Heather Capital, Glasgow City Council*).

- **Indemnity Claims:** Enforceability is a matter of construction (*Scott Lithgow*). Wording like “claims, proceedings, compensation and costs payable” indicates the indemnity only arises once liability is established (*Reeve and Co*).
- **Declarator Conclusions:** Competent even where loss is incurred but unquantified (*Highlands and Islands Airports*). Declarators can prevent multiplicity of proceedings, even if enforceability depends on a future event (*Esso Petroleum*).

2. External drivers

- **Grenfell Tower Fire (2017):** Prompted audits of external cladding across NHS estates and MPX’s internal reviews. Initially focused on external cladding but expanded to broader fire safety risks.
- **Chief Executive Letter (CEL) 11 (2011):** Issued by the Scottish Government, required NHS bodies to ensure fire compliance, conduct risk assessments, and maintain component records. The court found these steps were “reasonably required” of property owners.
- **Kingspan K15 Disclosure (2020):** Revealed flawed test data and loss of accreditation. MPX conducted a further review of QEUH cladding, leading to expert advice in Jan 2021 about ACM PE risk and subsequent GGHB notification.
- **Commercial Realities:** Design and product choices (e.g. switching cladding to save costs) illustrate the role of value engineering. Routine practices—like payment applications and compliance certificates—reflect standard industry procedures and were discussed in relation to induced error.
- **Sectoral Needs:** The QEUH’s nature as a major hospital underscores the critical need for fire safety. The volume of public footfall (c. 20,000 daily) and prior issues with NHS facility handovers (addressed by CEL 11) highlight sector-specific vulnerabilities.

Legal Issues and Analysis

1. Commencement of the Prescriptive Period (s.11(1) and s.11(2))

Prescription begins when injuria and damnum coincide—i.e. when wrongful act and loss both occur.

- In building contracts, loss usually occurs at **completion**, not when defective work is done. Lord Braid accepted GGHB’s view: MPX’s obligation “to provide the works” under NEC Clause 20.1 became enforceable on 26 Jan 2015 (sectional completion).
- For MPX’s claims:
 - JDP: 17 May 2013 (payment for non-compliant pods).
 - NA/WSP: Dec 2012 (initial payments).
- s.11(2) only applies to continuing breaches—not lingering effects. Relying on *Johnston and Warren James*, Lord Braid held that design/install breaches were completed well before completion.
- **Coherence:** Completion marks injuria/damnum for main contracts; installation or payment dates mark it for subcontracts. s.11(2) is narrowly and consistently applied.
- **Implications:** Define “completion” clearly. Professional breaches are complete on performance unless continuing duties are expressly stated.

2. Postponement of Prescription (s.11(3))

- s.11(3) delays prescription if the creditor could not have known of the loss with reasonable

diligence.

- *David T Morrison, Gordon's Trustees, Tilbury Douglas*: Awareness of objective facts (not legal wrong) starts the clock.
- GGHB's claim failed—court held it was aware by 26 Jan 2015 (handover). MPX also failed—aware of downstream losses by Dec 2012 (NA/WSP) or Nov 2013 (JDP).
- **Coherence**: Courts apply a strict, objective standard—mere unawareness of legal implications is insufficient.
- **Implications**: Parties must investigate promptly; ignorance of law or implications won't extend the period.

3. Suspension of Prescription (s.6(4))

Prescription is suspended if error was induced by the debtor's fraud or conduct, ending once the creditor could have discovered it with reasonable diligence.

- **"Induced to Refrain"**: Error need not involve a conscious decision (*BP Exploration*); must relate to rights/remedies (*Tilbury Douglas*).
- *Heather Capital*: Conduct need only contribute to error.
- *Tilbury Douglas* (Inner House): Routine conduct (e.g. payments, statements of confidence) is insufficient to induce error. Lord Braid followed this: normal acts won't suspend prescription.
- **Proof of Error**: Must show actual error and debtor inducement (*Dryburgh*). GGHB's witnesses offered hypothetical views—insufficient.
- **Specific Conduct Considered**:
 - Payment applications, certificates, warranties: Routine, not relied on.
 - O&M Manual: Not reviewed until 2021—couldn't have caused earlier error.
 - Silence/non-disclosure (MPX): No duty to disclose under Scots law; *Stag Line* (English) distinguished.
 - Collateral Warranties: Generic obligations, issued pre-breach, not capable of inducing error.
- **Reasonable Diligence Proviso**:
 - *Heather Capital*: Standard = ordinarily prudent person.
 - **GGHB** failed to comply with CEL 11 (fire safety duties). Had it reviewed the O&M manual and undertaken proper assessments, it would have discovered the error by 2017.
 - **MPX**: Despite the atrium being classed as external space, it limited its post-Grenfell review. Lord Braid found it should have discovered the error by Jan 2015, or at the latest by Mar 2018 (internal expert advice).
- **Coherence**: Courts restrict s.6(4) to avoid overuse. Routine acts and assumptions won't suffice; diligence must be proactive.
- **Implications**:
 - **Contract Drafting**: Clarify duties of disclosure and inspection.
 - **Dispute Resolution**: Relying on silence or routine paperwork won't extend time; active checks are expected.

4. Enforceability of Indemnity Claims

Prescription of indemnity claims depends on when the indemnity becomes enforceable—determined by contract wording.

- *Scott Lithgow*: Enforceability is a matter of construction.
- Lord Braid, applying *Reeve*, interpreted “claims, proceedings, compensation and costs payable” to mean the indemnity is triggered **only when liability is established**.
- This avoids requiring claims before the indemnified party is itself sued.
- **Coherence**: Aligns prescription with crystallisation of liability.

Implications:

- **Drafting**: Be precise—define when indemnities are triggered.
- **Dispute Resolution**: Declarators can protect position before liability is quantified.

5. Competency and Relevancy of Declarator Conclusions

Declarators allow courts to define legal rights before loss is crystallised.

- *Highlands and Islands Airports*: Bare declarators interrupt prescription.
- *Esso Petroleum*: Courts favour early declaratory actions to avoid fragmented litigation.
- Lord Braid found MPX’s broad conclusions competent—final orders can be tailored to proven facts.
- **Coherence**: Courts take a pragmatic, preventative approach.
- **Implications**: Declarators can preserve rights in complex disputes, even where full damages are unquantified.

In Practice: Construction

- **Fire Safety Compliance**: The Grenfell fire (2017) triggered reviews of cladding systems, including QEUH, highlighting fire safety risks.
- **Regulatory Compliance - CEL 11**: Imposed duties on NHS bodies to verify fire safety, conduct risk assessments, and keep permanent records. GGHB failed to comply—highlighting the legal and operational importance of proper handover procedures.
- **Information Management**: Use of platforms (Aconex, Zutec) doesn’t ensure diligence if key documents (e.g. O&M manuals) aren’t reviewed.
- **Value Engineering**: Cost-driven substitutions (e.g. Dibond to Etalbond) must not compromise compliance. Oversight is essential.
- **Professional Reliance**: Main contractors and owners cannot rely solely on consultants or subcontractors. Routine acts (e.g. invoices, certificates) are not enough. The onus is on active verification—particularly for safety-critical issues.

Conclusion

The court has primarily addressed the issue of **prescription** (claims becoming extinguished due to the passage of time) under the Prescription and Limitation (Scotland) Act 1973 for various claims related to the defective cladding in the atrium of the Queen Elizabeth University Hospital (QEUH).

Here are the key conclusions for each action:

1. Greater Glasgow Health Board (GGHB) against Multiplex Construction Europe Limited (MPX) and others (the principal action) CSOH 56:

- **GGHB's claim against MPX for damages due to alleged defects in the atrium cladding has prescribed.**

- Prescription began on 26 Jan 2015 (practical completion).
- GGHB could not rely on s.11(3) (ignorance) or s.6(4) (induced error).
- The court found no conduct by MPX capable of inducing error; GGHB staff gave no evidence of actual inducement.
- Even if error occurred, GGHB failed to exercise reasonable diligence—the O&M manual and CEL 11 duties would have revealed the issue by May 2016.
- Decree of absolvitor granted to MPX.

2. Multiplex Construction Europe Limited (MPX) against J&D Pierce (Contracts) Limited (JDP) (downstream action CA81/24) CSOH 57:

- **MPX's breach of contract and breach of duty claim against JDP regarding the atrium cladding has prescribed.**
- Prescription began no later than 22 Nov 2013 (completion/payment).
- s.11(2) and s.11(3) did not apply.
- No inducement shown under s.6(4); payment/compliance letters were routine acts.
- MPX failed to exercise reasonable diligence—it should have discovered the issue by end 2017.
- However, MPX's indemnity claim is not prescribed. The clause (referring to "claims, proceedings, compensation and costs payable") only becomes enforceable when liability is established.

3. Multiplex Construction Europe Limited (MPX) against Nightingale Architects Limited (NA) (downstream action CA82/24) CSOH 58:

- **MPX's breach of contract and breach of common law duty claim against NA regarding the atrium cladding has prescribed.**
- Prescription began no later than Dec 2012.
- s.11(2) and s.11(3) did not apply.
- NA's actions (payments, warranty, design compliance) were routine and not inducing error; Emma White's 2018 email came after prescription expired.
- MPX failed to exercise reasonable diligence—should have discovered the issue by Jan 2015, or at latest by 2017/Mar 2018.
- The indemnity claim is not prescribed.
- Declarator conclusions (for breach and indemnity) were competent and relevant, despite broad wording, allowing early resolution of disputed liabilities.

4. Multiplex Construction Europe Limited (MPX) against WSP UK Ltd (WSP) (downstream action CA83/24) CSOH 59:

- **MPX's breach of contract and breach of common law duty claim against WSP regarding the atrium cladding has prescribed.**
- Prescription began no later than Dec 2012.
- s.11(2) and s.11(3) did not apply.
- No inducement under s.6(4); WSP's conduct (payments, warranty, compliance statements) was routine and non-inducing. The collateral warranty pre-dated construction and was not for MPX's benefit.
- MPX failed to exercise reasonable diligence—should have discovered the issue by 1 Aug 2017,

or by end 2017/Mar 2018.

- The indemnity claim is not prescribed. The enforceability issue remains unresolved, as it was outside the preliminary proof's scope.

Summary

All breach of contract/duty claims have **prescribed**. However, **indemnity claims**—which depend on liability being established—have **not prescribed**, allowing potential further proceedings on those points.

Key Takeaway:

*Lord Braid's judgments highlight the importance of understanding **Scottish prescription law** in complex construction and professional negligence cases. The decisions—where primary claims prescribed—offer key lessons.*

6.1 What to Watch For

1. Strict Application of the Five-Year Period

- Obligation to make reparation is extinguished after five years without a "relevant claim".
- Prescription starts at **concurrence of injuria and damnum**—when objective facts of loss occur, e.g., payment for or installation of non-compliant goods.
- In construction, **practical completion** (e.g. 26 Jan 2015 at QEUH) often marks this date.
- "Salami slicing" different defects or stages is not generally accepted; a single trigger applies.

2. Limited Scope for Postponement (s.11(3))

- s.11(3) applies only if the creditor was unaware of **objective facts** constituting loss and could not have discovered them with reasonable diligence.
- Awareness of factual possession (e.g., non-compliant hospital) is enough—legal understanding is not required.

3. High Bar for "Induced Error" (s.6(4))

- **Routine conduct** (e.g. payment apps, compliance certs) is not "conduct" capable of inducing error.
- **Silence** generally does not induce error unless it conceals a fact the other party was already aware of. Scots law does not impose a duty to disclose one's own breach.
- **Proof of actual error** is essential—speculative or hearsay evidence is insufficient. Corporates must show an individual's state of mind as part of their "directing mind and will".

4. Stringent "Reasonable Diligence" Standard

- Even if induced, prescription resumes once the creditor **could** have discovered the error.
- Diligence = actions of an "ordinarily prudent person" in similar circumstances.
- **CEL 11** obligations meant GGHB should have reviewed O&M manuals and conducted proper FRAs.
- Diligence is assessed **individually**; one party's inaction doesn't excuse the other.

5. Indemnity Claims vs Breach of Contract Claims

For indemnities referencing “claims, proceedings, compensation and costs payable,” prescription starts **when liability is established**, not at the breach—giving a **later trigger** than breach of contract.

6. Competency of Declarators for Future/Contingent Liability

Declarators are **competent** even when loss isn’t yet quantified or liability isn’t established. They can interrupt prescription and prevent multiple future actions.

6.2 How to Protect Clients

1. Act Swiftly on Breach of Contract/Duty

- Treat first discernible loss (e.g. payment or completion) as trigger.
- Promptly investigate "as-built" compliance.
- Consider raising protective actions (e.g., bare declarator) if prescription timing is unclear.

2. Rigorous Diligence and Documentation

- **Review O&M manuals** thoroughly on handover. Don’t assume completeness.
- **Conduct robust compliance checks** (FRAs, design verification), not just visual inspections.
- **Keep records:** Minute all interactions and document all RFI responses. Informal or unrecorded exchanges carry little evidential weight.

3. Strategic Use of Indemnities and Declarators

- **Draft indemnities** clearly—use trigger terms like “costs payable” to align with delayed prescription start.
- **Raise declarators early** for indemnity obligations if main liability is still pending.

4. Avoid Reliance on Routine Conduct for "Induced Error"

- Don’t assume everyday contractual behaviour will extend prescription.
- **Seek specific, documented assurances** if relying on another party.
- If aware of silence or nondisclosure, **proactively seek clarification**. Do not assume silence extends time.

Conclusion:

The judgments establish a strict and fact-based approach to prescription. Active diligence, timely action, and clear documentation are critical to preserving claims in construction disputes.

Parting Thoughts

If these judgments had a slogan, it would be: “Use it, or lose it – and read your O&M manuals.” Lord Braid has offered a judicial masterclass in how not to preserve claims in complex construction disputes governed by the Prescription and Limitation (Scotland) Act 1973. In case after case, the theme was the same: routine conduct is not a cloak of deception, silence is not seduction, and time waits for no negligent architect, contractor, or public body.

GGHB's main claim against Multiplex failed not because there was no defect, but because the prescriptive clock started the moment they took possession of their non-conforming hospital. That they didn't read the manuals or follow CEL 11 guidance is, in legal terms, their problem. Meanwhile, Multiplex's attempts to recoup its potential losses downstream met a similar fate—once you've paid for a defective panel or accepted a compliance certificate, you're on notice. That's the law.

On the other hand, the court was more forgiving when it came to indemnity clauses. A well-drafted indemnity—triggered by “claims, proceedings, compensation or costs payable”—was treated not as a ticking time bomb from the date of breach, but as a liability that only explodes once the claim actually lands. Declaratory conclusions also survived the doctrinal threshers: the court embraced their procedural usefulness, even if they seemed vague, hypothetical, or premature to the defendants.

In the end, what emerges is a coherent—and arguably brutal—doctrine: construction professionals must stop expecting the courts to rescue them from their own administrative indolence. Induced error is not a fairy godmother. Silence is not sabotage. And if you're sitting on an unread fire safety policy while debating compliance with Euroclass B, you'd better act fast—five years fast. Because when the music stops, Lord Braid is not handing out chairs.

**#LegalUpdate #DDAlegal #ConstructionLaw #PrescriptionScotland
#ProfessionalNegligence
#IndemnityClaims #DeclaratoryRelief #CourtOfSession #CladdingDisputes
#FireSafetyCompliance #ReasonableDiligence #InducedError #ScotsLaw**

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ICE DRC CPD Committee Chairman

Adjudicator Exam Question Setter for the ICE

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CIArb Arbitration Panel Member since 2006

CIC Adjudication Panel Member since 2010

Law Society Panel Arbitrator

RIBA Adjudication Panel Member since 2018

RICS Adjudication Panel Member since 2006/7

TECSA Adjudication Panel Member since 2012

FIDIC Adjudication Panel Member since 2021

ICE Adjudication Panel Member since 2021

RICS Dispute Board Registered since 2013

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